

# **The Public Life of Abortion and the Making of South Africa's *Choice on Termination of Pregnancy Act***

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**This work has not been submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works of other people have been attributed, and has been cited and referenced.**

**Ronel Koekemoer**

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## **Abstract**

This thesis is a study of the making of post-apartheid South Africa's abortion law, the *Choice on Termination of Pregnancy Act, 1996*. It focusses on how abortion as a public interest issue at the time of SA's transition from apartheid to democracy shaped the arguments, actors and arenas involved in the development of CTOP. This has the broader goal of denaturalising these institutions and evaluating the role of contextual factors in assessing CTOP's institutional legacy on abortion practices and, by extension, access. Aside from a means to terminate pregnancy, in different historical moments and geographical contexts, abortion has had various meanings and represented specific interests. A more recent manifestation is abortion as a complicated and contested subject of public debate. My dissertation establishes what the public life of abortion looked like at the time of SA's transition and how this public life influenced the law and its legacy for reproductive rights and justice. Medical and legal experts, civil society organisations, and aborting women formed a core network of voices that informed South Africa's progressive law. These contexts and publics require interrogation because of how they constructed CTOP as permissive and liberal. The concomitant perceptions of rights, empowerment, and democratic participation overshadowed the tangible ways that CTOP restricts abortion access.

## **Note on Terminology**

Throughout this dissertation, I have used the terms “pro-choice” and “pro-life”. As chapter 3 shows, these terms oversimplify the histories and politics of those who describe themselves by these nomenclatures. However, I use these terms unproblematically out of respect to my interviewees and their agency to identify with these words. This is not to take a particular stance on abortion.

I use the word ‘black’ to describe publics who were systematically disenfranchised by the apartheid regime and who were then turned hyper-visible in productive and spurious ways during the transition. I am open to critique in this regard but use this form of racial categorisation to speak of the past as well as to move away from discriminatory terms like ‘non-white’ and ‘non-European’. These choices are embedded in a particular political history.

I refer to ‘aborting women’ as people who sought and/or underwent abortions. Cisgendered women are not the only people who terminate pregnancies and reproductive issues do not affect them alone. I use the word ‘women’ in keeping with the identifier used for aborting people in the periods I focus on.

Lastly, I use the word ‘abortion’ unproblematically throughout this thesis. My argument is not one about the ethics or morality of abortion.

# Acknowledgements

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Two interviewees passed away between the writing and submission of my final project. I dedicate this research to the memory of Dr Eddie Mhlanga, who fought tirelessly to make safe and legal ToPs a reality for South African women. Despite his many accomplishments and renown in the world of reproductive justice, he committed his life and work to the realization of reproductive autonomy for rural women who did not have access to private healthcare. This thesis is also dedicated to the memory of Penny Dodge who so willingly agreed to be a part of my research and was open and sincere about her story and beliefs. Rest gently now, Penny. Your time may have been far too short, but you left a legacy that few leave after a lifetime.

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# List of Abbreviations

**ACDP:** African Christian Democratic Party

**ANC:** African National Congress

**ARAG:** Abortion Reform Action Group

**ASA:** Abortion and Sterilization Act of 1975

**CTOP:** Choice on Termination of Pregnancy Act, 1996

**D&C:** Dilation and Curettage

**ICPD:** International Conference on Population Development

**MP:** Member of Parliament

**MVA:** Manual Vacuum Aspiration

**NCW:** National Council of Women

**NP:** Afrikaner National Party

**RRA:** Reproductive Rights Alliance

**SASOG:** South African Society of Obstetricians and Gynecologists

**ToP:** Termination of Pregnancy

**UN:** United Nations

**UP:** United Party

**USA:** United States of America

**UK:** United Kingdom

**WHO:** World Health Organisation

**WHP:** Women's Health Project

# Contents

Introduction.....	Pg. 1
Chapter 1 “The most robust debate our democracy has ever experienced”: Public Participation in the Making of CTOP.....	Pg. 27
Chapter 2 “I never knew a doctor who was pro-choice”: Expert Publics.....	Pg. 46
Chapter 3 “Is South Africa pro-choice or pro-Life?”: A Divided Public.....	Pg.79
Chapter 4 “The kind of person that the new government wanted to support and empower”: An Aborting Public.....	Pg. 106
Final Conclusion.....	Pg. 133
Reference List.....	Pg. 137

# Introduction

To talk publicly about abortion in South Africa today is to break a taboo. To scream privately during an abortion is to risk prosecution for breaking the law...Of course, it is not only when lying spread-eagled on abortionists' tables that women have been silenced.<sup>1</sup>

This thesis explores themes in historian Helen Bradford's above sentiment. It investigates the relationship between abortion as a public interest issue, a private experience, and the women "spread-eagled" between these discourses.<sup>2</sup> This will be examined through the making of SA's *Choice on Termination of Pregnancy Act*.

This thesis will outline historical forces from 1970 to 1998 that informed CTOP's development. The main period of this inquiry is the 1990s, when SA was in the teething stages of a transition from apartheid to liberal democracy.<sup>3</sup> Legislative change was a central element of the this. Part of the nation-building project was a reconstruction of SA's legal system into a constitutional democracy that adhered to principles of human rights.<sup>4</sup>

CTOP, enacted in February 1997, was a key law in this regard. CTOP liberalised SA's existing abortion law and decriminalised abortion on request in the first 12 weeks of pregnancy.<sup>5</sup> This was a significant departure from the restrictive apartheid era law, the Abortion and Sterilisation Act, 1975.<sup>6</sup>

CTOP is considered one of the most permissive and progressive abortion laws in the world. Despite this, abortion remains markedly inaccessible in SA. This disproportionately affects the same women who were disadvantaged under the previous regime. The same women, as this thesis will show, that CTOP was designed to empower.

I argue that contemporary issues with inaccessibility can be attributed to the umbilical cord between CTOP and the apartheid past. CTOP's reproductive rights framing effaces these

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<sup>1</sup> Helen Bradford, 'Herbs, Knives and Plastic: 150 Years of Abortion in South Africa', in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pg.1

<sup>2</sup> Ibid

<sup>3</sup> Marion Stevens, Barbara Klugman and Katrina Arends, "Developing Women's Health Policy from the Grassroots", *Reproductive Health Matters*, 3(6), (November 1995), pg. 122

<sup>4</sup> Rebecca Hodes, "Too Many Rights? Reproductive Freedom in Post-Apartheid South Africa", *University of Cape Town Aids and Society Research Unit*, (2017), pg. 1

<sup>5</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015), pg. 214

<sup>6</sup> RSA, 1975, *Abortion and Sterilisation Act*

connections and, with it, the less emancipatory public discourses about abortion that continue to shape abortion access.<sup>7</sup>

This becomes evident when CTOP is contextualised. Unlike previous research that situates abortion law in national histories of change, this thesis focusses on another important contextual reality. Contrary to Bradford's assertion, abortion was a major subject of public chatter in the 1990s. Abortion was highly contested in the public sphere and was the subject of conferences, talk-shows, opinion polls, editorials, parliamentary debates, and protests.<sup>8</sup> CTOP, then, needs to be considered in the context of abortion as an issue in public life.

In this context, women seeking to terminate pregnancies were accompanied by a myriad of competing meanings around about abortion.

Bradford's quote gestures to a complex relationship which this dissertation will explore—that between public meanings of abortion, abortion as a private experience, and the role of the law in navigating these terrains. At the core of this undertaking is the aborting woman as a discursive figure. Women were not only silenced through restrictive abortion laws and stigma. As this research will evidence, aborting women were appropriated throughout the making of CTOP. The silencing is reflected in how rhetoric of choice, empowerment and rights disguised the restrictive realities aborting women would face under CTOP.<sup>9</sup>

## Background & Context

Perceptions that abortion is inherently controversial and that female reproduction “belongs to the timeless realm of nature” persist in public discourse.<sup>10</sup> However, as Susanne Klausen, Helen Bradford and Rebecca Hodes have outlined, public interest in abortion is relatively historically recent.<sup>11</sup>

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<sup>7</sup> Rebecca Hodes, 'Too Many Rights? Reproductive Freedom in Post-Apartheid South Africa', *University of Cape Town Aids and Society Research Unit*, (2017), pg. 1

<sup>8</sup> Theoretical underpinnings of 'the public' and 'the public sphere' will be examined throughout this dissertation.

