

1997

South Africa's 1996 Choice on Termination of Pregnancy Act

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Audrey E. Haroz, South Africa's 1996 Choice on Termination of Pregnancy Act, 30 *Vanderbilt Law Review* 863 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol30/iss4/8>

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South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women

ABSTRACT

After more than forty years of apartheid rule and oppressive customary law, South Africa pledged to move beyond the racial and gender hostilities that plagued its past to create a democratic South Africa. In 1994, South Africa held its first fully democratic election and Nelson Mandela's African National Congress (hereinafter ANC) rose to power. The ruling ANC government espoused equality for women as a goal of the new regime. Subsequently, the 1996 South African Constitution, adopted by the post-apartheid government, mandated a system of racial and gender equality.

This Note examines the evolving social position of black women in South African society in regard to reproductive rights. The Note begins by detailing the traditional position of black South African women under apartheid and customary law and the limited reproductive choices of black women under these systems. The Note then discusses the guarantees provided to women by the 1996 Constitution. The Note further examines South Africa's previous restrictive abortion legislation and traces the passage of the 1996 Choice on Termination of Pregnancy Act. The Note contemplates a constitutional challenge to the 1996 Abortion Act and provides an analytical framework within which the South African Constitutional Court will be able to uphold the Act's constitutionality. The Note concludes that while the 1996 Abortion Act is a significant and symbolic victory in the recognition of reproductive rights for black South African women and for the international community, the impact of the legislation will be hindered by the struggling economics of the South African health care system and by widespread debate concerning the religious and moral implications of such a law.

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I. INTRODUCTION

We, the people of South Africa . . . adopt this Constitution as the supreme law of the Republic so as to—Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . . based on the will of the people and [in which] every citizen is equally protected by law.

—Preamble, Constitution of South Africa, 1996¹

Human rights . . . like democracy and all vibrant visions, are not static, nor are they the property of any one group. While these concepts began in a particular historical moment and were defined in terms of the needs of a limited sector of the population, their dynamism and ongoing relevance stem from the fact that more people are claiming them and, in the process, expanding the meaning of "rights" to incorporate their own hopes and needs . . . So, too, women are transforming the concept of human rights to address the degradations and violations that are a fundamental threat to our human dignity . . .

—Charlotte Bunch²

For the final time, at midnight on April 26, 1994, individuals in South Africa's nine provincial capitals³ lowered the blue, white, and orange South African flag, long associated with a regime of oppression and apartheid; multicolored post-apartheid banners were raised in its stead.⁴ On April 27, South Africa held its first fully democratic election, marking the end of a four-year transition out of apartheid and into majority rule.⁵ April 27 also

1. S. AFR. CONST. preamble (1996) [hereinafter S. AFR. CONST.].

2. Charlotte Bunch, *Transforming Human Rights From a Feminist Perspective*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 11, 13 (Julie Peters & Andrea Wolper eds., 1995).

3. The nine provinces are: Eastern Cape, Eastern Transvaal, KwaZulu Natal, Northern Cape, Northern Transvaal, North West, Orange Free State, PWV (Pretoria, Witwatersrand, Vaal), and Western Cape. DION A. BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION: TEXT AND NOTES xxxiv (1994).

4. *Key Milestones on S. Africa's Road to Democracy*, Reuters World Serv., May 9, 1994, available in LEXIS, News Library, REUWLD File [hereinafter *Key Milestones*]; Bruce W. Nelan, *Time to Take Charge: At Long Last, the Black Majority Moves from Repression into the Halls of Government*, TIME, May 9, 1994, at 27 (stating that "[t]he old order formally ended as cheering crowds in the nine new provincial capitals hailed the lowering of apartheid's blue-white-and-orange flag and the raising of a banner with six colors symbolizing the people, their blood, their land, the gold under the ground, the sky—and white for peace.").

5. Jerelyn Eddings & Eric Ransdell, *Free at Last*, U.S. NEWS & WORLD REP., May 9, 1994, at 28, 34. The election resulted in a 62.25% vote victory for Nelson Mandela's African National Congress [hereinafter ANC]. Frederik de Klerk's National Party obtained 20.39% of the vote, while Mangosuthu Buthelezi's Zulu Nationalist Inkatha Freedom Party received 10.54%. Patrick Collings, *ANC Wins South Africa Election*, UPI, May 6, 1994, available in LEXIS, News Library, UPI File. See Matthew Fisher, *Nelson's No. 1; ANC Leader Mandela Becomes First*

marked the birth of the Interim Constitution, which promised a new social order in South Africa based on equality and fundamental rights.⁶ Commentators everywhere realized that "beyond the euphoria" of the new government and Constitution lay the difficult task of "putting South Africa right and building it into a strong, unified nation."⁷ Against a backdrop of over forty years of apartheid rule and oppressive customary law, South Africa has pledged to create a new and better South Africa by moving beyond the racial, gender, tribal, and ethnic hostilities that plagued its past.⁸

The 1993 Interim Constitution and the Constitution adopted in 1996 by the post-apartheid government both espouse equality for women as a goal of the South African regime,⁹ and, in certain respects, the South African government has succeeded in promoting the position of women in South African society. The South African parliament currently consists of almost twenty-five percent women, and two women sit on the South African Constitutional Court.¹⁰ These statistics place South Africa among

Black President in South African History, TORONTO SUN, May 7, 1994, available in LEXIS, News Library, TSTAR File ("With an estimated 86% voter turnout, the ANC received 62.6% of the national votes, winning six of the nine provincial races."); *Free at Last!*, N.Y. TIMES, May 4, 1994, at A22 (reporting slightly different return figures). Nelson Mandela, leader of the victorious ANC, was endorsed as President on May 9, 1994. *Key Milestones*, *supra* note 4.

6. A copy of the Constitution of the Republic of South Africa, Act 200 of 1993 [hereinafter Interim Constitution], may be found in BASSON, *supra* note 3, or at *Constitution of the Republic of South Africa, Act 200 of 1993* (visited Sept. 29, 1997) <<http://www.constitution.org.za/1993cons.htm>>. The Interim Constitution was drafted by a Multi-Party Negotiating Process (hereinafter MPNP) before the April 1994 elections and took effect the day of the elections, replacing the former apartheid constitution. *South African Assembly Starts Work on New Constitution*, DEUTSCHE PRESSE-AGENTUR, Jan. 25, 1995, available in LEXIS, News Library, DPA File; BASSON, *supra* note 3, at xxxiv. The MPNP was charged with drafting the Interim Constitution, which was in effect for five years. The newly created (post-election) government was then given the task of drafting and adopting a final Constitution by 1999 within the confines of the principles agreed on by the MPNP. BASSON, *supra*, at xxi-xxiii.

7. Eddings & Ransdell, *supra* note 5, at 32.

8. *Id.* at 30. South Africa chose to negotiate a revolution rather than fall victim to a civil war. *Free at Last!*, *supra* note 5. For a description of the predicted mayhem of the 1994 elections and the relative calm within which they occurred, see John Humphreys, *Cynicism Routed by the Voters*, INDEP., May 8, 1994, available in 1994 WL 9031992.

9. Interim Constitution, ch. 3, § 8(1); S. AFR. CONST. ch. 2, § 9(3).

10. *South African Woman*, ECONOMIST, Oct. 5, 1996, at 79, available in LEXIS, News Library, ECON File. The Constitutional Court is South Africa's equivalent to the U.S. Supreme Court and will be "the most powerful shaper of this new [South African] society," as it is ultimately responsible for interpreting the Constitution. Mark Gevisser, *South Africa in Transition: Democracy in Living Color*, NATION, Dec. 26, 1994, at 800, available in LEXIS, News Library, NATION File.

the world's leaders for female representation in parliamentary bodies.¹¹

South Africa passed another large hurdle in women's rights on February 1, 1997, when the South African Choice on Termination of Pregnancy Act (hereinafter 1996 Abortion Act) went into effect. The Act gives women of any age or marital status access to abortion on demand during the first twelve weeks of pregnancy, and in certain cases, extends access to the first twenty weeks of pregnancy.¹² With the passage of this new legislation, South Africa's first democratic parliament replaced one of the most stringent abortion laws in the world with one of the most liberal.

Part II of this Note examines the cultural and political setting in which South Africa passed the 1996 Abortion Act. This section describes the traditional position of black South African women¹³ in a society under apartheid and customary law. Part II also provides an overview of the rights recently granted to the citizens of South Africa by South Africa's Constitution.

Part III describes South Africa's previous abortion legislation and examines the detrimental impact such restrictive laws have had on black South African women. This Part further discusses the debate surrounding the adoption of South Africa's current

11. Brigitte Mabandla, *Women in South Africa and the Constitution-Making Process*, in *WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES*, *supra* note 2, at 70 (identifying South Africa as among the 10 leading countries in parliamentary participation by women).

12. Choice on Termination of Pregnancy Act, No. 92, § 2(1)(a) (1996) (S. Afr.) [hereinafter 1996 Abortion Act].

13. While the 1996 Abortion Act is applicable to all women in South Africa, this Note focuses primarily on black South African women and how these women are affected by past discrimination, the current Constitution, and the implications of the new bill. This Note highlights differences in the level and extent of discrimination faced by black South African women as compared to other South African women.

Under apartheid government, the population of South Africa was typically classified as black, white, Asian, or coloured (mixed European and African descent); however, in these post-apartheid days, it is difficult in South Africa to "find racial terms that are either accurate or inoffensive." S. Talcott Camp, *Why Have You Been Silent? The Church and the Abortion Ban in South Africa*, 4 *COLUM. J. GENDER & L.* 143, 145 (1994). The Author has chosen to use the term "black" (others may use the term African) to describe the segment of the population to which she largely refers, as she found the term used more commonly in articles written about South African society.

South Africa's population today is 76.1% black, 12.8% white, 8.5% coloured and 2.6% Asian. *South Africa-Population by Sex* (visited Sept. 29, 1997) <<http://www.ctcc.gov.za/general/demog/national/popsex.htm>>. With a total population of 40,648,575 people, 15,627,448 black women and only 2,611,908 white women live in South Africa. *Id.* See also *Population* (visited Sept. 29, 1997) <<http://www.southafrica.net/reference/pop.html>> (reporting slightly different statistics).

abortion legislation and delineates particular provisions of 1996 Abortion Act. Part III concludes with a brief account of the 1996 Abortion Act's effects.

Anticipating a constitutional challenge to the 1996 Abortion Act, Part IV of this Note provides an appropriate framework for analyzing the 1996 Abortion Act's constitutionality under the South African Constitution, the values underlying South African society, and international law.

This Note concludes that the 1996 Abortion Act is a significant victory for black South African women. The Act reflects a recognition of reproductive control as an essential element in the achievement of women's equality, security, and human dignity. Despite these symbolic achievements, the 1996 Abortion Act's impact will be hindered by the struggling economics of the evolving health care system in South Africa.

II. THE STATUS OF BLACK SOUTH AFRICAN WOMEN AND ITS IMPACT ON REPRODUCTIVE CHOICE

The interwoven systems of apartheid and customary law defined the role of black women in South African society and severely limited the scope of these women's reproductive choices. Consequently, many black South African women viewed illegal and dangerous abortions as their only alternative to gaining control of their lives and bodies.

In the hope of expanding women's reproductive choices and control, the 1996 South African Constitution abolished racial and gender segregation established under apartheid and customary law and ensured the availability of reproductive autonomy to black South African women.

A. *The Traditional Status of Black Women in South African Society and Its Effect on Reproductive Choice*

Before the 1993 Interim Constitution, black South African women lived under a system of apartheid that discriminated against them on the basis of race. In addition, a system of customary law discriminated against them on the basis of gender.¹⁴ The convergence of these systems of racial and sexual

14. *South African Woman*, *supra* note 10; Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 *BROOK. J. INT'L L.* 857, 861-62 (1996); Adrien K. Wing & Eunice P. de Carvalho, *Black South African Women: Toward Equal Rights*, 8 *HARV. HUM. RTS. J.* 57, 60 (1995).

discrimination created a state of powerlessness, vulnerability, and oppression for black South African women¹⁵ that relegated them to "the lowest rung of [South Africa's] social ladder."¹⁶ Apartheid and customary law jointly operated to deprive black South African women of reproductive autonomy by preventing them from choosing whether to have sex, whether to have children, or whether to carry a pregnancy to term.¹⁷

1. Apartheid's Effect on Reproductive Choices for Black South African Women

Apartheid rule began in 1948 as a state-instituted system of racial segregation that "prescribed [the] social, political, and geographical segregation" of the South African population.¹⁸ The National Party's division of South Africa along racial lines stemmed from the belief that white interests were best served by keeping the races apart.¹⁹ The Population Registration Act of 1950 implemented the system of apartheid by requiring the classification of South Africans into racial groups²⁰ of white, black, and coloured.²¹ South African citizens were subject to laws based upon their racial classification.