<sup>9</sup> Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, (California: University of California Press, 2012)

<sup>10</sup> Helen Bradford, 'You Call that Democratic? Struggles over Abortion in South Africa Since the 1960s', Presentation at the History Workshop held at the University of Witwatersrand 13-15 July 1994, pg. 4

<sup>11</sup> See Rebecca Hodes, 'The Medical History of Abortion in South Africa, c.1970-2000'. *Journal of Southern African Studies* 39, no. 3 (2013) pgs.527-542, and Susanne Klausen, Chapter 3: "My Uterus Belongs to Me":

For historians, shifts in abortion law provides a valuable way to track how the meanings of and beliefs about abortion change. This thesis looks at aborting women and their “relationship with, to and under the law” in SA’s past.<sup>12</sup>

## Abortion Law Before 1975

Charles Ngwenya and Helen Bradford outlined abortion practices in pre-colonial communities in SA.<sup>13</sup> Because of this, Bradford suggests, it is in the colonial context where “abortion acquired a recorded history”, despite it being widely practiced in different places and times.<sup>14</sup>

From documents of colonial bureaucrats, Bradford identified abortion practices in indigenous communities.<sup>15</sup> Before colonial law, an assortment of flora was used to induce miscarriage.<sup>16</sup> Different groups had their own preferred abortifacients. The “Malays” were rumoured to favour red geraniums, while a particular thornbush was favoured by the Afrikaners, Sotho, Zulus, Xhosas, and Shangaan.<sup>17</sup> Bradford argues that these groups got their medicinal knowledge from “Khoisan lore” and incorporated it into their own cultures.<sup>18</sup> For example, a concoction of *dassiespies* (dassie urine), was imitated from the Khoisan and Bantu speaking peoples by white settlers.<sup>19</sup> By the time the English colonised SA, this “reputedly excellent abortifacient” was being prepared and prescribed by both Black Herbalists and Afrikaner midwives.<sup>20</sup> Bradford mentions how ritual was added to make for a successful miscarriage: the woman was instructed

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The Campaign for Abortion Law Reform in Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015).

<sup>12</sup> Carol Steedman, *History and the Law: A Love Story*, (Cambridge: Cambridge University Press, 2020)

<sup>13</sup> Charles Ngwenya, ‘The History and Transformation of Abortion Law in South Africa’, *Acta Academia*, vol.3 (1996), pg.34

<sup>14</sup> Helen Bradford, ‘Herbs, Knives and Plastic: 150 Years of Abortion in South Africa’, in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pp.2

<sup>15</sup> Helen Bradford, ‘Herbs, Knives and Plastic: 150 Years of Abortion in South Africa’, in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pp. 2

<sup>16</sup> Ibid, pgs.2-4

<sup>17</sup> Helen Bradford, ‘Herbs, Knives and Plastic: 150 Years of Abortion in South Africa’, in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pg.13; part of the reason we know that this thornbush was popular amongst these groups is the way each had their own language for it. Afrikaners called it meidjieblaar, the Zulus uhlunguhlungu, Xhosa speakers called it isaquni, Sotho peoples called it Sekanama and the Shangaan named it siluvari.

<sup>18</sup> Helen Bradford, ‘Herbs, Knives and Plastic: 150 Years of Abortion in South Africa’, in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pg.3

<sup>19</sup> Helen Bradford, ‘Herbs, Knives and Plastic: 150 Years of Abortion in South Africa’, in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pg.4

<sup>20</sup> Ibid, pg. 4

to drink the mixture three times a day and then go in search of a “black ant nest made in the rhinoceros bush” and drink it.<sup>21</sup> Abortion practices in this context provides insight into abortion before law. It is also proof that abortion was a form of fertility regulation in the absence of Western medicine. This is especially important considering the premise that abortion ‘belongs’ to legal and medical expertise and specialisation.

In the 1820s, white missionaries visiting the Transkei noted that abortion was being practiced without punishment “by all classes of families in [Black] society”.<sup>22</sup> Similarly, a settler gynaecologist observed that Sotho women believed that in the first three months of pregnancy “it is not a child, it is only blood”.<sup>23</sup> Beliefs about when life began played a significant part in when abortions were morally or legally acceptable.<sup>24</sup> For example, oral histories from early family planning clinics highlighted that in the 18<sup>th</sup> and 19<sup>th</sup> centuries, many believed that abortion was not considered to be more morally problematic than other contraception.<sup>25</sup> During this era, terminating a pregnancy before “quickening” (foetal movement) was not criminalised.<sup>26</sup>

For Susanne Klausen, the “relatively recent phenomenon” of criminalised abortion is another import of colonialism.<sup>27</sup> The introduction of Roman-Dutch law to SA expressly forbade terminating pregnancies and made the procurement of abortion illegal.<sup>28</sup> An exception was made under the “therapeutic abortion” defence, which legalised abortion if it would save a woman’s life.<sup>29</sup> This common law on abortion was ambiguous; there were no explicit protocols defining “saving the life of the mother”.<sup>30</sup>

The ways abortion was practiced in pre-colonial, and colonial eras highlights the significance of a historical lens. In the words of Sara Dubow, histories of abortion recognise that:

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<sup>21</sup> Ibid, pg. 4

<sup>22</sup> Helen Bradford, “You Call that Democratic? Struggles over Abortion in South Africa Since the 1960s”, Presentation at the History Workshop held at the University of Witwatersrand (13-15 July 1994), pg. 2

<sup>23</sup> Ibid, pg. 2

<sup>24</sup> L.L Wynn & Angel M. Foster, *Abortion Pills, Test Tube Babies, and Sex Toys: Emerging Sexual and Reproductive Technologies in the Middle East and North Africa* (New York: Vanderbilt University Press, 2016)

<sup>25</sup> Joanna Bornat, *Oral History, Health and Welfare* (London: Routledge, 1999)

<sup>26</sup> Johanna Schoen, *Choice and Coercion: Birth Control, Sterilization, and Abortion in Public Health and Welfare*, (California: University of North Carolina Press, 2005), pg. 160

<sup>27</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015) pg. 15

<sup>28</sup> Charles Ngwenya, ‘The History and Transformation of Abortion Law in South Africa’, *Acta Academia*, vol.3 (1996), pg. 35

<sup>29</sup> Charles Ngwenya, ‘The History and Transformation of Abortion Law in South Africa’, *Acta Academia*, vol.3 (1996), pg. 35

<sup>30</sup> Ibid

The foetus in 1870 is not the same thing as a foetus in 1930, which is not the same thing as a foetus in 1970, which is not the same thing as a foetus in 2010. Although multiple and competing foetuses have always coexisted, particular historical circumstances have generated and valorised different stories about the foetus.<sup>31</sup>

It is not just the foetus whose meaning changes over time. Similarly “historically contingent” are assumptions about the relationship between pregnancy and womanhood.<sup>32</sup> In Kristin Luker’s 1985 book *Abortion and the Politics of Motherhood*, she tracked how different components of the abortion debate in America “came into being”.<sup>33</sup> Luker’s book was one of the first to examine how the meaning of abortion evolved.<sup>34</sup> Whether abortion was murder or a matter of choice, Luker’s book highlighted that the existence of these debates “is a relatively recent belief”.<sup>35</sup> This thesis contributes to this literature by investigating what abortion meant in the context of SA’s transition. It also scrutinizes how public meanings of abortion informed the making of CTOP.

## The 1975 Abortion and Sterilisation Act

ASA is important as it heavily influenced abortion law in post-apartheid SA. ASA’s relationship to CTOP will be examined throughout this thesis.<sup>36</sup>

Klausen echoes Luker about the recentness of abortion controversy and debate. Klausen’s book *Abortion Under Apartheid*, details that it is only in the late 60s that abortion becomes overtly political.<sup>37</sup> She further sketches that it was the medical profession that “pulled clandestine abortion from the margins to the centre of public life”.<sup>38</sup> Klausen’s interrogation focusses on the making of ASA. I build on Klausen’s history by detailing the relationship between ASA and CTOP with a specific focus on how different publics forged meanings for abortion between these laws.

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<sup>31</sup> Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America*, (Oxford: Oxford University Press, 2010) pg. 3 as quoted in Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd, 2017) pg. 22

<sup>32</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd, 2017), pg. 22

<sup>33</sup> Kristin Luker, *Abortion and Politics of Motherhood*, (California: University of California Press, 1984), pg. xiii

<sup>34</sup> Ibid

<sup>35</sup> Ibid, pg. 11

<sup>36</sup> However, the making of ASA has been extensively researched and recounted in the works of Susanne Klausen and June Cope and so not be detailed here

<sup>37</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015) pg. 83

<sup>38</sup> Ibid, pg. 84

The 1960s and 1970s saw international trends legalising abortion.<sup>39</sup> In South Africa, the medical profession was aware of the international advancement of medical methods of termination.<sup>40</sup> Simultaneously, the ambiguity of the common law was problematic for doctors faced with an increased demand for abortions.<sup>41</sup> In response to this, obstetricians and gynaecologists were performing abortions based on subjective assessments of what constituted danger to the woman's life.<sup>42</sup> In the early 1970s, two prominent doctors were tried for performing abortions.<sup>43</sup> These highly publicised trials highlighted the challenge the ambiguous law posed to medical professionals.<sup>44</sup>

Another factor driving abortion out of the shadows was the prevalence of dangerous backstreet abortions.<sup>45</sup> One review commissioned by Groote Schuur Hospital in 1973 found that 13 681 patients had been admitted for septic abortions between 1965 and 1972.<sup>46</sup> At the same hospital in 1970, 29.3% of all gynaecology admissions were for septic abortions.<sup>47</sup> Head of the Gynaecology and Obstetrics unit, Dr Derk Crichton believed that he had treated 40 000 Black women between 1954 and 1972.<sup>48</sup>

It was in this context that abortion law reform was lobbied for. However, the efforts of doctors and a small number of feminists had to convince the conservative and Calvinist NP government that law reform was necessary. Given that the 1970s coincided with an escalation in NP anxiety over retaining power, abortion reform had to appeal to a government panicking about Black 'swamping' and the erosion of white morality.<sup>49</sup>

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<sup>39</sup> Guttmacher, S., Kapadia, F., Te Water Naude, J & de Pihno, H. "Abortion Reform in South Africa: A Case Study on The Choice of Termination of Pregnancy Act of 1996". *International Family Planning Perspectives* (24)4, (1999)

<sup>40</sup>Rebecca Hodes, "The Medical History of Abortion in South Africa, c.1970-2000.", *Journal of Southern African Studies* 39, no. 3 (2013) pp. 527-542.

<sup>41</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015) pg. 84

<sup>42</sup> Ibid

<sup>43</sup> For more detail on these trials see Klausen and Cope.

<sup>44</sup> Interview with Dr Margaret Hoffman (Medical doctor involved in the making of CTOP and member of ARAG). Interviewed by Ronel Koekemoer via Zoom. Mowbray, audio on record with author

<sup>45</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Press, 1993) pp. 8-9

<sup>46</sup> Rebecca Hodes. "The Culture of Illegal Abortion in South Africa", *Journal of Southern African Studies*, 42:1 (2016), pp. 79-93

<sup>47</sup>June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Press, 1993) pg. 9

<sup>48</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* (Oxford: Oxford University Press, 2015) pg. 21

<sup>49</sup>Rebecca Hodes, "The Medical History of Abortion in South Africa, c.1970-2000" *Journal of Southern African Studies* 39, no. 3 (2013) pg. 531

June Cope's 1993 book *A Matter of Choice* described the efforts of pro-choice reformers in trying to change the abortion law.<sup>50</sup> Cope was a part of one such group, ARAG. Despite the presence of a feminist organisation, the resultant law fell far short of their ideals.

ASA was designed to clarify the circumstances under which abortion could be performed.<sup>51</sup> However, it criminalised abortion on demand or request.<sup>52</sup> ASA imposed rigid criteria that were bureaucratically excessive.<sup>53</sup> In the words of Charles Ngwenya, "the resulting Act was a curious mix of legislation that sought to extend the grounds for abortion and yet did everything possible to hamper access to abortion".<sup>54</sup>

Various scholars have proven that abortion under ASA was grossly inaccessible to black women.<sup>55</sup> The negative health consequences of the pre-ASA era persisted. In the last years of apartheid, complications from unsafe abortions were one of the most common reasons for admission to gynaecology wards around the country.<sup>56</sup>

## Reproductive Rights in the Rainbow Nation

As this thesis will detail, the end of apartheid provided an opportunity for abortion law reform that would centre women's health and choice. Head of Planned Parenthood SA, Helen Rees, said in 1993 that "the political debate [moved] away from the politics of resistance towards the politics of reform and rebuilding".<sup>57</sup> Repealing ASA became possible in this context and its successor, CTOP, was internationally lauded as progressive, liberal, and a "champion for sexual and reproductive health rights in the region".<sup>58</sup>

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<sup>50</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Press, 1993).

<sup>51</sup> Charles Ngwenya, "The History and Transformation of Abortion Law in South Africa", *Acta Academia*, vol.3 (1996)

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Charles Ngwenya, "The History and Transformation of Abortion Law in South Africa", *Acta Academia*, vol.3 (1996)

<sup>55</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Press, 1993)

<sup>56</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015) pp. 212-213

<sup>57</sup> Helen Rees, "Abortion and the Law in SA today", *Conference in Pietermaritzburg*, (4-7 February 1993)

<sup>58</sup> Cathi Albertyn. "Claiming and Defending Abortion Rights in South Africa", *Rev. direito GV* 11(2), (Jul-Dec 2015), pg. 430

Judging an abortion law as liberal was based on two major metrics: gestational stage of pregnancy and circumstances under which abortion was permitted.<sup>59</sup> A progressive abortion law generally allows a woman to terminate a pregnancy on request or for a broad array of reasons. A liberal law stipulates that a ToP can occur for an extended amount of time into her pregnancy.<sup>60</sup>

CTOP differentiates how and why a ToP is granted based on a trimester approach to pregnancy.<sup>61</sup> In SA, a person can legally terminate a pregnancy on request—without having to motivate why—during the first trimester (the first 12 weeks of pregnancy).<sup>62</sup> From 13 to 20 weeks of pregnancy, the pregnant individual has to meet certain criteria, but these are broadly defined and left to the discretion of the individual seeking the ToP rather than the provider.<sup>63</sup> After 20 weeks, an abortion can be performed legally “if two medical practitioners have the same opinion that the continued pregnancy would endanger the woman’s life, resulting in a severely malformed foetus, or putting a risk of injury to the foetus”.<sup>64</sup> In assessing democracies at the time, the state’s approach to sexuality and reproduction had to be positive in order to establish the government’s commitment to gender equality.<sup>65</sup>

CTOP was part of SA’s ‘democratisation project’ by in exactly this way. Not only did it promise protection to women’s substantive freedoms, but it also communicated a break from the patriarchal paternalism of its apartheid predecessor.<sup>66</sup> This is explicit in the preamble to CTOP which reads that access to ToPs are fundamental to the realisation of “the advancement of human rights and freedoms which underlie a democratic South Africa”.<sup>67</sup>

For two men involved in the public debates on CTOP, the relationship between the liberal law and democratic nation building were obvious. Professor Hugh Corder described how, in the face of diminished Soviet Union support, the ANC wanted to “wanted to woo Western

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<sup>59</sup> Rachel Roubche, “Chapter 5: A Functionalist Approach to Comparative Abortion Law”, in Rebecca J. Cook (ed), *Abortion Law in Transnational Perspective: Cases and Controversies* (USA: University of Pennsylvania Press, 2014), pg. 105

<sup>60</sup> Ibid

<sup>61</sup> Cathi Albertyn. “Claiming and Defending Abortion Rights in South Africa”, *Rev. direito GV* 11(2),(Jul-Dec 2015), pg. 435

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid, pp. 429-430

<sup>66</sup> Ibid, pg. 430

<sup>67</sup> RSA *Choice on Termination of Pregnancy Act, 1996*, preamble

democratic society”.<sup>68</sup> In order to do that, Corder argued, the ANC started “talking liberal democratic language. And what is a key instrument in that? Human rights”.<sup>69</sup> Dr Chris Warton had a similar view. Warton speculated that the ANC supported a pro-choice abortion law because they “saw that as part and parcel of a right-thinking liberal democracy”.<sup>70</sup>

## Research Problem

Much research has been done to evaluate the accessibility and effectiveness of CTOP since it came into effect on 1 February 1997.<sup>71</sup> The SA case study illustrates the importance of complicating the role of the law and public health in controlling abortion. Even though CTOP is considered pro-choice, progressive, and liberal, ToPs remain inaccessible in SA. Women wanting to terminate pregnancies must navigate a highly stigmatised landscape that interferes with the freedoms that CTOP guarantees.<sup>72</sup>

Implementing CTOP proved difficult. A significant amount of literature on CTOP focuses on barriers to access and implementation. Dr Eddie Mhlanga, also a supporter of CTOP, identified the following hurdles: “information availability, rurality, attitude of health workers and communities, and limited resources for counselling. The stigma attached to termination of pregnancy is something that the health system and health care community has to deal with”.<sup>73</sup> Overwhelming, the studies have shown that while CTOP has decreased the rate of maternal mortality as a result of illegal abortions, it has not significantly—if at all—reduced the number

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<sup>68</sup> Interview with Professor Hugh Corder (Constitutional law professor involved in drawing up SA’s constitution and Bill of Rights). Interviewed by Ronel Koekemoer, Rondebosch, 2019, audio on file with author

<sup>69</sup> Interview with Professor Hugh Corder (Constitutional law professor involved in drawing up SA’s constitution and Bill of Rights). Interviewed by Ronel Koekemoer, Rondebosch, 2019

<sup>70</sup> Interview with Dr Chris Warton (Pro-Life activist and medical doctor), interview by Ronel Koekemoer, Plumstead, 30 October 2019. On record with the author.

<sup>71</sup> Koekemoer, Ronel. ‘The Choice of Termination of Pregnancy Act is Enacted by the Parliament of South Africa’, *South African History Online*, 11 April 2017, available at <http://www.sahistory.org.za/dated-event/choice-termination-act-enacted-parliament-south-africa>

<sup>72</sup> The work coming out of UCKAR by Professor Catriona Macleod and colleagues is particularly encouraging. See specifically C Macleod and M Chiweshe, Cultural De-colonization versus Liberal Approaches to Abortion in Africa: The Politics of Representation and Voice. *African Journal of Reproductive Health*, 22(2), 2019,49-59, Chiweshe, M., Mavuso, J. & Macleod, C. (2017). Reproductive justice in context: South African and Zimbabwean women’s narratives of their abortion decision. *Feminism & Psychology* 27(2) and Macleod, C.. ‘Expanding Reproductive Justice through a Supportability Reparative Justice Framework: the Case of Abortion in South Africa’. *Culture Health & Sexuality*, 21(2), 2018 :1-17.