Apartheid rules controlled various facets of black South African life. For example, those rules dictated where blacks could

For a thoughtful discussion of how black women and women of color are faced with an interplay of racism and sexism, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

15. JACKLYN COCK, MAIDS AND MADAMS: DOMESTIC WORKERS UNDER APARTHEID 14 (rev. ed. 1989); see Mabandla, *supra* note 11, at 67.

The situation of black South African women differs drastically from that of white South African women, and therefore "presents a challenge to any oversimplified feminist notion of 'sisterhood'." COCK, *supra*, at 1. The institution of domestic service illustrates their divergent experiences; the low wages and the long hours endured by black maids for their white madams illustrate the oppression of women by women that was so prevalent during apartheid. *Id.*

16. Mabandla, *supra* note 11, at 67.

17. Fitnat Naa-Adjeley Adjetey, *Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1352 (1995).

18. Wing & de Carvalho, *supra* note 14, at 61. When Prime Minister Hendrik Frensch Verwoerd came to power in South Africa in 1948, he and his National Party instituted an official state policy of racial segregation. *Id.*

19. Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 745 (1991). The National Party also operated under the view that separating the races would help contain conflict. *Id.*

20. Population Registration Act, No. 30 (1950) (S. Afr.); see Wing & de Carvalho, *supra* note 14, at 61.

21. van der Vyver, *supra* note 19, at 746. For purposes of the Act, Indians and other East Asians were classified as coloured. *Id.* at 746 n.4.

reside and what degree of access blacks could have to urban centers and political activities.²² Blacks were forbidden from voting for national offices; elections that did occur were often rigged.²³ Apartheid laws outlawed principle opposition groups such as the ANC.²⁴ The South African Congress operated without a bill of rights.²⁵ In essence, apartheid became a system of institutionalized violence against blacks and other non-white groups.²⁶

While apartheid laws negatively impacted all black South Africans, these laws especially affected black South African women. In a society in which women generally had little voice in politics and government, the apartheid laws sounded the death knell for the protection of women's issues and the advancement of reproductive choices.²⁷

Pass laws regulated the residence of Africans and required the production of identification papers²⁸ on demand for any individual older than sixteen.²⁹ An individual's right to remain in

22. For example, the Natives Act (Abolition of Passes and Coordination of Documents), No. 67 (1952) (S. Afr.) handled the rights of blacks to have access to industrial and urban areas; the Suppression of Communism Act, No. 44 (1950) (S. Afr.) provides one example of a law restricting the political activities of black citizens.

23. RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994*, at 1-2 (1995); see also, HILDA BERNSTEIN, *FOR THEIR TRIUMPHS AND FOR THEIR TEARS* 125-26 (rev. ed. 1985) (discussing separate government and residence laws). In an attempt to separate blacks from whites, and in hopes of establishing separate and inferior governmental systems for blacks, ten black Homelands (a.k.a. bantustans) were established. BERNSTEIN, *supra*, at 125-26. These bantustans were presented as separate National States. *Id.* Every black South African was assigned to a bantustan, typically in a scattered and poverty-stricken area, with no consideration of birthplace or dwelling. *Id.* In these areas, blacks were allowed to develop their own systems of government. *Id.*

24. ABEL, *supra* note 23, at 1-2.

25. *Id.* For a discussion of apartheid laws, see generally van der Vyver, *supra* note 19, at 746-748.

26. van der Vyver, *supra* note 19, at 751. Such violence erupted as the ruling white government attempted to enforce apartheid laws against the wishes of the majority of the South African population. Such enforcement could only occur using repressive means of law enforcement. *Id.*

27. Nelson Mandela noted that "apartheid has inflicted more pain on [the women of South Africa] than on anyone else." Lyn Normant, *The Women of South Africa*, EBONY, August, 1994, at 98, available in LEXIS, Market Library, EBONY File (statement by Nelson Mandela, on release from prison on Feb. 11, 1990).

28. These identification papers were commonly referred to as *dompas*. Rich Mkhondo, *New Laws Will Not Bring End to Horror of Apartheid*, CALGARY HERALD, June 21, 1991, available in 1991 WL 7587798.

29. Group Areas Act, No. 36 (1966) (S. Afr.); Natives Act (Abolition of Passes and Coordination of Documentation) No. 67 (1952) (S. Afr.); ABEL, *supra* note 23, at 3. Many viewed the pass laws as creating the "greatest indignity" of all the apartheid laws. *Id.* at 24.

an industrial or commercial area was conditioned on attaining a pass.³⁰ Pass distribution was linked to employment. Thus, African men, often migrants from the bantustans³¹ serving a period of contract labor in the city, obtained passes, whereas women, children, and the elderly or disabled were denied access to the urban workforce and left to reside on the bantustans.³² The Urban Areas Act further reduced the number of women in the urban workforce by allowing the exclusion of "idle and undesirable" individuals from urban areas.³³ Under apartheid law, women were easily categorized as "idle and undesirable."³⁴ While the Group Areas Act segregated blacks into rural residential areas, black South African women were left in uncultivated rural settings to tend to children and crops while men left for the cities to work.³⁵ These rural settings lacked adequate resources such as doctors, hospitals, and counseling programs that could have provided professional information concerning reproductive choices for women. Apartheid made it almost impossible, and often illegal, for African women to live with their husbands.³⁶

The passes contained such information as name, place of employment, residence, and tax information. BERNSTEIN, *supra* note 23, at 17. For women, these books also contained a place for the woman's father, husband, or male guardian to sign and a place for the commissioner of her home district to sign in recognition of a grant of consent for the woman to work. *Id.*

30. BERNSTEIN, *supra* note 23, at 127. Commercial and industrial areas were divided into prescribed areas, while farmland and mines consisted of non-prescribed areas. *Id.*

31. In the case of Africans from the independent bantustans, passes were commonly referred to as passports. *Id.*

32. Romany, *supra* note 14, at 866.

33. ABEL, *supra* note 23, at 11; Romany, *supra* note 14, at 866.

34. Romany, *supra* note 14, at 866.

35. Group Areas Act, No. 36 (1966) (S. Afr.); *South African Woman*, *supra* note 10; BERNSTEIN, *supra* note 23, at 9.

In 1959, under the Promotion of the Bantu Self-Government Act, eight black "nations" were created under the auspices of eventual independence. Wing & de Carvalho, *supra* note 14, at 62. All black South African citizens had to claim one nation as their home. *Id.* In 1970, under the Bantu Homelands Citizenship Act, the ten homelands became the nations of Bophuthatswana, Ciskei, Gazankulu, KwaNgwane, KwaNdebele, KwaZulu, Lebowa, QuaQua, Transkei, and Venda. *Id.* at 62 n.26.

Outside the bantustans, black South Africans were required to live in restricted residential areas called townships, in hostels at mines, or in large industrial cities. BERNSTEIN, *supra* note 23, at 127. The Group Areas Policy divided towns and cities into racially segregated zones. *Id.*

36. BERNSTEIN, *supra* note 23, at 15. For example, the wives of migrant workers were authorized to visit their husbands in white areas for only 72 hours at a time and for no more than 90 days a year. Romany, *supra* note 14, at 865-66. Given the severe poverty of most black women and the fact that the hostels available in the cities were single sex (i.e. male), visitation was unrealistic. *Id.*

Women who gained access to urban work under apartheid were typically employed as domestic servants for white families. These women either faced the tremendous burden of commuting the long distance from rural homes to urban cities or stayed with their urban employers and were separated from their own families.³⁷ Apartheid law prevented female domestic workers from living with their husbands or children.³⁸

Black women who secured entry into the urban workforce often became victims of sexual harassment, ranging from jokes or insults to rape.³⁹ Most women simply tolerated such behavior; the first case of sexual harassment in South Africa was not brought until 1989.⁴⁰

Under the apartheid system, blacks received a separate "Bantu Education" designed to teach black children skills for entrance into menial labor.⁴¹ This educational system left the black segment of the South African population in a position of permanent economic inferiority.⁴² Because families had to pay to educate their children, when money began to run out, female children were removed from school first, enabling male relatives to continue their education.⁴³ Illiteracy among black women contributed to their state of powerlessness and their inability to gain reproductive control.⁴⁴ Furthermore, the large number of black women living in rural areas had little, if any, access to education.⁴⁵ The lack of reproductive freedom contributed to the high rate of pregnancy, resulting in high drop-out rates for those

37. Wing & de Carvalho, *supra* note 14, at 69; COCK, *supra* note 15, at 10. Sometimes these jobs created their own bars to reproductive autonomy, as female employees often found themselves at the sexual mercy of their male employers. See also COCK, *supra* at 79-81.

38. Wing & de Carvalho, *supra* note 14, at 69.

39. *Id.*

40. *Id.* at 69-70 (citing as an example, *J. v. M. Ltd.*, 10 I.L.J. 755 (1989) (S. Afr.)). See Carla Sutherland, *Paying for Stolen Kisses? The Law and Sexual Harassment in South Africa*, in *PUTTING WOMEN ON THE AGENDA* 194, 199 (Susan Bazilli ed., 1991).

41. Black Education Act, No. 47 (1953) (S. Afr.); Wing & de Carvalho, *supra* note 14, at 70. ("Bantu" is the official term under apartheid to refer to black Africans. Wing & de Carvalho, *supra* note 14, at 62, n.25.) White South Africans, on the other hand, studied a curriculum that prepared them for higher education and higher-skilled careers. *Id.* at 70. Dr. Verwoerd believed there was "no place for the black man in the European community above the level of certain forms of labor and . . . there was no point in educating blacks for positions . . . that they would never be allowed to occupy." *Id.*

42. ABEL, *supra* note 23, at 23.

43. Wing & de Carvalho, *supra* note 14, at 71.

44. Women's health is further threatened by their lack of access to education. Romany, *supra* note 14, at 866.

45. See Wing & de Carvalho, *supra* note 14, at 71.

black South African women who were fortunate enough to be enrolled in school.⁴⁶

2. Customary Law and Reproductive Choices

Customary law, or "tribal law," is the "Black law or customs as applied by the Black tribes" in South Africa.⁴⁷ The Native Administration Act legitimized customary law in 1927.⁴⁸ The right to live by customary law remains enshrined in the post-apartheid Constitution.⁴⁹ Customary laws regulate marriage,

46. *Id.* at 72.

47. *Id.* at 63 (quoting L. H. Hoffmann & D. Zeffertt, *THE SOUTH AFRICAN LAW OF EVIDENCE* 428 (4th ed. 1988)). Customary law is also referred to as "indigenous law," "black law," or "traditional law." *Id.* at 63 n.39.

Arati Rao points out that "[n]o social group has suffered greater violation of its human rights in the name of culture than women." Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES*, *supra* note 2, at 167, 169.

The phrase "customary law" can be misleading, because it is neither "customary" nor "law." Thandabantu Nhlapo, *Women's Rights and the Family in Traditional and Customary Law*, in *PUTTING WOMEN ON THE AGENDA*, *supra* note 40, at 111, 112. During the colonial period, when an alliance grew between the colonial administration and the African male elders, a shift occurred from "custom" to "customary law" that impacted the familial sphere. *Id.* at 113. The African males, seeing their power dwindle, sought to regain it; the colonial administration either misunderstood African institutions or saw women as entities without rights under male authority. *Id.* The result of this union was the emergence of rigid rules of "customary law." *Id.*

48. Native Administration Act, No. 38 (1927) (S. Afr.). Customary law existed in South Africa as part of a dual legal system consisting of Roman-Dutch law and customary law. In the years of apartheid, customary law was "administered through a separate system of courts made up of tribal chiefs, native appeal courts, and native family courts." Wing & de Carvalho, *supra* note 14, at 64.

For a general discussion of customary law in South Africa, see T.W. BENNETT, *THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA: THE CONFLICT OF PERSONAL LAWS* (1985).

49. *South African Wimmen*, *supra* note 10. The Constitution states that "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent they are consistent with the Bill." S. AFR. CONST. § 39(3); however, it seems apparent that many South African customary laws are going to come into direct conflict with new rights guaranteed under the 1996 Constitution. See Liz Sly, *Equality Yes-but for Women, Too?; S. African Tribal Chiefs Fear Loss of Ancient Privileges*, CHI. TRIB., Nov. 4, 1993, at 1, available in LEXIS, News Library, CHTRIB File; see generally Christine M. Venter, *The New South African Constitution: Facing the Challenges of Women's Rights and Cultural Rights in Post-Apartheid South Africa*, 21 J. LEGIS. 1, 1 (1995) (discussing the conflict of new rights guaranteed by the South African Constitution and customary law). Also, for millions of rural blacks, traditional leaders are still regarded with unquestioning respect; such influence may hinder implementation of any government policies disapproved by the tribal leaders. Sly, *supra*.

family relations, children, contractual power, and property rights.⁵⁰ Adherents to customary law view women as perpetual minors and wards of their male relations.⁵¹ A woman must have her father's permission to marry and her husband's permission to work.⁵² A woman cannot sue or be sued because of her minority status.⁵³ Under customary law, it is inconceivable that a woman would act independent of the direction of a man.⁵⁴ This belief prevents women from making reproductive choices on their own.

Three traditional customary laws present particularly troubling features for black South African females. First, the customary law of polygamy allows male South Africans to take more than one wife.⁵⁵ South African women are denied any part in this life-altering decision.⁵⁶ Senior, first-married wives retain a higher status over junior, later-married wives.⁵⁷ Where primogeniture is given effect, the first-born son of the senior wife takes over after his father's death.⁵⁸ In certain tribes, a man may take an unmarried female member of his wife's family for bearing children if his wife proves infertile.⁵⁹ Polygamy buttresses inequality.⁶⁰

Second, customary law denies South African women the right to inherit property or to contract on their own behalf.⁶¹ A male relation, most commonly the husband or the father, gains control over any assets acquired by a female wife or daughter.⁶² Under customary law, when a husband dies, the husband's family asserts authority over the woman and may require her to cook,

50. Nhlapo explains that "the overriding value in the African family is reflected in the *non-individual nature of marriage*, sometimes called the collective or communal aspect of the marriage relationship." Nhlapo, *supra* note 47, at 113. Marriage was traditionally viewed as the union of two kinship groups, an alliance realizing goals beyond the need of the individual couple, such as procreation and survival, which were essential for the well-being of the larger group in pre-industrial society. *Id.* And, in Africa, as in other patriarchal societies, group interests are framed in favor of men. *Id.*

51. Wing & de Carvalho, *supra* note 14, at 64; Romany, *supra* note 14, at 867; Venter, *supra* note 49, at 8; Nina J. Crimm, *Introductory Remarks Women's Rights as International Human Rights*, 69 ST. JOHN'S L. REV. 1, 4-5 (1995).

52. Wing & de Carvalho, *supra* note 14, at 64.

53. Venter, *supra* note 49, at 8. In fact, in the past, husbands were often charged jointly with their wives if the wives were indicted on criminal charges. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 9.

57. *Id.*

58. *Id.*

59. *Id.*

60. *South African Wimmin*, *supra* note 10.

61. Wing & de Carvalho, *supra* note 14, at 65; *see* Venter, *supra* note 49, at 8-9.

62. Wing & de Carvalho, *supra* note 14, at 65.

tend the soil, or even to bear children for men in the deceased husband's family group.⁶³ Furthermore, the husband's property passes to his first born son, or if a son does not exist, to the nearest male relative.⁶⁴ The "legal allocation of land only to men has resulted in great inequities for women."⁶⁵

Finally, tribal law requires the payment of *lobola* before marriage. *Lobola* is a "bride price" paid by the husband to the bride's parents.⁶⁶ Traditionally, the payment of *lobola* consisted of a gift of cows symbolizing the union of two families; today, *lobola* generally takes the form of a cash gift.⁶⁷ For many black South African women, this payment symbolizes a deprivation of the right to refuse their husband's sexual advances or the right to oppose the addition of another wife to the family.⁶⁸ The payment of *lobola* gives the husband the right to make all decisions related to the woman's reproductive life; the effect is to "transform the woman's person and reproductive capabilities into part of her husband's property."⁶⁹

Central to customary law is the concept of the woman as the property of a man. This view has contributed to the overwhelming frequency of violence against South African women.⁷⁰ The incidence of rape in South Africa may be the

63. Venter, *supra* note 49, at 9.

64. Wing & de Carvalho, *supra* note 14, at 66.

65. *Id.*

66. *South African Wommin*, *supra* note 10. In its earliest form, lobolo was actually a "child-price;" the exchange of cattle gave a husband a claim to his wife's children. BERNSTEIN, *supra* note 23, at 35. Thus, a wife could not leave a husband unless she was willing to forfeit her children. *Id.*

Some commentators object to the comparison of lobolo to a sale of property, because the husband does not "own" his wife as he would own, for example, a piece of land, and thus cannot sell or lease his wife. Wing & de Carvalho, *supra* note 14, at n.53.

67. Venter, *supra* note 49, at 8. Among the black elite, lobola can be as much as \$4,400. *South African Wommin*, *supra* note 10.

68. *South African Wommin*, *supra* note 10, at 79-80; Wing & de Carvalho, *supra* note 14, at 65. At the marriage ceremony, a stiff whip is often displayed to symbolize the husband's control in the marital relationship and the husband's right to chastise his wife. Venter, *supra* note 49, at 8.

69. Adjetey, *supra* note 17, at 1359. The woman is not able to determine the number of children she will bear or the spacing between the children, and she loses the ability to ask for safe sex. *Id.*

70. Lloyd Vogelmann, Director of the Study of Violence at Johannesburg's Witwatersrand University, explains South Africa's high incidence of rape in the context of an extensively violent and sexist culture. Furthermore, Vogelmann notes, "women are an easy target" at which men can release their frustrations and anger with unemployment and political oppression. John Carlin, *After Violation, There is Only Fear*, INDEP., May 30, 1992, at 14, available in LEXIS, News Library, INDPNT File.

highest in the world.⁷¹ Customary law allows a husband to rape his wife with impunity.⁷² In 1991, twenty-two thousand rape cases were reported in South Africa; an estimated ninety-five percent of rapes went unreported.⁷³ Of the estimated 418,000 rapes occurring in South Africa in 1991, it is believed that ninety-five percent were committed against black women.⁷⁴ In 1994, 32,107 rape cases were reported in South Africa.⁷⁵ Violence against women, especially in the form of rape, drastically affects a woman's ability to prevent an unwanted pregnancy⁷⁶ and provides a major obstacle to women's reproductive choices.⁷⁷ Some groups estimate that at least ten percent of rape survivors are impregnated as a result of rape.⁷⁸

B. Post-Apartheid Constitution Guarantees

On December 10, 1996, President Nelson Mandela signed into law a South African Constitution that promised a new social order for the country.⁷⁹ Constitutional scholars refer to the

71. *Id.* "South Africa has the highest level of rape among countries that collect statistics on violence against women." Gumisai Mutume, *South Africa—Population: Reproductive Health Care Still Lagging*, INTER PRESS SERV., May 27, 1997, available in LEXIS, News Library, INPRES File [hereinafter *Reproductive Health Care Still Lagging*].

72. See Adjetey, *supra* note 17, at 1359. The concept that a wife can be raped by her husband does not even exist, because all sex within a marriage is considered consensual. *Id.* It is further estimated that one of every six South African women is assaulted regularly by her partner. Wing & de Carvalho, *supra* note 14, at 73.

73. Adjetey, *supra* note 17, at 1359. An average of 1,205 rapes occur each day in South Africa. *Id.* One Johannesburg newspaper reported that 20 to 30 rapes occur in Soweto over a weekend. Romany, *supra* note 14, at 868 n.43.

74. Wing & de Carvalho, *supra* note 14, at 72.

75. *Reproductive Health Care Still Lagging*, *supra* note 71. Although this number marks a 16% increase in the number of reported rapes from previous years, South African police estimate that only 2.8% of rapes are reported. *Id.*

76. See Lori L. Heise, *Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, *supra* note 2, at 238, 239.

77. *Id.* at 238.

78. Desirée Hansson, *Working Against Violence Against Women: Recommendation from Rape Crisis (Cape Town)*, in PUTTING WOMEN ON THE AGENDA, *supra* note 40, at 180, 186.

79. See generally S. AFR. CONST. This document was signed into law in Sharpesville, a town near Johannesburg. This locale was particularly significant because Sharpesville was the scene of a massacre of 69 blacks during a 1960 anti-apartheid protest. Chris Erasmus, *South Africans Embrace Rights of New Constitution*, USA TODAY, Dec. 11, 1996, at 4A.

This document is a "negotiated settlement of the country's constitutional dispute, with a view to the full participation of all political interest groups, irrespective of race . . ." van der Vyver, *supra* note 19, at 745.

Constitution, the result of two years of collaborations between the ANC, the National Party, and five smaller parties, as "one of the world's most liberal documents."⁸⁰ The Constitution includes an elaborate Bill of Rights.⁸¹

1. Guarantees for the People of South Africa

The Constitution's Bill of Rights eradicates the racial hierarchy established under apartheid rule and prohibits discrimination on any basis.⁸² The founding provisions of the Constitution state that "[t]he Republic of South Africa is one sovereign democratic state founded on . . . [h]uman dignity, the achievement of equality . . . [and] non-racialism and non-sexism."⁸³ Thus, the Constitution and the Bill of Rights apply to all South Africans, black or white, male or female.

The Bill of Rights specifically addresses many areas of concern apparent from apartheid rule. The Bill of Rights guarantees the South Africans' right to privacy, including the right not to have their persons or homes searched or property or possessions seized.⁸⁴ The Bill of Rights guarantees every citizen the freedom to make political choices, including the right to form a political party and to participate in the activities of a political

80. Brendan Boyle, *New S. African Constitution Entrenches Democracy*, Reuters World Serv., Dec. 4, 1996, available in LEXIS, News Library, REUWLD File (quoting preamble of the New Constitution); *South Africa; Constitution Ushers New Era for South Africans*, AFRICA NEWS SERV., Dec. 18, 1996, available in LEXIS, News Library, AFRNWS File. This document will gradually replace the Interim Constitution established after the first democratic all-race elections in South Africa.

The path to the creation of the new Constitution was marked by compromise. In May 1996, the initial draft of the Constitution was completed and adopted by the Constitutional Assembly; however, this draft was rejected by the Constitutional Court. Although many feared the reopening of negotiations, the current draft was edited and adopted in only a month. See Suzanne Daley, *South African Constitution is Approved by High Court*, N.Y. TIMES, Dec. 5, 1996, at A11; Hugh Dellios, *S. Africa's New Constitution Overflows with Human Rights*, AUSTIN-AM. STATESMAN, Dec. 11, 1996, available in 1996 WL 3454813.

The new Constitution, like the Interim Constitution it replaces, creates a federal system with a presidency and a two-chamber legislature. One branch of the legislature is known as the National Assembly and consists of 400 members. The second branch is known as the National Council of Provinces. This branch has 60 members, a reduction from 90 members established under the Interim Constitution. For an explanation of the powers and duties of these legislative bodies, see Chapter 4 of the new Constitution.

81. S. AFR. CONST. ch. 2.

82. The new Constitution guarantees that "everyone is equal before the law and has the right to equal protection and benefit of the law." *Id.* ch. 2, § 9(1).

83. *Id.* ch. 1 (Founding Provisions), § 1(a)-(b).

84. *Id.* ch. 2, § 14 (a)-(c).

party.⁸⁵ Furthermore, every citizen has the right to free, fair, and regular elections for any legislative body.⁸⁶ Every adult also has the right to vote.⁸⁷ In reaction to old pass laws, every citizen is given the right to freedom of movement, and every citizen has the right to enter, remain, leave, and reside anywhere in the Republic.⁸⁸ In reaction to the "Bantu Education," every adult is given the right to a basic education.⁸⁹

2. Guarantees for South African Women

Particularly important to black South African women is the Constitution's prohibition of discrimination on the basis of race, gender, marital status, or pregnancy.⁹⁰ The Constitution creates autonomous bodies to monitor the rights of the South African population.⁹¹ The Constitution further establishes a Commission for Gender Equality to safeguard the rights of women in particular.⁹² On August 8, 1996, President Nelson Mandela proclaimed the commencement of the Gender Commission.⁹³ The

85. *Id.* ch. 2, § 19 (1)(a)-(c).