<sup>73</sup> RE Mhlanga, “Abortion: Developments and Impact in South Africa”, *British Medical Bulletin* vol. 67, (2003), pg. 115

of illegal abortions being provided in SA.<sup>74</sup> In light of this, there has been considerable research done into why this continues to be the case. In unpacking the factors that inform these barriers, Varkey highlights the persistent stigma limits access and is created by negative attitudes towards abortion by both health-care workers and the public.<sup>75</sup> Guttmacher et. al., looked at the public knowledge and perception about the CTOP and highlighted that inadequate reproductive rights education means that women do not know that they can obtain a legal abortion up until 12 weeks without reason or parental/spousal consent.<sup>76</sup>

In this plethora of research, comparatively little work interrogated the role of the law itself. This project seeks to address this gap and further arguments made by Klausen and Hodes that post-apartheid abortion culture has “strong continuities” with how abortion was perceived in the apartheid past.<sup>77</sup> Despite its positive rights framework, CTOP contributes to the obstacles that hinder women’s ability to terminate pregnancies. Furthermore, these elements and their legacies are often unrecognised precisely because of the historical context of CTOP’s ‘birth’ and its status as a progressive law. This research differs from work that evaluates abortion within public health or biomedicine.<sup>78</sup>

This dissertation does not argue that CTOP is a ‘failed’ law. Rather, it stresses that CTOP is a ‘part of the problem’ of access. While there is a “small body” of literature that “explores barriers to abortion access after the 1996 law change”, much of the literature focussed on how abortion practices fall short of the ideal written in legislation.

June Cope’s 1993 memoir, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, concluded that “unrecognised for what it is, this law [ASA] remains, and the history of its final collapse is yet to be written”.<sup>79</sup> This history is in part the story of that collapse. It also interrogates if CTOP represents more of a reinvention than a collapse.

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<sup>74</sup> Meel BL, Kaswa RP. “The Impact of the Choice on Termination of Pregnancy Act of 1996 (Act 92 of 1996) on Criminal Abortions in the Mthatha area of South Africa”, *Health Care & Family Medicine vol. 1*, (2009), pp.33-36

<sup>75</sup> Varkney, S. “Abortion Services in South Africa: Available but Not Yet Accessible to All”. *International Family Planning Perspectives (26)2*, (2000), pg. 88

<sup>76</sup> Guttmacher, S., Kapadia, F., Te Water Naude, J & de Pihno, H. “Abortion Reform in South Africa: A Case Study on The Choice of Termination of Pregnancy Act of 1996”. *International Family Planning Perspectives (24)4*, (1999)

<sup>77</sup> Hodes, Rebecca, “The Culture of Illegal Abortion in South Africa”, *Journal of Southern African Studies*, 42:1, (2016), pp.79-93

<sup>78</sup> Drew a lot of this from work coming out of UCKAR.

<sup>79</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Books, 1993) pg. 172

## Conceptual and Theoretical Frameworks

### Destabilising Abortion as a Public Interest Issue: The Value of an Institutional Analysis

The framing of abortion as a ‘social issue’ has meant that different institutions—religion, science, women’s rights movements, the state, medicine—have been in well-publicised competition over authority on “individuals’ sexual and reproductive lives”.<sup>80</sup>

To strengthen understandings of barriers to abortion access in SA, the ways CTOP contributes to this problem needs to be investigated. To do this, this dissertation relies on an historical approach, both in terms of methodology and a focus on context. To respond to the emerging literature on CTOP’s role in abortion (in)accessibility through historicisation, I am considering not only SA’s transitional context but also the context of policymaking and reform at a time when abortion was positioned as a public interest issue.

In studying abortion policy-making processes, homing in on the make-up of the institutions involved has been the subject of at least three books published in the last 10 years.<sup>81</sup> This dissertation adds the SA case study to this literature. I am building on threads in these works that argue that deconstructing, nuancing, and texturing the institutions involved in abortion policymaking proves useful in illustrating the law’s relationship to abortion practice and, by extension, access.

Drew Halfmann’s 2011 book, *Doctors and Demonstrators*, criticised the tendency to treat political institutions that are involved in abortion policy-making “as almost natural occurrences”.<sup>82</sup> In terms of CTOP, a lot of research takes effort to flesh-out why SA’s transitional moment was an opportunity for abortion law reform.<sup>83</sup> However, many of the aspects of the different arguments, actors and arenas that were involved are treated as fixed, ahistorical and almost natural. One way to interpret this neglect in the literature is part of seeing abortion as a lens rather than an historical subject.

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<sup>80</sup> Abortion book in middle east 7-9

<sup>81</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011)

<sup>82</sup> Ibid, pg. 5

<sup>83</sup> Rebecca Hodes, “The Medical History of Abortion in South Africa, c.1970-2000”. *Journal of southern African studies* 39, no. 3 (2013): pp. 527-542. <http://www.jstor.org/stable/42001354>, pp. 527-542

I am arguing—as Halfmann does—that deconstructing and analysing certain institutions highlights different elements of these that “bias politics and policy”.<sup>84</sup> For example, in the realm of studying abortion policy and law reform, specific arguments—including and beyond “pro-choice versus pro-life”, different actors such as experts and social movements, and arenas of policy-making, change and enactment like parliament and the courtroom, all have legacies for what an abortion law comes to ‘look like’. These institutional legacies all have implications for how abortion law translates into practice in improving and hindering access to ToPs.

In her 2019 book that examines abortion in Northern Ireland, Jennifer Thomson similarly draws on Halfmann’s critique and further argues that a close examination of the constitutive elements of institutions involved in abortion politics is a key way to see how abortion is handled.<sup>85</sup> In short, the ‘things’ that make-up democratic institutions warp and shape how abortion is dealt with at the level of policy-making.<sup>86</sup> Rachel Johnson uses the metaphor of haunting to conceptualise the ways SA’s parliament did and did not change between the parliamentary debate on ASA and that of CTOP.<sup>87</sup> Johnson’s article puts forward key questions in this regard: “is there a simple relationship between, for example, changing the people in Parliament and transforming the ways it operates?” and argues that “the old norms of an institution never simply disappear during processes of transformation”.<sup>88</sup>

My dissertation will provide a similar assessment of abortion on the parliamentary floor. It will add to this by destabilising the ideas about the impact of how this ‘haunting’ can represent more than just the informal or formal rules of space and participation; it seeps into the way different actors and venues become the ‘appropriate’ or natural home for abortion.

In terms of abortion politics, one of the things I will argue is despite many aspects of institutional change, and despite the law ‘hiding behind’ these changes there are “continued effects of a now-discredited political culture on a new one”.<sup>89</sup> With this in mind, while I focus

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<sup>84</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg.5

<sup>85</sup> Jennifer Thomson, *Abortion Law and Political Institutions: Explaining Policy Resistance*, (Cham: Palgrave Macmillan, 2019), pp. 3-5

<sup>86</sup> *Ibid*, pg. 5

<sup>87</sup> Rachel E Johnson, “Haunted by the Somatic Norm: South African Parliamentary Debates on Abortion in 1975 and 1996”, *Signs: Journal of Women in Culture and Society*, vol. 39, (2014)

<sup>88</sup> *Ibid*, pg. 486

<sup>89</sup> *Ibid*, pg. 487

on the making of CTOP, I will also look at aspects about the making and ‘life’ of ASA to support my arguments. While institutions shape behaviours and legacies, it is important not to collapse the power of institutions with individual agency. Instead, to understand that institutions may have a final say on abortion is to forget the pregnant individual’s say and navigation of existing limitations. Chapter 4 will address this.

To specify, by institutional lens/institutional legacies, I mean the formal and informal rules of operation, the physical infrastructures or the internal norms and cultures.<sup>90</sup> I am referring not only to physical arenas but the explicit and implicit “rules, norms, roles, and meanings that form the context for individual and group actions”.<sup>91</sup>

Throughout, I will be looking at different publics to trace various textures that made up the abortion debate. To better understand the dissonance between law and practice, complicating concepts that preoccupy the debate is important. From a feminist standpoint, the “aim is to drag it down from its pedestal or yank it up from the dirt where it festers, the try and find where it all started”.<sup>92</sup>

## **Situating Abortion in the Law**

The law is an effective and valuable way to approach abortion and the discourses that dominate it. As Michelle Oberman puts it, “the war over abortion...becomes a struggle over abortion law”.<sup>93</sup> Discussions about abortion are almost always organised within the reductive framework of being for or against it. Concomitant with this is a conviction over whether it should be legal. Because of this, abortion is often thought about within legislative frameworks; much of the way it is thought about is dictated by the laws that govern it in different contexts. In keeping with Stoler’s idea of reading “along the archival grain”, I will be using this legislative framework to think about abortion in SA but also echo a question posed by Oberman: “what is it about abortion that we think will be changed by way of abortion laws?”.<sup>94</sup>

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<sup>90</sup> Ibid, pg. 485

<sup>91</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg.5

<sup>92</sup> Jacqueline Rose, *Mothers: an Essay in Love and Cruelty*, (London: Faber & Faber Ltd., 2018), pg. 38

<sup>93</sup>Michelle Oberman, *Her Body, Our Laws: On the Front Lines of the Abortion War, from El Salvador to Oklahoma*, (Boston: Beacon Press, 2018), pg. 11

<sup>94</sup> Ibid, pg. 12

In my dissertation, historicising CTOP has proven an interesting case study and answer to Oberman’s question. Professor Catherine Albertyn’s *Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts* is an example of this. In it, she examines two constitutional challenges to CTOP by anti-abortion groups.<sup>95</sup> She argues that while the court “affirmed the core right to reproductive autonomy”, a more nuanced exploration or development of CTOP and its relationship to abortion rights was purposefully and strategically avoided.<sup>96</sup>

In answering Oberman’s question, I am working off Albertyn’s argument that the Constitutional Court’s avoidance of a “‘show trial’ on abortion” and the consequent reliance on narrow understandings of reproductive rights rather than reproductive justice is symptomatic of CTOP’s expressive function as a law.<sup>97</sup> The idea of a law’s expressive function is that legislation is not simply a way of preventing a particular crime.<sup>98</sup> Law also tells us “who we are and what we value”.<sup>99</sup> So, we support a particular law because of the moral boundaries or social norms it safeguards as well as beliefs around how the law prevents or punishes transgressions of those boundaries and norms. In short, we value certain laws because of the statement it makes about us as a society.<sup>100</sup>

But often, as Albertyn’s research shows, a law’s expressive function is communicated not only in the legislation but in court narratives as well.<sup>101</sup> This is revealed through different ways of historicising CTOP. A major obstacle to abortion access (and reproductive justice) in SA is that the expressive function of CTOP is de-historicised and the context in which it was enacted taken for granted. The result of this, is that CTOP is perceived in as—at its core—an empowering law and progressive hallmark; but this perception effaces some of the ways CTOP contributes to and informs the challenges people face in obtaining ToPs.

Denise Ackermann, who wrote about the drafting process in 1995, said:

There is insufficient inclusive and reasoned public debate...Such debates that do take place are limited either to women’s organisations, women’s forums within political

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<sup>95</sup> Cathi Albertyn, “Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts”, *University of Oxford Human Rights Hub Journal*, vol. 1, (2019): pg. 106

<sup>96</sup> Ibid, pg. 106

<sup>97</sup> Ibid, pg. 106

<sup>98</sup> Michelle Oberman, *Her Body, Our Laws: On the Front Lines of the Abortion War, from El Salvador to Oklahoma*, (Boston: Beacon Press, 2018), pg. 41

<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> Cathi Albertyn, “Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts”, *University of Oxford Human Rights Hub Journal*, vol. 1, (2019): pp. 87-119

parties, and select church commissions or to televised events in which opposing parties exchange rhetoric from polarized positions. The lack of informed public debate...merely confirm that women's fertility is women's problem.<sup>102</sup>

The role of CTOP in the democratization process informed the law's expressive function. To return to Albertyn's argument, the narrowing of abortion trials in various ways highlights that CTOP is much more influenced by the state's desire to design democracy than create meaningful or even lasting change in how the public engages with abortion.

In Rita Kesselring's work on law and emancipation from victimhood in post-Apartheid SA, she speaks about how the idea that law is a mere codification of pre-existing social norms has been challenged in recent legal scholarship.<sup>103</sup> Increasingly, legal theorists are examining the constitutive power of the law.<sup>104</sup> For the purpose of my argument, Frederick Schauer's work on the law's "coercive dimension" is particularly salient here.<sup>105</sup> In his book, *The Force of Law*, he argues that even in the case of laws that are more about enabling than punishing (like CTOP), there is a coercive element that is overlooked.<sup>106</sup> He says that "requiring that I do something the state's way rather than my way" is coercive.<sup>107</sup> So in the case of CTOP, even though it allows a person to have an abortion on demand—where the previous law did not—it requires that the person do it according to specific criteria or they cannot do it at all.<sup>108</sup> When considering the SA context, this is important because there is a booming informal abortion sector that is providing access to abortion for those that the law fails.

The advent of medical abortion (as opposed to surgical abortion) fuelled this.<sup>109</sup> The availability of abortion drugs like misoprostol has meant that undergoing an abortion illegally, is no longer a case of coat hangers or bicycle spokes. Misoprostol brings about a miscarriage in 90 percent of cases with minimal complications that may require seeing a doctor.<sup>110</sup>

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<sup>102</sup>Denise Ackerman, "Reproductive Rights and the Politics of Transition in South Africa", *Journal of Feminist Studies in Religion*, vol.11, (1995): pg. 123

<sup>103</sup> Rita Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa*, (Stanford: Stanford University Press, 2006), pg. 5

<sup>104</sup> Ibid

<sup>105</sup>Frederick Schauer "Chapter 1. The Force of Law" in *The Force of Law*, (Massachusetts: Harvard University Press, 2015): pg. 5

<sup>106</sup> Ibid, pg. 3

<sup>107</sup> Frederick Schauer "Chapter 1. The Force of Law" in *The Force of Law*, (Massachusetts: Harvard University Press, 2015): pg. 27

<sup>108</sup> Ibid, pg. 28

<sup>109</sup> Barbara Baird, "Abortion, Questions, Ethics, Embodiment", *History Workshop Journal*, 52, (2001)

<sup>110</sup>Michelle Oberman, *Her Body, Our Laws: On the Front Lines of the Abortion War, from El Salvador to Oklahoma*, (Boston: Beacon Press, 2018), pg. 8

In a 2015 study that examined SA women’s experiences of the informal abortion sector, it was found that women are choosing to undergo abortions in this way because of fears of being mistreated and mistrust of the formal health-care system.<sup>111</sup> This illustrates how CTOP—even though it is seen as a positive force in enabling abortion access—has a coercive and punishing element. An analysis of these factors is crucial. A meaningful examination of why abortion remains inaccessible needs to include not only an examination of abortion practice but also a complication of CTOP’s ‘sacredness’. It needs to highlight and interrogate CTOP’s constitutive powers and coercive elements.

My hope with this approach is to build an argument that abortion law reform in SA can be congruent with a reproductive justice framework. CTOP needs to be complicated and revised according to how abortion is happening in practice. It needs to include a serious consideration of the social dimension of abortion which, as Nicky Priaulx puts it, requires more effort than merely “telling lawyers that the social is important”.<sup>112</sup>

## Reproductive Justice

Legal criticism of CTOP in research has strengthened in the last five years.<sup>113</sup> This dissertation adds a historical lens to these critiques. In 2011, legal scholar Rachel Rebouché touched on the connections between the making of CTOP and issues with abortion access.<sup>114</sup> Rebouché argued that reproductive rights-based advocacy underestimated “the social context that shapes the law’s implementation”.<sup>115</sup> Exploring the making of CTOP highlights a “grammar of social worlds” which directly influenced the law and now continue to undermine its principles.<sup>116</sup>

More recently, Cathi Albertyn has published work advocating for “the possibilities of reproductive justice”.<sup>117</sup> Albertyn argued that a reproductive justice approach or framework

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<sup>111</sup> Ibid

<sup>112</sup> Nicky Priaulx, “The Social Life of Abortion Law: On Personal and Political Pedagogy” in *Medical Law Review*, vol. 25, (winter 2017), pp. 73-98, <https://doi.org/10.1093/medlaw/fww044>

<sup>113</sup> Most notably here are Rebouche, Albertyn, Macleod

<sup>114</sup> Rachel Rebouché, “The Limits of Reproductive Rights in Improving Women’s Health”, *Alabama Law Review* 63 (2011)

<sup>115</sup> Rachel Rebouché, “The Limits of Reproductive Rights in Improving Women’s Health”, *Alabama Law Review* 63 (2011), pg. 42

<sup>116</sup> Didier Fassim, *Humanitarian Reason: A Moral History of the Present*, (California: University of California Press, 2012), pg. 247

<sup>117</sup> Cathi Albertyn, “Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts”, *University of Oxford Human Rights Hub Journal*, vol. 1, (2019)

could revive “the stagnation, if not decline, in abortion service provision and access”.<sup>118</sup> Albertyn further stated that dealing with problems of implementation and misuse of the law “requires political and legal engagement”.<sup>119</sup> The notion of reproductive justice comes from a particular history. It was developed by African American women who maintained that because of the socialisation of black women who were given a unique socialisation about having children, sexuality, and their relationship to eugenic thinking and population control in the US.<sup>120</sup> Reproductive justice thus demands and foregrounds intersectional analysis.

In South Africa, reproductive justice could also be helpful. As CTOP is premised on the idea of reproductive rights, CTOP conceptualises questions of practical access along the metrics of freedom from discrimination and informed consent.<sup>121</sup> CTOP does not account for the incommensurable access needs of women impacted of historic subjugation based on race and class.<sup>122</sup>

Catriona Ida Macleod has similarly advocated for reproductive justice in the South African context. Macleod posits that while people may agree on the principles of reproductive justice, “theoretical frameworks that can foster these goals have been insufficiently explored and debated in the literature”.<sup>123</sup> This dissertation takes up this challenge by putting forward an argument about the influence of one such “interweaving of individual and social process”: the individual and social processes of publics.<sup>124</sup>

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<sup>118</sup> Ibid, pg. 117

<sup>119</sup> Ibid, pg. 118

<sup>120</sup> Ibid, pg. 101

<sup>121</sup> Rachel Rebouché, “The Limits of Reproductive Rights in Improving Women’s Health”, *Alabama Law Review* 63 (2011): pg. 37

<sup>122</sup> Catriona Ida Macleod, “Expanding Reproductive Justice Through a Supportability Reparative Justice Framework: the Case of Abortion in South Africa”, *Culture, Health & Sexuality*, 2:1 (2019): 47; Rachel Rebouché, “The Limits of Reproductive Rights in Improving Women’s Health”, *Alabama Law Review* 63 (2011): 38. Also worth noting here is the role of the medical profession in supporting and upholding notions of racial and economic segregation.