86. *Id.* ch. 2, § 19(2).

87. *Id.* ch. 2, § 19(3)(a).

88. *Id.* ch. 2, § 21(1)-(3).

89. *Id.* ch. 2, § 29(1)(a).

90. The Bill of Rights also prohibits discrimination, directly or indirectly, "against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth." *Id.* ch. 2, § 9(3). See Boyle, *supra* note 80; Daley, *supra* note 80; Dellios, *supra* note 80.

This Equality Clause is broader than the Equal Protection Clause in the U.S. Constitution: (1) it is not limited in its application and (2) it specifically targets discrimination against women. Wing & de Carvalho, *supra* note 14, at 78.

91. Boyle, *supra* note 80. These autonomous bodies are known as State Institutions Supporting Constitutional Democracy. S. AFR. CONST. ch. 9. Both the Public Protector and the Human Rights Commission deal with human rights issues of the population as a whole. The Public Protector has the power "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice." S. AFR. CONST. ch. 9, § 182 (1)(a). The Human Rights Commission was created to (1) promote respect for human rights and a culture of human rights; (2) promote the protection, development, and attainment of human rights; and (3) monitor and assess the observance of human rights in the South African Republic. S. AFR. CONST. ch. 9, § 184(1).

92. The Commission for Gender Equality must "promote respect for gender equality and the protection, development and attainment of gender equality." S. AFR. CONST. ch. 9, § 187(1).

93. See *Proclamation by the President of the Republic of South Africa, Commencement of the Commission on Gender Equality Act, No. 39 (1996)* (S. Afr.) (visited Sept. 29, 1997) <gopher://<gopher.anc.org.za:70/00/govdocs/proclamations/1996/proc96.046>.

The National Assembly recommended to President Mandela the appointment of Thenjwe Mtintso as chairperson of the Gender Equality Commission. See

Commission is empowered to monitor the policies of the state, public bodies, and private businesses to promote equality. The Commission has the power to evaluate laws, recommend new legislation affecting the status of women, resolve disputes by mediation, and impose sentences or fines.⁹⁴

The Constitution's Bill of Rights guarantees everyone "the right to bodily and psychological integrity."⁹⁵ Specifically included in this provision is the right "to make decisions concerning reproduction" and the right "to security in and control of their body."⁹⁶ Additionally, the Constitution guarantees that "everyone has the right to have access to health care service, including reproductive health care."⁹⁷

III. ABORTION IN SOUTH AFRICA

During twenty-one years of apartheid rule, a South African woman's ability to obtain an abortion was governed, and often frustrated, by the Abortion and Sterilization Act of 1975 (hereinafter 1975 Abortion Act). The 1975 Act operated, in pertinent part, to deny South African women the ability to terminate a pregnancy. This denial had a severe impact on both the psychological and physical well-being of black South African women. Not until the ANC rose to power in 1994 was a movement to expand a woman's right to abortion access supported by a ruling South African government.

A. Pre-1996 Abortion Law in South Africa

The Abortion and Sterilization Act of 1975, slightly modified in 1982,⁹⁸ governed South African women's access to legal

South Africa Government-Bodies, Commissions, and Task Groups (visited Sept. 29, 1997) <<http://www.polity.org.za/lists/govbodies.html>>.

94. See Gumisai Mutume, *South Africa - Politics: New Gender Commission Set*, INTER PRESS SERV., Nov. 20, 1996, available in LEXIS, News Library, INPRES File. The Commission has also been granted extensive executive powers and will be able to subpoena any person to answer questions or produce documents or information. *Id.* Additionally, the Commission has been granted the power to search and seize property and use force if "reasonably necessary" to overcome resistance. *Id.* Some argue this is "feminism gone mad." *Id.*

95. S. AFR. CONST. ch. 2, § 12(2).

96. *Id.* ch. 2, § 12(a) & (b).

97. *Id.* ch. 2, § 27(1)(a).

98. See generally Abortion and Sterilization Act, No. 2 (1975), as amended by Act. No. 48 of 1982, repealed by Choice on Termination of Pregnancy Act, no. 92 (1996) [hereinafter 1975 Abortion Act].

abortion for twenty-one years.⁹⁹ The law delineated five narrow circumstances in which a woman could legally obtain an abortion: (1) where continued pregnancy endangered the life of the woman or constituted a serious threat to her physical health, (2) where continued pregnancy posed a serious threat to the woman's mental health, (3) where a serious risk existed that the anticipated child would suffer an irreparable and serious physical or mental handicap, (4) where the pregnancy resulted from rape or incest, or (5) where the pregnancy resulted from illegitimate carnal intercourse with a woman suffering from a permanent mental handicap or defect that rendered her unable to comprehend the implications of her pregnancy and unable to take parental responsibility for a child.¹⁰⁰ The abortion had to be performed by a registered medical doctor in a state-controlled or designated hospital.¹⁰¹

The 1975 Abortion Act required a woman to obtain the approval of at least three doctors before securing the legal right to an abortion.¹⁰² A woman wishing to abort had to locate a doctor willing to perform the procedure and persuade the doctor to initiate a written application on her behalf.¹⁰³ Then, two additional doctors had to provide written certification for the abortion.¹⁰⁴ The pregnant woman also had to elicit the approval of the head of the institution where the abortion was to be performed.¹⁰⁵ The two corroborating physicians and the head of the institution were entitled to interrogate a woman seeking an abortion as much as necessary to determine whether she qualified.¹⁰⁶

The 1975 Abortion Act also limited the number of doctors who could perform and certify an abortion. The two certifying doctors could not be employed by the performing doctor and one of the two must have practiced medicine for at least four years.¹⁰⁷

99. *Id.* Prior to the 1975 Abortion Act, access to abortion was governed by Roman-Dutch common law that allowed abortion only to save the life of the mother. Camp, *supra* note 13, at 157-58.

100. 1975 Abortion Act, § 3(1)(a)-(e); see Camp, *supra* note 13, at 158-59.

101. 1975 Abortion Act, §§ 3(1) & 5(1).

102. *Id.* § 3.

103. *Id.* § 6(2).

104. *Id.* § 3(1). Additionally, the doctor in charge of the hospital where the abortion was to be performed had to give written authorization. *Id.* § 6(1)(a).

105. *Id.* § 6(2). Although this certification could count as one of the required three, a pregnant woman is usually required to obtain a fourth signature to comply with the requirement that the two certifying doctors not work with the performing doctor. *Id.* § 3(2).

106. See Camp, *supra* note 13, at 159-60. This ability to interrogate discouraged women from trying to obtain abortions because of their discomfort with being so highly scrutinized. See *id.*

107. 1975 Abortion Act, §§ 3(2)(a)(1) & 3(3)(a).

Additionally, neither of the certifying doctors could assist with the abortion. Furthermore, to qualify under the mental health exception, one of the two certifying doctors had to be a state psychiatrist.¹⁰⁸ To qualify under the rape or incest exception, approval had to be obtained both from the district surgeon who examined the female on a report of its occurrence and from a magistrate.¹⁰⁹

Under the 1975 Abortion Act, doctors were given statutory authorization to refuse to perform an abortion.¹¹⁰ Any doctor who performed an illegal abortion or any woman who received the illegal procedure could receive a fine of 5000 rand¹¹¹ and a five-year prison term.¹¹² Between July 1988 and June 1991, over eighty South Africans were convicted under the Act.¹¹³

B. *Effects of the Pre-1996 Abortion Law*

With such stringent requirements, the 1975 Abortion Act effectively became a ban on abortions.¹¹⁴ The law gave legal and medical authorities the power to veto a woman's decision to abort.¹¹⁵ As a result, as few as one thousand legal abortions were performed annually.¹¹⁶ The legal abortions performed were overwhelmingly conducted on white women.¹¹⁷

108. *Id.* § 3(3)(b).

109. *Id.* §§ 3(3)(c) & 6(4)(1). The magistrate must certify that: (1) a complaint alleging unlawful carnal intercourse was filed with the police or good reason exists why the complaint was not filed, (2) after examining the documents from the police and after interrogating the woman, the magistrate believes unlawful carnal intercourse occurred, (3) in the case of incest, the prohibited degree of relation exists, and (4) the woman certifies in an affidavit that unlawful carnal intercourse occurred. *Id.* §§ (4)(1)(a)(i)-(iii) & 6(4)(1)(b).

110. *See id.* § 9.

111. *Id.* § 10.

112. *Id.*; Camp, *supra* note 13, at 159.

113. Camp, *supra* note 13, at 159. While 80 is not an enormous number, it is sizeable enough to strike fear into doctors contemplating aiding a women in an illegal abortion. *Id.*

114. Since the 1975 Act, South African women have been fighting against a hostile bureaucracy to obtain abortions. *South Africa: New Abortion Policy Takes Effect*, AM. POL. NETWORK ABORTION REP., Feb. 7, 1997, available in LEXIS, Legis Library, APN File [hereinafter *New Abortion Policy*].

The 1975 Act provides one example of "paternalistic control of women's sexual and reproductive behavior manifest[ed] . . . in laws and policies that condition women's access . . ." to medical care. Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, *supra* note 2, at 256.

115. Camp, *supra* note 13, at 158. Hospital administrators, magistrates, certifying doctors, and performing doctors all have veto power. *Id.* at 158-60.

116. *Id.* at 145-46.

117. Helen Ress, a maternity care consultant in Baragwanath Hospital in Soweta, reports that, of the one thousand legal abortions performed annually,

White South African women, especially the wealthier ones, had more success negotiating the requirements under the 1975 Abortion Act to obtain a legal abortion. The most common mechanism for obtaining a legal abortion was to qualify under the mental health exception;¹¹⁸ qualification required the approval of a state psychiatrist.¹¹⁹ In the mid-1980s, only twenty-seven state psychiatrists were available.¹²⁰ These psychiatrists were concentrated in urban areas.¹²¹ Thus, poor black women, especially in rural areas, had little hope of seeing a state psychiatrist.¹²² Even for women who could afford to get to a doctor, language barriers and high illiteracy rates among blacks contributed to the inability to meet the 1975 Abortion Act requirements.¹²³

The virtual ban on abortions forced women to resort to illegal and dangerous "backstreet abortions."¹²⁴ Many South African women, unable to access a legal abortion, attempted to perform their own abortions by using herbal enemas, knitting needles, oral quinine, castor oil, or laxatives.¹²⁵ Women also injected chemicals such as chloroxyleneol or soapy solutions into their uteruses via catheters in attempts to induce abortions.¹²⁶ Each year more than 250,000 South African women, predominantly black, have illegal backstreet abortions; this constitutes about one in every twenty-three fertile females in South Africa.¹²⁷ Forty-five thousand of these women require

70% were on white mothers claiming psychiatric problems. Ruairdh Nicoll, *Threat to New Abortion Clinics*, GUARDIAN, Feb. 4, 1997, available in LEXIS, News Library, TXTNWS File.

118. *Id.*

119. Camp, *supra* note 13, at 162-63.

120. *Id.* at 162.

121. *Id.* at 163.

122. A significantly larger number of white women than black women also qualified under the rape exception to the 1975 Abortion Act. *Id.* at 164-65. Only 50 legal abortions occurred under the rape exception in 1992, out of a total of 1027 legal abortions performed. *Id.* at 164.

123. *Id.* at 163.

124. Many women showed up at hospitals with catheters placed in their uteruses with the belief that the catheters would induce bleeding and allow the women to receive hospital treatment. See Nicoll, *supra* note 117.

125. Camp, *supra* note 13, at 155.

126. *Id.*

127. *Id.* at 144. In 1994, the Medical Research Council conducted research in 55 government hospitals in South Africa. This research concluded that 44,686 women with incomplete abortions ended up in the hospital each year. *Reproductive Rights Alliance, Abortion and Reproductive Health in South Africa* (visited Sept. 29, 1997) <<http://www.healthlink.org.za/rra/abr.htm>> [hereinafter RRA].

hospitalization;¹²⁸ 1500 to 3000 women die.¹²⁹ Ninety-nine percent of those hospitalized are black women.¹³⁰ Such gruesome statistics signaled a need for better reproductive health care and greater abortion options for women.