<sup>123</sup> Catriona Ida Macleod, “Expanding Reproductive Justice Through a Supportability Reparative Justice Framework: the Case of Abortion in South Africa”, *Culture, Health & Sexuality*, 2:1 (2019): pg. 47

<sup>124</sup> Catriona Ida Macleod, “Expanding Reproductive Justice Through a Supportability Reparative Justice Framework: the Case of Abortion in South Africa”, *Culture, Health & Sexuality*, 2:1 (2019), pg. 47

## Methodology & Limitations

In Susanne Klausen's account of abortion under apartheid, she concluded by outlining the making of CTOP.<sup>125</sup> Klausen invited historians to focus on abortion not as part of "important but limited goals of liberal feminism", but rather in such a way that asks more of abortion law reform by meaningfully centralising women's bodies.<sup>126</sup> This dissertation takes up that invitation by drawing on a range of archives. The archival spine includes oral history interviews with women who have had abortions under SA's abortion laws, as well as supporters, architects and antagonists involved in the making of CTOP.<sup>127</sup> Media coverage has been central to mapping public opinion on abortion during this period, and government publications and correspondence has highlighted the way abortion was navigated in the political arena in the early days of SA's democracy. Archival collections from UKZN's Killie Campbell Library as well as documents pulled from the flames of UCT's Jagger Library were also crucial.<sup>128</sup>

Anecdotally, in early March 2020, I requested archival materials from UCT's Jagger Library. Shortly after looking at them and putting them on reserve, SA went into a Covid-19 lockdown and the library was closed. Just over a year later, the library was severely damaged in a fire, with many documents from the African Studies collection being lost. Items that were on reserve, however, were spared by the library's fire protection mechanisms. Amongst these were the materials I requested. Below is an image (courtesy of Michal Singer) of the requested materials after the April 2021 fire.

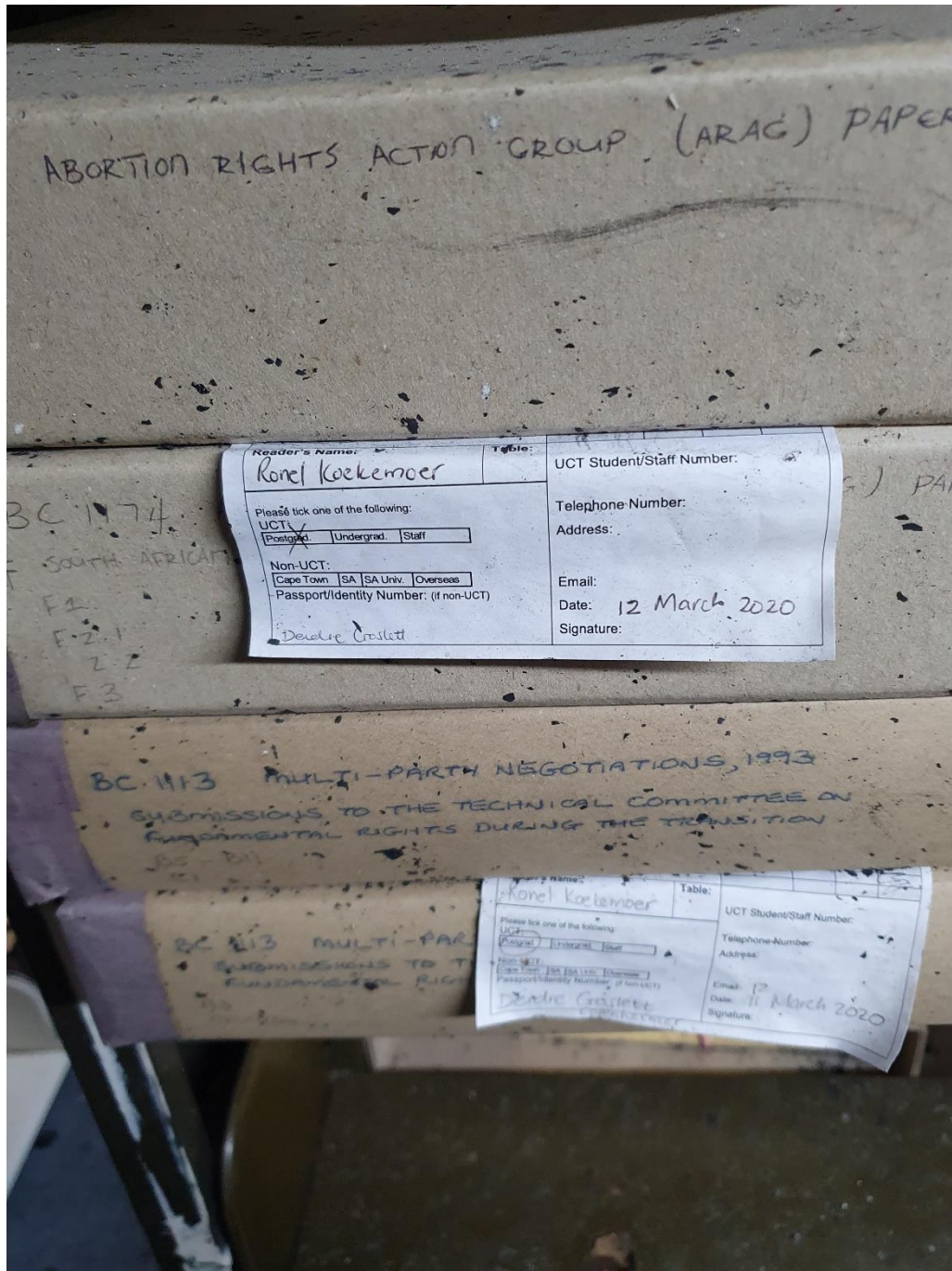
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<sup>125</sup>Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015) pg. 219

<sup>126</sup> Ibid

<sup>127</sup> While some interviews were conducted before the Covid-19 pandemic and the subsequent lockdowns, a majority of these conversations took place remotely. I structured my interviews with a life history approach in mind. I thought of CTOP as having a life of its own and collected oral histories from those who were a part of this life. This included the friends (those in support of the law or its general principle of decriminalizing abortion on request), its enemies (those who were pro-life or against liberalizing the abortion law), and what oral historian Beatrice Webb called "subordinates". In my iteration, people who terminated pregnancies were the ones implementing (or overcoming) the laws provisions. See Valerie Yow, 257-267.

<sup>128</sup> The burning down of the Jagger Library made most of these documents inaccessible after a year where UCT closed its physical repositories as part of the nationwide lockdown.



## Print Media

This thesis used newspaper coverage of the making of CTOP to access the different strands of SA's abortion debate at the time. Though public discourse takes place in various arenas, by the 1990s, news media was a significant forum for public debate. Experts, activists, politicians,

aborting women, and the broader public consumed or utilised this form of media.<sup>129</sup> Similarly, these different players participated in this forum to address those they wished to convince or engage with.<sup>130</sup> Though the messages of these publics are mediated by editorial choice and format, the newspaper reportage represents how the views of these players would be presented to other groups.<sup>131</sup> Some level of shared view from certain publics can be deduced as specific players represent their profession or stance in the media.<sup>132</sup> Importantly, the media forum also influences and is influenced by “broader cultural changes in the civil society”.<sup>133</sup>

While useful, newspapers are limited. Their presentation of the public abortion debate is the result of editorial and journalist choice for the benefit of the audiences which, in the newspapers I accessed, were an overwhelmingly liberal English audience. Similarly, on issues like abortion, opinions are less informed by newspaper reportage and more by other forums such as religious organisations, cultural authorities, and civil society organisations.<sup>134</sup>

I have drawn from newspapers aimed at Black audiences such as *The Sowetan* and *Indaba*. I also tried to find public sources of Black women’s input on abortion as well as to prioritise interviews with Black role players. Publications such as *The Sowetan* and *Indaba* proved invaluable in assessing the narratives of the time. As Lesley Cowling shows in her article ‘*Building a Nation: The Sowetan and the Creation of Black Public*’, *The Sowetan* “formed a counterweight to apartheid representations of Black Africans and facilitated public engagement with questions of citizenship and nationhood long before South Africa’s constitutional democracy”.<sup>135</sup>

The clippings about the pro-life movement were taken from Dot Cleminshaw’s papers and as such, reflect a particular kind of view on those movements. Adding to this perspective are oral history interviews with three pro-life activists who were active in the making of CTOP. Important to note is that though the news media may present and strengthen the side of a

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<sup>129</sup> Myra Marx Ferree, William Gamson, Jurgen Gerhards, Dieter Rucht. *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States*, (Cambridge: Cambridge University Press, 2004), pp. 9-10

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Ibid, pp. 14-15

<sup>133</sup> Ibid

<sup>134</sup> Ibid

<sup>135</sup> Leslie Cowling, “Building a Nation: The Sowetan and the Creation of a Black Public”, *Journal of Southern African Studies*, (2014), pg. 325. Cowling has written about the relationship between the Sowetan and black public life. See for example, *Saving the Sowetan: the public interest and commercial imperatives in journalism practice* (2015) and *Understanding the “Sowetans”: journalism as a product of organisational culture* (2017)

particular change or view, this does not mean that it is this view that will have a significant impact “on either public policy or on the everyday lives” of its readers.<sup>136</sup> As Chapters 2 and 3 will highlight, having impact on the policy domain depends less on raw public opinion and more on political strategy.