C. *The Path to Passage of the 1996 Bill*

The election platform of the ANC unequivocally favored women's rights and specifically promised a woman's right to a safe and legal abortion.¹³¹ Furthering its campaign pledge, the South African Cabinet, dominated by President Mandela's ANC government, on July 3, 1996, approved a draft bill on a woman's choice to terminate pregnancy.¹³² This draft bill supported abortion on demand for any woman regardless of age or marital status for the first fourteen weeks of pregnancy.¹³³

Approval of the draft bill fueled an emotionally charged debate. The fight over the 1996 Choice on Termination of

128. *New Abortion Policy*, *supra* note 114; Glenn McKenzie, *S. Africans Trickle into Hospitals for Historic Abortions*, AGENCE FRANCE PRESSE, Feb. 4, 1997, available in LEXIS, News Library, AFP File. Other women have been forced to resort to private abortion clinics, which charge an estimated 1500 rand (\$350) to perform an illegal abortion. McKenzie, *supra*. The women who use hospitals cost the state approximately four million dollars annually. *South Africa Legalizes Abortion on Demand*, WASH. TIMES, Feb. 1, 1997, available in LEXIS, News Library, WTIMES File. Camp identifies several causes of death resulting from back-street abortions, including blood poisoning, infection, hemorrhaging, and kidney failure. Camp, *supra* note 13, at 155-56. Many survivors suffer from infection, sterility, hysterectomy, and psychological trauma. *Id.* at 156.

129. Camp, *supra* note 13, at 144. The World Health Organization estimates that 500,000 women die annually from pregnancy-related causes. Twenty-five to fifty percent of these deaths are caused by unsafe abortions. Cook, *supra* note 114, at 256-57.

130. See *New Abortion Policy*, *supra* note 114; *RRA*, *supra* note 127. The South African ministry of health estimates that each day a woman dies because of a botched abortion. Carolyn Dempster, *Abortion Act Splits S. Africa*, SCOTSMAN, Feb. 3, 1997, available in LEXIS, News Library, TXTNWS File. See also *New Abortion Policy*, *supra* note 114 (four hundred women a year die from complications arising from botched illegal abortions); McKenzie, *supra* note 128 (estimating that at least 425 women die annually from botched backstreet abortions).

131. See *South Africa Abortion Vote Pressures Parliament*, AFRICA NEWS, June 21, 1996, available in LEXIS, News Library, AFRNWS File [hereinafter *Abortion Vote Pressures Parliament*].

132. *Political Storm over Proposed Abortion on Demand in South Africa*, DEUTSCHE PRESSE-AGENTUR, July 5, 1996, available in LEXIS, News Library, DPA File [hereinafter *Political Storm*].

133. Gumisai Mutume, *South Africa-Health: Anti-Abortion Lobby Prepares for Battle*, INTER PRESS SERV., July 9, 1996, available in LEXIS, News Library, INPRES File [hereinafter *South Africa-Health*]. The draft bill supported abortion if recommended by a social worker, doctor, or midwife. *Id.*

Pregnancy Bill, like abortion legislation worldwide, featured pro-life and pro-choice supporters.¹³⁴ Pro-life groups viewed the abortion legislation as legalizing murder.¹³⁵ Christian and Muslim churches and groups such as Doctors for Life championed the pro-life cause.¹³⁶ The Catholic Church threatened to excommunicate anyone involved in the termination of a pregnancy;¹³⁷ Islamic groups threatened to forward the names of any Moslems supporting abortion to religious leaders in the Middle East.¹³⁸ Pro-life activists claimed that the majority of South Africans who are active in Christian churches opposed the abortion law.¹³⁹ Months before the abortion vote, more than twenty pro-life organizations and several churches joined together

134. John Flemming, *South Africa-Human Rights: Abortion Bill Awaits its Fate*, INTER PRESS SERV., Aug. 6, 1996, available in LEXIS, News Library, INPRES File [hereinafter *South Africa-Human Rights*].

135. *South Africa-Health*, supra note 133. The National Party's health spokesman, Willie Odendaal, said that his party believes that both pre-born and post-born South Africans deserve the same constitutional right to human life. *S. African Parliament Opens Abortion Debate*, Reuters World Serv., Sept. 20, 1996, available in LEXIS, News Library, REUWLD File.

136. *International Briefing: South African Senate Passes Abortion Bill*, AM. POL. NETWORK ABORTION REP., Nov. 7, 1996, available in LEXIS, Legis Library, APN File.

Doctors for Life consists of 500 doctors who have vowed not to perform an abortion or to give a referral to a woman searching for an abortion practitioner. *South Africa-Health*, supra note 133.

137. Despite this threat, issued the evening before the vote on abortion legislation in the National Assembly, the Catholic Church did not excommunicate anyone. Gaye Davis, *South Africa; ANC to Act Over Abortion Vote*, AFRICA NEWS, Nov. 15, 1996, available in LEXIS, News Library, AFRNWS File. Catholics who did vote in support of the legislation will be expected to seek forgiveness through confession. *Id.*

Note also that the Catholic Church, only a few months earlier, was at the center of an emotional debate on liberalizing abortion when it was alleged that a Roman Catholic priest had impregnated a woman and that the Church had paid for the woman to have an abortion. *S. Africa Catholics Deny Paying for Abortion*, Reuters North Am. Wire, Oct. 17, 1996, available in LEXIS, News Library, REUNA File. The priest admitted to the affair but claimed that the Church gave the pregnant woman money to seek counseling, not to have an abortion. Gumisai Mutume, *South Africa-Population: Parliament Puts Legal Stamp on Abortion*, Inter Press Serv., Oct. 30, 1996, available in LEXIS, News Library, INPRES File.

138. N.C. Lee, *Sweeping Changes Made to South Africa's Abortion Law*, LANCET, Nov. 9, 1996, at 1304, available in LEXIS, News Library, LANCET File.

139. Ed O'Loughlin, *S. Africa Abortion Law Puts ANC in a Corner*, CHRISTIAN SCI. MONITOR, Nov. 7, 1996, at 6, available in LEXIS, News Library, CSM File. An informal phone-in poll conducted by Johannesburg's English-language Radio received 6,348 calls against the abortion legislation and only 3,285 in support of the legislation. *Id.*

Earlier studies suggest that 70% of the South African population is against abortion on demand. *Political Storm*, supra note 132; see also *South Africa-Health*, supra note 133 (stating that 69% of the South African population is opposed to abortion). Note that these studies relate to constituents outside the parliament.

under the auspices of the National Alliance for Life to hold anti-abortion rallies and to plant two thousand crosses on the lawn of the government headquarters in Pretoria.¹⁴⁰

Other groups, including the Reproductive Rights Alliance and Planned Parenthood, championed the pro-choice side of the debate.¹⁴¹ The ANC, also a pro-choice proponent, stood firmly to its campaign platform, arguing that abortion on demand was part of the platform that got the ANC elected and as such, necessitated implementation.¹⁴² Pro-choice activists viewed the Abortion Act as a significant achievement for women's rights advocates, for the fight against repressive laws and attitudes, and toward the development of individual security and dignity.¹⁴³

The debate also featured a "struggle between the deeply conservative, religious establishment spawned by the era of apartheid, and the new South Africa, led by a liberal government committed to racial and gender equality."¹⁴⁴ For those trying to balance traditional and religious moral beliefs with development of a new, liberal, democratic government, this struggle created a paradox.¹⁴⁵ For instance, many members of the ANC believe that the expansion of legalized abortion comports with the ANC's commitment to gender rights and equality. Yet these same individuals are Roman Catholics or Muslims who cannot vote for abortion and stay true to their faith.¹⁴⁶

When the South African National Assembly voted on the abortion legislation on October 30, 1996, many argued that representatives should be allowed to vote against their party lines.¹⁴⁷ The ANC, however, dominated the seats in the National

140. Richard Nyberg, *Pro-Life Activists Deplore Liberal Abortion Law: South Africa*, CHRISTIANITY TODAY, Jan. 6, 1997, at 60, available in LEXIS, News Library, ASAPII File. Pro-life activists also sent "horrific pictures of fetuses [sic]" to members of parliament before committee hearings on the bill. Rehana Rossouw, *South Africa: Pro-Lifers Will Fight 'To The Death'*, AFRICA NEWS, Nov. 1, 1997, available in LEXIS, News Library, AFRNWS File.

141. O'Loughlin, *supra* note 139, at 6.

142. *Id.*

143. *South Africa-Health*, *supra* note 133.

144. O'Loughlin, *supra* note 139, at 6. The ANC, the Pan-Africanist Congress of Azania, and the Democratic Party all favored the abortion legislation; the National Party, the Zulu-Nationalist Inkatha Freedom Party, the Afrikaner Freedom Front, and the Christian Democratic Party were all opposed. *South Africa's New Abortion Bill Adopted*, XINHUA NEWS AGENCY, Oct. 23, 1996, available in LEXIS, News Library, TXINWS File.

145. See *South Africa-Human Rights*, *supra* note 134.

146. *Abortion Vote Pressures Parliament*, *supra* note 131; Tag Williams, *South Africa: Abortion Puts Government on the Spot*, Inter Press Serv., Aug. 13, 1996, available in LEXIS, News Library, INPRES File.

147. *South Africa-Human Rights*, *supra* note 134; *Abortion Vote Pressures Parliament*, *supra* note 131. Professor John de Gruchy, the Reverend Barney Pitjana, and the Reverend Frank Chikane authored a paper in support of open

Assembly, and argued that South Africa's parliamentary democracy requires voters to choose a party, not an individual member.¹⁴⁸ Therefore, the ANC concluded that members should vote for the party position.¹⁴⁹ Furthermore, the ANC had promised a liberal abortion law in its campaign, and open voting by parliamentary members could threaten the success of the vote. All ANC opposition parties, in contrast, allowed their members to vote on the abortion legislation in accordance with their consciences and religious beliefs.¹⁵⁰ The ANC passed the legislation 209 to 87 with five abstentions and ninety-nine absentees.¹⁵¹ Observers say the vote would have been different had the ANC allowed an open vote.¹⁵²

After the National Assembly passed the bill, but before the legislation made its way to the South African Senate, thousands of Catholics, armed with messages of support from such prominent figures as Pope John Paul II and Mother Teresa, held marches to protest the bill.¹⁵³ The South African Senate approved the Choice on Termination of Pregnancy Bill on November 5, 1996, with a vote of forty-nine to twenty-one despite these protests.¹⁵⁴ Twenty senators, including many ANC members, were absent for the vote after the ANC again denied party members the right to vote individually on the bill.¹⁵⁵

voting that circulated among the members of the South African parliament. *Abortion Vote Pressures Parliament, supra.*

148. *South African-Human Rights, supra* note 134.

149. *Id.*

150. Juliette Saunders, *ANC to Whip in Abortion Changes*, INDEP., Oct. 11, 1996, at 15, available in LEXIS, News Library, INDPNT File.

151. Gumisai Mutume, *South Africa-Population: Parliament Puts Legal Stamp on Abortion*, Inter Press Serv., Oct. 30, 1996, available in LEXIS, News Library, INPRES File; Nyberg, *supra* note 140, at 60.

One abstainee, MP Jennifer Ferguson, explained that she chose to abstain because she thought that "in between the two buttons we had to press, of 'yes' or 'no', there's a vast and complex ethical landscape . . . [that] the Act has put an Elastoplast over." Glynis O'Hara, *I'll Fly Away*, AFRICAN NEWS, Apr. 18, 1997, available in 1997 WL 10552875. Ferguson expressed a desire for a national campaign covering AIDS, sex education, and gender politics, as well as a desire to decrease the 20-week mark in the Abortion Act to a 12-week mark. *Id.*

152. Nyberg, *supra* note 140, at 60. The ANC holds 252 seats in the National Assembly. *South Africa: Protests Continue as South Africa Adopts Abortion Law*, AFRICA NEWS, Nov. 13, 1996, available in LEXIS, News Library, AFRNWS File.

153. *S. African Senate Passes Liberal Abortion Law*, AGENCE FRANCE PRESSE, Nov. 5, 1996, available in LEXIS, News Library, AFP File.

154. *Id.*

155. *South Africa Adopts a Liberal Abortion Law*, N.Y. TIMES, Nov. 6, 1996, at

President Nelson Mandela signed the bill into law on December 11, 1996.¹⁵⁶ The bill took effect on February 1, 1997.¹⁵⁷

D. *The 1996 Abortion Act*

The Preamble of the Act provides sweeping language reminiscent of the South African Bill of Rights and the South African Constitution.¹⁵⁸ The Preamble states that the act fulfills the "values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa."¹⁵⁹ The Preamble further recognizes the right of persons to security over their bodies and to make decisions concerning reproduction.¹⁶⁰ The Preamble also creates affirmative duties for the state to provide safe conditions for exercising the right of choice.¹⁶¹ The Preamble additionally recognizes that "the decision to have children is fundamental to women's physical, psychological, and social health and that universal access to reproductive health care . . . includes . . . termination of pregnancy."¹⁶²

The new law permits an abortion on demand for any woman during her first twelve weeks of pregnancy.¹⁶³ An abortion may be performed by a qualified medical practitioner or by a registered midwife.¹⁶⁴ The law also permits a medical practitioner to perform an abortion from the thirteenth week through the twentieth week of pregnancy if: (1) the practitioner believes it is necessary to ensure the physical or mental health of the woman, (2) if continued pregnancy would significantly affect the social or economic circumstances of the woman, (3) if a substantial risk exists of severe physical or mental abnormalities in the fetus, or

156. *Mandela Signs S. Africa's New Liberal Abortion Law*, Reuters No. Am. Wire, Dec. 11, 1996, available in LEXIS, News Library, REUNA File.

157. See South Africa Department of Health, *Choice on Termination of Pregnancy Press Release*, Jan. 28, 1997 (visited Oct. 7, 1997) <gopher://gopher.anc.org.za/00/govdocs/pr/1997/pr/pr0128.02> (stating the effective date of the legislation).

158. See *infra* notes 81-89 and accompanying text.

159. 1996 Abortion Act, *supra* note 12, preamble.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* § 2(1)(a).

164. *Id.* § 2(2). A registered midwife who has completed the prescribed training may only terminate a pregnancy within the first twelve weeks. A medical practitioner can perform an abortion after this time, as provided in the Act. *Id.*

(4) if the pregnancy resulted from rape or incest.¹⁶⁵ After the twentieth week, an abortion is permitted if a medical practitioner, after consultation with another medical practitioner or with a qualified midwife, determines that continued pregnancy would: (1) endanger the life of the pregnant woman, (2) result in a severe malformation of the fetus, or (3) pose a risk of injury to the fetus.¹⁶⁶

An abortion under the 1996 Abortion Act requires the informed consent of the woman.¹⁶⁷ The 1996 Abortion Act promotes the provision of non-mandatory and non-directive counseling before and after pregnancy termination.¹⁶⁸ The law does not require parental or spousal notification regardless of the pregnant woman's age.¹⁶⁹ The law requires medical practitioners to advise a pregnant minor to consult with her parents, other family members, or friends before terminating a pregnancy;¹⁷⁰ however, the abortion can be performed even if the minor ignores this advice.¹⁷¹ If a woman cannot give informed consent because of a severe mental disability or a state of continual unconsciousness, the 1996 Abortion Act allows a decision to be made by the woman's natural guardian, spouse, or legal guardian, or by *curator personal*.¹⁷²

Draft legislation of the bill allowed a medical practitioner to refuse to perform an abortion if he or she had a conscientious objection to the termination of a pregnancy.¹⁷³ This provision required the practitioner to refer the pregnant woman to a practitioner willing to perform the abortion procedure.¹⁷⁴ The current act eliminated this clause.¹⁷⁵ It remains to be seen whether this omission will allow the imposition of a criminal

165. *Id.* § 2(1)(b)(i)-(iv). This standard, especially the one allowing for an abortion if the social or economic circumstances of the woman would be affected by pregnancy, seems to liberalize the abortion law to allow for abortion in virtually any circumstance for the first 20 weeks of pregnancy.

166. *Id.* § 2(1)(c)(i)-(iii).

167. *Id.* § 5(1).

168. *Id.* § 4.

169. *Id.* §§ 5(2) & (3).

170. *Id.* § 5(3).

171. *Id.* § 5(3).

172. *Id.* § 5(4).

173. See Termination of Pregnancy Bill, No. 80, § 8 (1996) (S. Afr.) (as introduced) ("no person shall be under any legal duty . . . to participate in the termination of a pregnancy if he or she has a conscientious objection to the termination of the pregnancy." Such an objector "shall . . . refer a woman who requests termination of her pregnancy to another medical practitioner or registered midwife.").

174. *Id.* at § 8(3).

175. See generally 1996 Abortion Act (not providing for the conscientious objections of medical practitioners or midwives to the performance of abortions).

penalty against a practitioner who refuses to perform such operations.¹⁷⁶ Penalties remain intact in the current legislation for anyone who performs an abortion without qualification, prevents the lawful termination of a pregnancy, or obstructs access to a facility that performs abortions.¹⁷⁷ Such individuals are guilty of a criminal offense and may be liable for a fine or imprisonment as much as ten years.¹⁷⁸ The act further requires facilities in which abortions are performed to maintain careful records and statistics.¹⁷⁹ Failure to do so may result in a fine or imprisonment for less than six months for the responsible medical practitioner.¹⁸⁰

For women without adequate medical coverage, the abortion is state-funded.¹⁸¹ Women are entitled to a state-funded abortion on demand during the first twelve weeks of pregnancy if they have no private medical aid and go to a state hospital for the procedure.¹⁸² Subject to broadly and widely defined conditions, women may extend their term of eligibility for a state-funded abortion for another eight weeks.¹⁸³

E. *The Act's Effects*

The 1996 Abortion Act became effective February 1, 1997. Supporters of the Act hope it will put illegal abortionists out of work while diminishing the number of women with incomplete abortions and admitted to hospitals with complications from illegal abortions.¹⁸⁴ As many as 250 women per week are expected to flood South Africa's larger hospitals in hopes of

176. A statement by the Department of Health on January 28, 1997, indicates that "health workers are not obliged to take an active part in the termination of a pregnancy. However, in the case of an emergency, health workers must participate in order to save the patient." South Africa Department of Health, *Choice on Termination of Pregnancy Press Release*, Jan. 28, 1997 (visited Oct. 7, 1997) <gopher://gopher.anc.org.za/00/govdocs/pr/1997/pr0128.02>.

177. *Id.*; 1996 Abortion Act, § 10(1)(a)-(c).

178. 1996 Abortion Act, § 10(1).

179. *Id.* § 7(1)-(5). These records shall contain prescribed information provided that the name and address of the woman requesting or obtaining abortion information is excluded. *Id.* § 7(3). Under the old abortion law, records included the name of the woman and offered little privacy, providing another disincentive to seek a legal abortion. See 1975 Abortion Act, § 7.

180. 1996 Abortion Act § 10(2).

181. *South Africans Can Get Abortions Starting Today*, ORLANDO SENTINEL, Feb. 1, 1997, available in LEXIS, News Library, ORSENT File.

182. *Id.*

183. *Id.* See also Juliette Saunders, *S. Africa Gears up for Abortion on Demand*, Reuters No. Am. Wire, Jan. 31, 1997, available in LEXIS, News Library, REUAM File; Zhao Yi, *Roundup: Abortion Not Yet Legal in South Africa*, XINHUA NEWS AGENCY, Feb. 3, 1997, available in LEXIS, News Library, CURNWS File.

184. See Saunders, *supra* note 183.

obtaining an abortion.¹⁸⁵ By May 28, five thousand legal abortions had been performed in South Africa under the new law.¹⁸⁶ In Gauteng State Hospitals, reports indicate that six hundred women had received abortions under the new law,¹⁸⁷ and 2300 women had legally terminated a pregnancy by May 27.¹⁸⁸ Some estimate that, in South Africa, 200 to 520 abortions are requested for every 1000 births.¹⁸⁹ Many provincial health departments were unprepared for the influx of abortion requests; many designated units suffered from a lack of resources and from staff resistance to abortion procedures.¹⁹⁰ In many provinces, abortions will only be available at major hospitals. Even Baragwanath Hospital in Soweto was limited to eight abortions per day.¹⁹¹ Some estimate that smaller community hospitals will require years before they are able to handle the demand for abortions created by the new law.¹⁹² Reports indicate that an abortion at a government clinic or hospital costs \$136.¹⁹³ Private clinics charge slightly more.¹⁹⁴

185. *Id.*

186. *Reproductive Health Care Still Lagging*, *supra* note 71.

187. *Major News Items in Leading S. African Newspapers*, XINHUA NEWS AGENCY, Feb. 28, 1997, available in LEXIS, News Library, TXTNWS File.

188. *Reproductive Health Care Still Lagging*, *supra* note 71. Gauteng, an economic powerhouse in South Africa, has increased the number of hospitals that provide abortion services from 10 to 22 since the Act began. *Id.*

189. In comparison, 321 abortions were performed for every 1000 live births in the United States in 1994. Cal McCrystal, *Agony of Birth: A Matter of Life . . . and Death*, OBSERVER, Jan. 5, 1997, at 15, available in LEXIS, News Library, TXTNWS File; *Science and Health; Medical Units Ill-Prepared for Abortions*, AFRICA NEWS, Jan. 31, 1997, available in LEXIS, News Library, AFRNWS File [hereinafter *Medical Units Ill-Prepared*].

190. *Medical Units Ill-Prepared*, *supra* note 189. Several hospitals were reluctant to offer information on their preparation for the legalization of abortion for fear of being swamped by abortion requests. Jim Day, *South Africa; Hospitals Mum Because They Fear Swamping*, AFRICA NEWS, Jan. 31, 1997, available in LEXIS, News Library, AFRNWS File.

191. McKenzie, *supra* note 128. Baragwanath is the largest hospital in the world and serves more than three million inhabitants. *Id.* Many provinces expect the roll-out to the community level to take months, if not years. "Provinces such as Gauteng, Northern Province, and the Western Cape have dozens of hospitals listed as abortion providers." *Medical Units II-Prepared*, *supra* note 189. For other provinces, abortion is less accessible. Only four public hospitals in the Eastern Cape will perform the procedure, while only two will do so in the Northern Cape. *Id.* In the Free State, abortions will be available in Bloemfontein only, and estimates predict it will be years before the 14 Free State districts can perform abortions. *Id.*

192. *Id.*

193. Tag Williams, *South Africa: Abortion in Demand*, INTER PRESS SERV., Mar. 19, 1997, available in LEXIS, News Library, INPRES File.

194. *Id.* These new prices mark a decrease in cost. It cost \$350 (1500 rand) to obtain an illegal abortion in a private clinic pre-Act. *Law Versus Ethics in South Africa*, AFRICA NEWS, available in 1997 WL 9966419.

Thus, the passage of the 1996 Abortion Act has raised several concerns in South Africa. The most pressing concern is that many hospitals, especially in rural areas, are ill-equipped to handle the demand for abortions.¹⁹⁵ Patients already wait months for operations.¹⁹⁶ These hospitals lack equipment and qualified staff.¹⁹⁷ The South African health system, unable to handle domestic abortion demands, faces the additional demands of women in neighboring countries where abortions remain illegal.¹⁹⁸ Furthermore, some concern exists that news of the new law has yet to filter to rural areas where women urgently need family planning counseling.¹⁹⁹

Additionally, the majority of hospitals and clinics in South Africa do not have counseling programs for South African women facing the difficult decision of whether to abort.²⁰⁰ This is an especially grave concern because the new law allows minor women to choose to abort without requiring parental notification or permission.

A further concern is that many medical professionals who must meet the demand for abortion oppose it on religious or ethical grounds.²⁰¹ These professionals refuse to perform the abortion procedure.²⁰²

Into this mix of concerns fall the abortion protesters. Christian fundamentalist demonstrators have forced a family planning clinic to close its doors.²⁰³ Other opponents of the new bill promise to follow women trying to obtain an abortion while they are en route to hospitals and clinics, in an effort to influence these women's decisions.²⁰⁴

Unfortunately, backstreet abortions continue because many South African women are either uninformed about the new law or

195. In fact, 33% of the country's hospitals, most of them located in formerly "designated" black areas must be rebuilt. *Reproductive Health Care Still Lagging*, *supra* note 71.

196. Nyberg, *supra* note 140, at 60.

197. Alexandra Zavis, *S. Africa to Grant Abortion Requests*, AUSTIN-AM. STATESMAN, Feb. 2, 1997, at A12, available in LEXIS, News Library, AUSTIN File. For this reason, many abortions in the early stages of pregnancy are likely to be carried out by the RU-486 pill. Nyberg, *supra* note 140, at 60.