## Oral History

Feminist historians embraced the oral history movement of the 1970s with its fantasies of probing private spheres and experiences. Oral history offered a methodology that integrated women into historical scholarship. Similarly, oral history approaches allowed for a reconfiguration of histories of the social, economic and political worlds of women that had been obscured.<sup>137</sup> In short, oral history was an attractive feminist methodology because of how it emphasised personal experience that had previously been dismissed as subjective because it was constructed as private. It was this desire to spotlight the private spheres of life—which has been gendered as the terrain of women—that led to the entanglement between feminist historical methodologies and oral history.

Women and our ‘issues’ are popular targets for oral history. As chief victims of patriarchal oppression, living in the apparently ‘ahistorical’ domestic and private spheres, oral history methodology—with its social justice foundations—has strived to ‘rescue’ the woman’s ‘voice’.<sup>138</sup> Its aims of giving “diversified perspectives on the past” meant that not only could women feature more prominently in historical scholarship, but that their perspectives would be ‘fleshed out’ and both generate literatures and nuance pre-existing narratives.<sup>139</sup> Feminist historians have been attracted to this acknowledgement that “traditional sources” neglected and oversimplified the lives of women.<sup>140</sup> One of its most explicitly feminist features was its objective to create an archive that considered women as both historical subjects and as

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<sup>136</sup> Myra Marx Ferree, William Gamson, Jurgen Gerhards, Dieter Rucht. *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States*, (Cambridge: Cambridge University Press, 2004), pp. 14-15

<sup>137</sup> Jeannie Ludlow, “The Things We Cannot Say: Witnessing the Trauma-Tization of Abortion in the United States”, *Women’s Studies Quarterly* 36, no. 1/2 (2008): pp. 28–41. <http://www.jstor.org/stable/27649733.5>

<sup>138</sup> Diana Sands, “Using Oral History to Chart the Course of Illegal Abortions in Montana” in *Frontiers: A Journal of Women Studies* vol.7 (1), (1983): pp.32-37

<sup>139</sup> Joan Sangster (1994) Telling our stories: feminist debates and the use of oral history, *Women’s History Review*, 3:1, (1994): pp. 5-28, DOI: [10.1080/09612029400200046](https://doi.org/10.1080/09612029400200046)

<sup>140</sup> *Ibid*, pg. 5

producers of historical knowledge. Interviewing women informed “the research agenda by articulating what [was] of importance to them”.<sup>141</sup>

Reproduction has been and remains, important to women in a way that has evolved over time and remains grossly underestimated. At the time when oral history was gaining its feminist credentials, reproductive rights was at the centre of the feminist agenda. While this has expanded the archive and recognised women and their experiences as historical agents and processes, oral history in the writing of women’s histories remain reductive.<sup>142</sup> Julie Stephens argues that many oral historians have used individual interviews from women to stabilise narratives around women’s lives.<sup>143</sup> Instead of embracing the contradictions and ambiguities that theorists like Thompson and Portelli argue are so central to the interpretation of oral history interviews, when this methodology is used to ‘uncover’ the underrepresented lives of women, there remains a tendency to ignore the complexities these idiosyncrasies hint at.<sup>144</sup>

The centrality of abortion as a women’s and feminist issue has meant that many researchers have used oral history to explore histories of abortion.<sup>145</sup> Barbara Baird’s work points to the ability of oral history interviews to nuance understandings of abortion.<sup>146</sup> She states that the ambiguities in oral history interviews about abortion highlighted the complexity of the experience and showcased and destabilised cultural assumptions that abortions inevitability lead to suffering and feelings of guilt.<sup>147</sup> Jeannie Ludlow highlights that “there is a hierarchy of abortion narratives” where interviewers privilege stories deemed “politically necessary” from a pro-choice standpoint.<sup>148</sup> Because of oral history’s fantasy of finding “speakers who are not already recognised protagonists in the public space” and using these voices for a social justice means, the oral histories of abortion are dominated by stories about rape and incest survivors,

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<sup>141</sup> Ibid

<sup>142</sup> Alistair Thomson “Four Paradigm Transformations in Oral History” in *The Oral History Review* vol. 34 (1), (2007), pp. 49-77

<sup>143</sup> Julie Stephens, “Our Remembered Selves: Oral History and Feminist Memory” in *Oral History: Power and Protest*, vol. 38, (2010): pp.81-90

<sup>144</sup> Alistair Thomson “Four Paradigm Transformations in Oral History” in *The Oral History Review* vol. 34 (1), (2007), pp. 49-77

<sup>145</sup> Diana Sands, “Using Oral History to Chart the Course of Illegal Abortions in Montana” in *Frontiers: A Journal of Women Studies* vol.7 (1), (1983): pp.32-37

<sup>146</sup> Barbara Baird, “Abortion, Questions, Ethics, Embodiment”, *History Workshop Journal*, 52, (2001), pp. 197-216; David Cline, “Introduction” in David Cline, *Creating Choice: A Community Responds to the Need for Abortion and Birth Control, 1961-1973*. (New York: Palgrave Macmillan, 2006).

<sup>147</sup> Ibid

<sup>148</sup> Jeannie Ludlow. “The Things We Cannot Say: Witnessing the Trauma-Tization of Abortion in the United States”, *Women’s Studies Quarterly* 36, no. 1/2 (2008), <http://www.istor.org/stable/27649733>: pg. 28

unviable foetuses and unmarried teenagers.<sup>149</sup> These stories are important, and their prevalence in oral histories of abortion are often in a bid to counter anti-abortion rhetoric. In the anti-abortion discourse, there remains an idea that if women do not want to fall pregnant, they should be more careful about sex and contraception.<sup>150</sup>

Feminist scholar Affrica Taylor asserted that “securing space...is a political act: whether through the invasion of territories; colonization; dispossession; appropriation; representation; the disciplining of knowledge; or the purchase of real-estate. The occupying of space is an assertion of power, and continual displacement is power’s spatial effect”.<sup>151</sup> This relationship between power and securing space is exactly why oral history proved so appealing to feminist historians. It was an assertion of space to make the personal so public and so political. It is also seen in how women were encouraged to speak about their abortions in direct response to “the cultural imperative to remain silent about one’s abortion” and instead to speak about it unapologetically in an attempt “to reframe abortions as a normal and shared experience”.<sup>152</sup>

This is particularly useful in writing abortion histories; as Barbara Baird’s work illustrates, working with the ambiguities, inconstancies and emotions that arise in interviews with women who have had abortions destabilises many of the assumptions about having an abortion.<sup>153</sup> Oral history methodology relies not only on the content of the interview but how the interview format and the social context of the event shapes the content.<sup>154</sup> This is valuable in nuancing understandings of the barriers to abortion access under CTOP.

I approached CTOP as a subject and so used a life history framework as the creative backbone of this project. This most significantly informed my choices in interviewees. Following Valerie Yow’s advice to interview “friends, enemies, and even the onlookers”, I interviewed various actors who had been affected by CTOP.<sup>155</sup> These include women who have terminated pregnancies, abortion providers, activists and experts, as well as vocal opponents of the current legislation.

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<sup>149</sup>Michelle Oberman, *Her Body, Our Laws: On the Front Lines of the Abortion War, from El Salvador to Oklahoma*, (Boston: Beacon Press, 2018), pg. 108

<sup>150</sup> Ibid, pg. 65

<sup>151</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women’s Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013), pg. 40

<sup>152</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd, 2017), pg. 274

<sup>153</sup> Ibid

<sup>154</sup> Ibid

<sup>155</sup>Valerie Yow, *Recording Oral History: A Guide for the Humanities and Social Science*, (Maryland: Rowman & Littlefield, 2015), pg. 265

However, these are not rigid categories of experience. Some of the participants have had experiences with abortion legislation in different ways. Interviewing women who have had abortions is crucial. At this stage, I am conceptualising these particular interviews along Beatrice Webb's notion that certain participants can comment as "subordinates" of the subject of the life history.<sup>156</sup> Webb defends this positioning by classing subordinates as individuals who often implement the subject's decisions and are the most common witness to the outcomes of those decisions.<sup>157</sup> What this means—outside of life history 'speak'—is that these women have experienced how the law operates in practice. The diversity of abortion experiences reflected is an attempt to see a) how abortion law works in practice over time and b) how abortion laws are defied, used, or warped in practice.

The input of abortion providers is invaluable in the construction of this history. Their role as providers allows them to comment on how the law does and does not influence abortion practice. Within the framework of this kind of legislation, providers act as experts, service providers, and law enforcement.