198. Williams, *supra* note 146.

199. Dempster, *supra* note 130, at 6; *Reproductive Health Care Still Lagging*, *supra* note 71.

200. Zavis, *supra* note 197.

201. *Id.*

202. *Id.* According to a Doctors for Life survey, 82% of the respondents said they would be unwilling to perform an abortion on demand. Nyberg, *supra* note 140, at 60.

203. *Abortion Vote Pressures Parliament*, *supra* note 131.

204. Dempster, *supra* note 130.

lack access to abortion services because of geographical isolation or lack of hospital capacity.²⁰⁵

IV. DETERMINING THE CONSTITUTIONALITY OF THE 1996 ABORTION ACT

Both the National Party and anti-abortion groups, such as Doctors for Life²⁰⁶ and the Johannesburg-based Christian Lawyers Association, have threatened to test the constitutionality of the 1996 Abortion Act in South Africa's Constitutional Court.²⁰⁷ The success of a claim of unconstitutionality depends on the Constitutional Court's interpretation of several clauses within the South African Constitution.

A. *A Guide to Determining the Constitutionality of South African Legislation*

If the South African Constitutional Court assesses the 1996 Abortion Act's constitutionality, the Court will be guided by a constitutional mandate. When interpreting parliamentary legislation, the Constitutional Court must "promote the spirit, purport and objects of the Bill of Rights."²⁰⁸ When interpreting the Bill of Rights, the Constitution prescribes that a court, tribunal, or forum "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom" and "must consider international law."²⁰⁹ In furtherance of the principles underlying South Africa's society and the aims of international law, the Constitutional Court will insist that acts of parliament avoid sexual discrimination and

205. *See id.*

206. *See infra* text accompanying note 136.

207. *Yi, supra* note 183. Chapter 8 of the South African Constitution empowers the Constitutional Court to determine whether an act of parliament is constitutional. The Constitutional Court is the highest court in all constitutional matters in South Africa. S. AFR. CONST. ch. 8, § 167(3). In fact, the Constitutional Court only has jurisdiction over constitutional matters. *Id.* A constitutional matter includes "any issue involving the interpretation, protection or enforcement of the Constitution." *Id.* at § 167(7). The Constitutional Court makes the final decision on whether an act of parliament, a provincial act, or conduct of the President is constitutional. *Id.* § 167(5).

For further explanation of the role and duties of the various courts in South Africa and the selection and removal of judicial officers, see Chapter VIII of the South African Constitution: Courts and Administration of Justice.

208. S. AFR. CONST. ch. 2, § 39(2).

209. The Bill of Rights also provides that a court "may consider foreign law." *Id.* § 39(1)(c) (emphasis added).

adverse effects on women's access to reproductive self-determination.²¹⁰

B. *The Language of the South African Constitution*

While the South African Constitution does not explicitly enumerate the right of women to choose to terminate a pregnancy, the right may be derived from several clauses within the Constitution.²¹¹ Clauses 12 (2)(a) and (b) guarantee the citizens of South Africa "the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction [and] to security in and control over their body." The drafters of the Constitution made no attempt to limit the application of this language. Thus, the Constitutional Court should liberally construe these words when interpreting the 1996 Abortion Act. South Africa's Constitutional Court will have difficulty defining abortion as anything other than a "decision concerning reproduction." The decision to have an abortion is simply a decision not to reproduce. Furthermore, the decision to terminate a pregnancy is an example of a way that a woman may exercise control over her body.

Clause 27(1)(a) guarantees everyone "the right to have access to health care services, including reproductive health care." The clear and ordinary meaning of the phrase "reproductive health care," while not limited to abortion, certainly encompasses the decision to terminate a pregnancy.²¹² This clause also supports the South African legislature's decision to provide state-funded abortions to those otherwise unable to afford them.²¹³ For a constitutional guarantee of health care to acquire substance for the large class of poor black South African women, the government must take a proactive role in the provision of that care.

Clause 14 states that "everyone has the right to privacy." The right to privacy arguably includes the right to make a private decision whether to have an abortion. U.S. law, for example, grounds a woman's right to terminate a pregnancy on a due

210. Rebecca J. Cook, *Keynote Speeches: Human Rights and Reproductive Self-Determination*, 44 AM. U.L. REV. 975, 986 (1995) [hereinafter Cook, *Keynote Speeches*].

211. Constitutional scholars argue that a woman's right to an abortion is enshrined in the new Constitution. *South Africa Reborn*, BOSTON GLOBE, May 11, 1996, at 10, available in LEXIS, News Library, BGLOBE File.

212. See *Main Points of New South African Constitution*, AGENCE FRANCE PRESSE, May 8, 1996, available in LEXIS, News Library, AFP File (arguing that the reproductive health clause *will* allow abortions) (emphasis added).

213. See *infra* notes 181-82 and accompanying text.

process privacy theory.²¹⁴ Legislation permitting the termination of pregnancy on privacy grounds has also been upheld under international law.²¹⁵

Additionally, Clause 28 discusses the rights of a South African child, defining the term *child* as "a person under the age of 18 years." It seems unlikely that a government that intended to prevent abortion or to severely limit it would fail to include within its highly developed Bill of Rights the right of a fetus to be born. Giving credence to this view is the public awareness of the large number of illegal backstreet abortions taking place each year in South Africa.²¹⁶

C. Values Underlying an Open and Democratic South African Society

The South African Constitution requires the Constitutional Court to assess the "values which underlie a . . . society based on human dignity, equality and freedom" when determining the constitutionality of the 1996 Abortion Act. The values that underlie the newly-founded open and democratic South African society can be found in the Constitutional Principles developed by the Multi-Negotiating Party for the Interim Constitution.²¹⁷ These thirty-four principles guided the construction of the Interim Constitution; the Interim Constitution mandated that any subsequent constitution comply in all respects with the principles enumerated for the Constitutional Court.²¹⁸

The first three principles closely relate to women's rights. First, the South African government shall be a democratic government committed to achieving equality between men and women and among people of all races.²¹⁹ Second, everyone shall enjoy universally accepted fundamental rights, freedoms, and civil liberties.²²⁰ Third, South Africa shall prohibit racial, gender, and other types of discrimination while promoting racial and gender equality.

214. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

215. See Cook, *Keynote Speeches*, *supra* note 210, at 1000 n.61 (providing as an example Case 2141, Inter-Am. C.H.R. 25, OEA/Ser. L./V./1154, doc. 9 rev.1 (1981)).

216. See *infra* Part III.

217. Interim Constitution, *supra* note 6, at Schedule 4, Constitutional Principles.

218. *Id.* § 71(1)(a). If the subsequent document failed to comply, it could not be certified as constitutional.

219. *Id.* at Schedule 4, Constitutional Principle I.

220. *Id.* at Schedule 4, Constitutional Principle II.

D. *International Law*

While general, value-laden tenets encourage the pursuit of equality in South Africa and the universal acceptance of fundamental rights, these broad principles fail to define a way to achieve equality or to enumerate which rights are fundamental. To answer these questions the Constitutional Court will need to refer to international law.

1. Defining International Law

International Law consists of the rules and principles that bind states to each other and to international organizations; additionally, international law governs the relations among international organizations, as well as the relations between states or international organizations and natural or juridical persons.²²¹ The South African Constitution specifically discusses international law in the General Provisions listed in Chapter 15; the Constitutional Court must follow these directives on the application of international law.²²²

Any international agreement becomes law in South Africa when it is enacted into law by a resolution approved by the national legislature.²²³ South Africa is further bound by any international agreements binding on the Republic when the 1996 Constitution took effect.²²⁴ Customary international law is also law in South Africa unless inconsistent with the Constitution or an act of parliament.²²⁵ The South African Constitution further dictates that, in interpreting parliamentary legislation, the Constitutional Court must prefer any "reasonable interpretation of the legislation that is consistent with international law."²²⁶

2. International Law and Women's Reproductive Rights

International law clearly prohibits sexual discrimination.²²⁷ The elimination of gender discrimination was first guaranteed

221. See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. Doc. A/CONF. 129/15 (1986), *reprinted in* 25 I.L.M. 543 (1986).

222. S. AFR. CONST. ch. 14, § 231.

223. *Id.* ch. 14, § 231(4).

224. *Id.* ch. 14, § 231(5).

225. *Id.* ch. 14, § 232.

226. *Id.* ch. 14, § 233.

227. Elissavet Stamatopoulou, *Women's Rights and the United Nations*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, *supra* note 2, at 37; Cook, *Keynote Speeches*, *supra* note 210, at 1006; Fiona Beveridge & Stobhan Mullally, *International Human Rights and Body Politics*, in LAW AND BODY

under the United Nations Charter in 1945.²²⁸ Subsequently, this prohibition has been reiterated by the Universal Declaration of Human Rights,²²⁹ the International Covenant on Economic, Social, and Cultural Rights,²³⁰ and the International Covenant on Civil and Political Rights.²³¹ South Africa signed onto these international covenants in 1994.²³² The Organization of African Unity adopted the African Charter on Human and People's Rights in 1981, and this agreement also promised the provision of rights

POLITICS 240 (Jo Bridgeman & Susan Milns eds., 1995). See IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 81 (1983) (defining the principle of non-discrimination as an example of customary international law).

228. "We the Peoples of the United Nations, Determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . ." U.N. CHARTER preamble. "The Purposes of the United Nations are: . . . to achieve international cooperation . . . and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." *Id.* art.1, para. 3. "[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." *Id.* art. 55.

229. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d mtg. at 71, U.N. Doc A/810 (1948) [hereinafter Universal Declaration]. "All human beings are born free and equal in dignity and rights." *Id.* art. 1. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex . . ." *Id.* art. 2. To date, South Africa has not signed or ratified this document. *List of Human Rights Treaties Acceded to or Ratified by South Africa*, (last modified July 7, 1997) <<http://pc72.law.wits.ac.za/docs/ratlist.html>> [hereinafter *South African Treaties List*].

230. International Covenant of Economic, Social and Cultural Rights, adopted Dec. 16, 1966, arts. 2, 3, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Economic Covenant]. South Africa ratified this treaty on Oct. 3, 1994. *South African Treaties List*, *supra* note 229. "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex . . ." Economic Covenant, *supra*, art. 2(2). "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in this Covenant." *Id.* art. 3.

231. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, arts. 2, 26, 999 U.N.T.S. 171 (1967) [hereinafter Political Covenant]. South Africa signed this treaty on October 3, 1994. *South African Treaties List*, *supra* note 229. "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized . . . without distinction of any kind, such as . . . sex . . ." Political Covenant, *supra*, art. 2(1). "The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." *Id.* art. 3.

232. *South African Treaties List*, *supra* note 229. Although South Africa has signed the Economic Covenant and the Political Covenant, it has ratified neither. *Id.*

without regard to gender.²³³ South Africa ratified the African Charter in 1996.²³⁴ The gender-neutral language of these international human rights documents necessarily applies equally to all human beings.

While these international human rights documents provided significant steps in the recognition of equality as an international goal and the elimination of discrimination against women, they failed to distinguish between human rights violations faced by men and those faced by women. As a result, a right to female bodily integrity and dignity went virtually unaddressed.²³⁵ This was especially evident in issues of the female body and reproductive control.

In light of the dearth of recognition of women's issues in generally applied human rights documents, a separate body of international law developed specifically addressing women's human rights. The concept of reproductive rights first received international attention at the International Conference of Human Rights in Teheran in 1968.²³⁶ The Teheran Conference recognized the basic human right of parents to "determine freely and responsibly the number and the spacing of their children."²³⁷ In 1967, the United Nations promulgated the Declaration on the Elimination of all Forms of Discrimination Against Women.²³⁸ This Declaration recognized the particular nature of discrimination against women as worthy of a separate legal

233. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter]. "Every individual shall be entitled to enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as . . . sex" *Id.* art. 2. "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." *Id.* art. 18(3).

234. *South African Treaties List*, supra note 229.

235. Beveridge & Mullally, supra note 227, at 240. Women's reproductive issues and right to bodily integrity went unaddressed largely because of what has become known as the public/private dichotomy in international law. Under the typical view, governments were only held accountable for human rights abuses fomented by the State or by a State actor. Thus, abuses of women's rights were often viewed as private or cultural issues, not as a matter requiring state action. See *id.* at 240. This dichotomy has been evident in laws and policies concerning violence against women, female genital mutilation, and access to birth control, to name a few.

Because the issue at hand is a state-imposed law, the public realm is implicated, and international public law norms apply.

236. *Final Act of the International Conference on Human Rights*, U.N. GAOR, 23rd Sess., Supp. No. 41, U.N. Doc. A/CONF. 32/41 (1968).

237. *Id.* para. 16.

238. G.A. Res. 2263, U.N. GAOR, 22nd Sess., U.N. Doc. A/6555 (1966).

response.²³⁹ Then, in 1979, the Convention on the Elimination of all Forms of Discrimination Against Women was formed (hereinafter Women's Convention).²⁴⁰ South Africa ratified the Women's Convention in 1995.²⁴¹ The Women's Convention recognized that despite international treaties proscribing discrimination on the basis of sex, discrimination against women remained prevalent.²⁴² The Women's Convention encouraged states to take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."²⁴³ While the Women's Convention reinforced the view of "equal treatment," it failed to build upon the foundation laid by the Teheran Conference by specifically addressing issues of women's bodies and reproductive control.

Despite language providing for equality and a recognition of a right to "space" children, international human rights law has been interpreted in light of gender-biased laws and societal structures, and has failed to give due recognition to "reproductive integrity" as an international human right.²⁴⁴ This can be explained in part by the fact that abuses faced by women were often perpetrated by private actors,²⁴⁵ they were not recognized as violations of human rights because they were not committed by states.²⁴⁶ Additionally, traditional international law favored civil and political rights over economic and social rights. The focus on civil and political rights prevented state regulation in private life; a recognition of women's issues necessitates a look into private

239. Cook, *Keynote Speeches*, *supra* note 210, at 1006.

240. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180, *reprinted in* 19 I.L.M. 33 (1980) [hereinafter Women's Convention].

241. *South African Treaties List*, *supra* note 229.

242. Women's Convention, *supra* note 240, preamble. In 1985, the United Nations summarized the continued gender inequality that exists in the world: Women constitute one-half of the world's population, perform two-thirds of the world's work, earn only one-tenth of the world's income, and own only one-hundredth of the world's property. Nina J. Crimm, *Introductory Remarks Women's Rights as International Human Rights*, 69 ST. JOHN'S L. REV. 1, 2 (1995).

243. Women's Convention, *supra* note 240, art. 2(e).

244. See Sarah Y. Lai & Regan E. Ralph, *Recent Development: Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 202-203 (1995). "Protection of women's reproductive health has not been a high priority in the value system of governments and the laws they have created." Rebecca J. Cook, *International Protection of Women's Reproduction Rights*, 24 N.Y.U. J. INT'L L. & POL'Y 645 (1992) [hereinafter Cook, *International Protection*].

245. Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, *supra* note 2, at 126-27; Lai & Ralph, *supra* note 244, at 205.

246. Sullivan, *supra* note 245, 126-27; Lai & Ralph, *supra* note 244, at 205.

lives.²⁴⁷ Furthermore, international norms that require the protection of the family succeeded in instituting an almost utter deference to the family entity, overlooking some of the most egregious abuses faced by women.²⁴⁸

Then, in 1994, the International Conference on Population and Development and its Programme of Action (hereinafter Cairo Programme) helped to define the concept of "reproductive health."²⁴⁹ Although the term "reproductive rights" fails to appear in any binding international human rights treaties, the Cairo Programme declared that reproductive rights are included in "certain human rights . . . already recognized in national laws, international human rights documents and other consensus documents."²⁵⁰ While some scholars had previously suggested a recognition of an international reproductive human right,²⁵¹ the Cairo Programme has allowed both scholars and the international community to espouse a greater acceptance of the possibility that

247. Sullivan, *supra* note 245, at 126-27; Lai & Ralph, *supra* note 244.

248. See generally Sullivan, *supra* note 245, at 127 (claiming that blanket difference to the family is disastrous for women).

249. *Report of the International Conference on Population and Development, Programme of Action of the International Conference on Population and Development*, U.N. ESCOR, 49th Sess., 30th mtg., U.N. Doc. A/CONF.171/13 (1994) [hereinafter *Cairo Programme*]. "Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes. The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights." *Id.* Principle Four.

"States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so." *Id.* Principle Eight.

250. *Id.* at 7(2). See also Lai & Ralph, *supra* note 244, at 201; Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L. J. 1 (1996). The Preamble of the *Cairo Programme* indicates that "the International Conference on Population and Development does not create any new international human rights, it affirms the application of universally recognized human rights standards." *Cairo Programme*, *supra* note 249, preamble at 1.15.

251. See Cook, *International Protection*, *supra* note 244, at 653; see generally Berta E. Hernandez, *To Bear or Not To Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 312 (1991); Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990); Hillary Charelsworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

an international reproductive human right is, and has been, guaranteed under current human rights law.²⁵²

With this reconceptualization of human rights documents and guarantees, a woman's right to decide whether to reproduce is gradually becoming an internationally recognized and accepted human right. Reproductive rights have become more commonly viewed as human rights, rooted in the principle that human dignity demands the inviolability of the human body.²⁵³ The trend in recent scholarship and in the Cairo Programme has been to combine separately recognized international human rights—rights concerning the family, individual liberty, and health care—to find an international human right of female reproductive self-determination.²⁵⁴

The right to found a family has been recognized in several human rights documents. The Proclamation of the Teheran Conference recognized that "[p]arents have a basic human right to determine freely and responsibly the number and spacing of their children." This concept was reiterated in 1969 in the United Nations Declaration on Social Progress and Development.²⁵⁵ Additionally, under the World Population Conference of 1974, the United Nations recognized that, with all population policies, parents have the right to "decide freely and responsibly the number and spacing of their children . . ."²⁵⁶ Recommendation 25 of the Bucharest Report states that "governments should . . . make universally available information, education and the means to assist couples and individuals to achieve their desired number of children. Family planning information, education and means should include all medically approved and appropriate methods of family planning . . . to ensure a voluntary and free choice in

252. See Lai & Ralph, *supra* note 244, at 201; Abrams, *supra* note 250, at 32; Crimm, *supra* note 242. Certain human rights documents have also begun to interpret "security of the person" and "inherent dignity of the person" more broadly than just in terms of custodial arrest or detention. See Lai & Ralph, *supra* note 244, at 208 n.33 (discussing the broad application of this language in General Recommendation No. 19 on Violence Against Women of the Committee on the Elimination of Discrimination Against Women, Article 1 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women).

253. Anika Rahman, *A View Towards Women's Reproductive Rights Perspectives on Selected Laws and Policies in Pakistan*, 15 WHITTIER L. REV. 981 (1994).

254. Cook, *Keynote Speeches*, *supra* note 210, at 979.

255. G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (1969).

256. *Report of the United Nations World Population Conference*, at 3, 7, U.N. Doc. E/CONF.60/19 (1974) [hereinafter *Bucharest Report*].

accordance with changing individual and cultural values.”²⁵⁷ Article 16(1)(e) of the Women’s Convention ensures that men and women have “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”

This same language can easily be construed as protecting the right of a woman to decide to terminate a pregnancy. Abortion provides an effective method of family planning and controls the number and spacing of children. As Rebecca Cook explains, the act of “foundation” goes beyond mere passive submission to female biology and involves the active role of the woman to positively plan, time, and space the arrival of children.²⁵⁸ While abortion is certainly not the only, or the most desirable, planning method that would be protected under the “right to found a family,” to ground such a right here does not strain the imagination.

The right to liberty and security of the person is another well-recognized international human right. The Universal Declaration of Human Rights protects the right to “life, liberty and security of the person.”²⁵⁹ The Political Covenant protects the right to “self-determination” and “security of the person.”²⁶⁰ The African Charter also states that “every human being shall be entitled to respect for his life and the integrity of his person” and “every individual shall have the rights to liberty and to the security of his person.”²⁶¹

The lack of access to effective means of birth spacing and fertility control violates a woman’s right to liberty and security of the person. Failure to provide access to safe and legal methods of birth control and abortion services endangers women’s lives. Women suffer impaired health from early and excessive childbearing, and die prematurely in labor, in countries that fail to provide safe and effective reproductive health services.²⁶²

257. This viewpoint was echoed in 1979 in the Convention on the Elimination of all Forms of Discrimination Against Women. Women’s Convention, *supra* note 240, art. 16(1)(e) (stating that parties shall ensure on a basis of equality “[T]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”).

258. Cook, *International Protection*, *supra* note 244, at 700.

259. *Universal Declaration*, *supra* note 229, art. 3.

260. Political Covenant, *supra* note 231, arts. 1(1), 9(1).

261. African Charter, *supra* note 233, arts. 4, 6.

262. Cook, *International Protection*, *supra* note 244, at 256. In industrialized countries, maternal death is rare; only between one in four thousand and one in ten thousand women die from pregnancy-related causes. In unindustrialized countries, between one in 15 and one in 50 women die from a pregnancy-related

Additionally, women who resort to and survive backstreet abortions often suffer grave physical and mental complications, such as the inability to bear children or to marry.²⁶³ Reproductive integrity is part of individual security, and reproductive self-determination is an essential part of liberty. A loss of liberty results from the inability to access contraceptives. One method of ensuring the "liberty and security of the person" is through providing safe and legal abortion methods.

Recently, international human rights documents have recognized rights relating specifically to reproductive health. In 1946, the Preamble of the World Health Organization provided a broad definition of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."²⁶⁴ The Economic Covenant broadly recognized the right of all individuals to the "enjoyment of the highest attainable standard of physical and mental health."²⁶⁵ This general mandate has been translated in subsequent documents to guarantee a level of health care concerning family planning and reproductive services. Under the Women's Convention, state parties are directed to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure . . . access to health care services, including those related to family planning."²⁶⁶

The Cairo Conference further discusses reproductive health issues in Section C on Women's Health and Safe Motherhood. The Cairo Conference specifically notes that while ninety percent of the countries of the world have laws permitting abortion in varying degrees, a significant proportion of the abortions that occur are nevertheless self-induced or otherwise unsafe. Maternal deaths resulting from such abortions have a drastic effect within the family, given the crucial role of the mother in protecting her children's health and welfare. Although the Cairo Programme does not encourage recourse to abortion, it indicates that any measures or changes related to abortion within the health system can be determined only at the national or local

complication. *Id.* at 648. These death rates are tied to the variant abortion law reforms in industrial and nonindustrial countries. *Id.*

263. *Id.* at 646.

264. Preamble to the Constitution of the World Health Organization, 2 Official Records of World Health Organization 100 (July 1946).

265. Economic Covenant, *supra* note 230, art. 12(1). Article 12(2) dictates that the steps to take to achieve this right require the provision of the reduction of the still-birth rate and of infant mortality and for the healthy development of the child . . . [and] the creation of conditions that would assure to all medical service.

266. Women's Convention, *supra* note 240, art. 12.

level.²⁶⁷ In circumstances where abortion is legal, it should be safe.

V. CONCLUSION

South Africa's Bill of Rights is one of the most liberal and elaborate in the world. Consequently, South Africa is at the forefront of defining human rights for individuals, especially women. Concurrently, international law is slowly undergoing a reconceptualization of human rights documents and guarantees to define a more definitive, protective, and pro-active body of rights for women.

By upholding the constitutionality of the 1996 Abortion Act, South Africa can define its own Bill of Rights in liberal terms and ensure that the South African Constitution continues to receive a broad interpretation. A welcome result would be the improvement of black women's status in South African society. South Africa further has the opportunity to be at the forefront of an emerging trend in international law. This trend is beginning to recognize the special abuses women face and the need for the protection of bodily integrity and reproductive freedom. South Africa's affirmative recognition of this emerging trend could provide the impetus for other countries to recognize such rights in international law.

Unfortunately, the symbolic gesture of upholding the 1996 Abortion Act's constitutionality under the South African Constitution and international law will lack practical meaning if the South African government fails to fund the family planning, counseling programs, abortion services, and the general health care services needed to realize the Act's aspirations. Thus, for South Africa, the true test will be how quickly the gap is bridged between the promise of legislation increasing women's reproductive self-determination and the current inadequate and inaccessible health care system. Although overhaul of any health care system takes time, South Africa's true commitment to providing reproductive rights to women may be measured by how quickly a fundamental change is effected.

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267. *Cairo Programme*, *supra* note 249, at 62 (Section C on Women's Health and Safe Motherhood).

*The author wishes to thank her parents, Donald and Carole Haroz, for their enthusiasm for and support of her legal career and interests. Additionally, the author wishes to thank the Office of Public Affairs at the South African Embassy for its thorough and expeditious responses to her many questions concerning the South African Constitutional Court.

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