I interviewed people who have been involved in the anti-abortion movement. In keeping with Yow's theory of biography, interviewing "enemies" gives insight into challenges in the subject's life.<sup>158</sup> It also highlights things "the subjects' friends did not experience".<sup>159</sup>

This thesis leans on an interpretation of history put forward by Svetlana Alexievich where "the narrators are not only witnesses...they are actors and makers".<sup>160</sup> The interviewees are not authorities because they were there to see 'what actually happened'. Rather, this thesis relies on their accounts of the making of CTOP because of the ways they remember and retell those experiences. In Alexievich's words, "I am dealing with versions, that each person has her version, and it is from them, from their plurality and their intersections, that the image of the time and the people living in it is born".<sup>161</sup>

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<sup>156</sup> Ibid

<sup>157</sup> Ibid

<sup>158</sup> Valerie Yow, *Recording Oral History: A Guide for the Humanities and Social Science*, (Maryland: Rowman & Littlefield, 2015), pg. 266

<sup>159</sup> Ibid

<sup>160</sup> Alexievich, Svetlana, *The Unwomanly Face of War*, (London: Penguin Random House, 2018), pg. xxi

<sup>161</sup> Ibid

Similarly, I accept Pumla Gqola's argument in *What is Slavery to Me?* that descriptions and depictions of history themselves have a history.<sup>162</sup> In dealing with each interviewee's "version", I look at ambiguities and inconsistencies from the "official" record as having its own contextual forces. I looked at these interviews as performances by me and my interviewees. These narratives "represent...one moment of history and how that moment in history is remembered through a particular subjectivity".<sup>163</sup>

The oral history approach is at once a fitting methodology but also an opportunity.<sup>164</sup> Abortion stories are in part about the complicated and loaded reasons why women have sex without contraception.<sup>165</sup> They are about shame and desperation as well as joy and relief. They are traumatic and they are ordinary. They change over time and in response to how they are spoken about, how often they are spoken about, and to whom they are spoken to. They are not stable stories of patriarchal injustice. I am using the oral history approach to celebrate the complexity and the variety of abortion experiences—even (especially) when this is inconvenient to certain social justice agendas.

## Overview of Thesis

Chapter 1 establishes the key venues of abortion law reform in the making of CTOP. It does this by focussing on how the public participated in the making of the law and, more poignantly, how this participation was co-opted in the new democratic state. It also points to the literature informing my conceptualisation of the public/public life of abortion and how this relates to the 1990s SA context.

Chapter 2 focusses on the role of medico-legal experts in the making of CTOP. It problematises perceptions that expertise over abortion is ahistorical. Similarly, controlling abortion in the name of specialist knowledge and objectivity veils the subjectivities at play, especially in the context of abortion. This chapter also discusses how expertise is used to circumvent negative

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<sup>162</sup>Pumla Dineo Gqola, "Remembering Differently: Repositioned Coloured Identities in a Democracy". In *What Is Slavery to Me?: Postcolonial/Slave Memory in Post-Apartheid South Africa*, pp. 21–60, (Johannesburg: Wits University Press, 2010)

<sup>163</sup>Patrick E Johnson, *Black. Queer. Southern. Women: An Oral History*, (USA: University of North Carolina Press, 2018)

<sup>164</sup> Ibid

<sup>165</sup>Michelle Oberman, *Her Body, Our Laws: On the Front Lines of the Abortion War, from El Salvador to Oklahoma* (Boston: Beacon Press, 2018), pg. 3

public opinion. It also scrutinizes different ways expertise was inserted into the abortion debate and gestures at the possibilities and pitfalls of abortion without limitations such as disciplinary protocols.

In Chapter 3, I look at the pro-choice versus pro-life culture war in the public debate. I examine how these ideologies coalesced into movements and how these actors grappled with the possibilities of law reform. I pay attention to the way the two camps perceived each other to highlight how this symbiosis informed CTOP and its longer-term relationship to abortion accessibility.

Chapter 4 interrogates the aborting women as she appeared in the making of CTOP. It pays attention to how this figure was used in the public debates to demarcate who the law 'was for'. It outlines a particular technology of shaming where aborting women were constructed as always tragic and how their abortions were evaluated based on the reasons women chose them. Chapter 4 demonstrates how even permissive or progressive abortion laws can still generate an ideal candidate for abortion: one that is forged in social and public expressions that have less to do with abortion and more to do with perceptions and gatekeeping.

# Chapter 1

## *“The most robust debate our democracy has ever experienced”<sup>1</sup>: Public Participation in the Making of CTOP*



*A montage of newspaper headlines, 1971-1995.*

<sup>1</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col 4761

In October 1971, journalist Lin Menge wrote in SA's *Daily Mail* newspaper that "abortion as a subject for public debate here [in SA] is still taboo".<sup>2</sup> Menge argued that abortion should no longer be limited to backstreets or courtrooms stating that "it is time the public entered the debate".<sup>3</sup> In the years following Menge's assertion, the SA public did become involved in the debate and, by the time the CTOP Bill was debated in Parliament in 1996, abortion was no longer a public unmentionable.

This chapter will highlight that public participation in the making of CTOP was a part of the broader project to legitimise the post-apartheid regime and its commitment to democratic principles. While the public had "entered the debate" by 1996, the degree to which this influenced the final law was contested.<sup>4</sup> Then health minister, Dr Nkosazana Dlamini-Zuma said the CTOP Bill was the subject of "the most robust debate our democracy has ever experienced".<sup>5</sup> However, when CTOP came into force on 1 February 1997, one journalist stated that "there was little or no sign that anything had changed"; there was no indication that the public registered the significant change in reproductive rights.<sup>6</sup>

This chapter sketches the emergence of abortion as a public interest issue in SA and the theoretical underpinnings of this thesis. By looking at debates about public participation in the making of CTOP, it illustrates the complex relationship between public interest and abortion law reform in SA's burgeoning democracy.

## Theorising Public Life

Edwin Cameron and Mark Gevisser said of the early 1990s

South Africans have explored, argued and exchanged ideas as never before. In bloody township battles, in torturous constitutional negotiations, in campaigns leading up to a first democratic election, in unprecedentedly open media, South Africa's forty million citizens are staking claim to their future.<sup>7</sup>

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<sup>2</sup> Lin Menge, "Unborn, Unwanted: What is South Africa Going to Do About Abortion?", *Rand Daily Mail* (Johannesburg), 9 October 1971

<sup>3</sup>Ibid

<sup>4</sup>Ibid

<sup>5</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col 4761

<sup>6</sup> Cas St Leger, "Little Notice of History in the Making", *Sunday Times* (Johannesburg), 2 February, 1997

<sup>7</sup>Mark Gevisser and Edwin Cameron, *Defiant Desire: Gay and Lesbian Lives in South Africa* (Braamfontein: Ravan Press, 1994), pg. 4

This description encapsulates ‘the public’ as this thesis uses it. It leans on theories of the public sphere and public life to analyse how the social meanings of abortion affected law reform.<sup>8</sup> Public life and the arguments, actors, and arenas it entailed serves as the undercurrent of this research.

Exploring, arguing, and exchanging ideas was central to Jürgen Habermas’s conception of the public sphere.<sup>9</sup> This sphere exists as processes where societies reach “consensus or compromise” about the meaning of issues and what should be done about them.<sup>10</sup> The public sphere represents a range of venues—such as the press or in townships—where “discursive interaction” takes place.<sup>11</sup> Public contestation is part of political involvement, and this has historically been a way to “delegitimise some interests, views and topics and valorise others”.<sup>12</sup> As this thesis will highlight, abortion epitomises this. Once overlooked as part of a gendered “private” realm, in the period under investigation, abortion was the subject of “bitter, acrimonious exchanges” in the public sphere.<sup>13</sup>

This thesis follows Nancy Fraser’s reworking of the public sphere. Fraser draws on Habermas’s historization as “conceptual resource” to understand how “democratic legitimisation” can be achieved through public participation and engagement.<sup>14</sup> Fraser’s response to the Habermasian project is helpful in how it conceptualises a space of discursive participation that “is neither private nor controlled by the state”.<sup>15</sup>

For example, while South African’s were “staking claim to their future” by debating what should be done about abortion, this did not mean that these exchanges would wholly dictate state policy. However, Seyla Benhabib adds that the public sphere is influential in

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<sup>8</sup> In thinking through these issues, I am indebted to Rehana Odendaal’s Master’s thesis *Wits Imagined: An Investigation into Wits University’s Public Roles and Responsibilities, 1922-1994*. See pages 126-131

<sup>9</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women’s Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013) pp. 8-9

<sup>10</sup> Alan McKee, *The Public Sphere: An Introduction*, (Cambridge: Cambridge University Press, 2004), pg. 5

<sup>11</sup> Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy”, *Social Text* no.25, (1990), pg. 57

<sup>12</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women’s Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013) pg. 48

<sup>13</sup> Dave Capel, “A Question of Choice: Does Abortion Constitute Murder or a Woman’s Right?”, *Sunday Times* (Johannesburg), 11 June 1995

<sup>14</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women’s Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013) pg.25

<sup>15</sup> Seyla Benhabib, “The Embattled Public Sphere: Hannah Arendt, Jürgen Habermas and Beyond”, *Theoria: A Journal of Social and Political Theory* (1997)

understanding emerging democracies because it emphasises that a state's policies, laws and rule are only authoritative insofar as they are guided by the public sphere.<sup>16</sup>

## Gender and the Public

Within the Habermasian model, the public sphere is theoretically open to everyone to participate.<sup>17</sup> However, feminist scholars have challenged this. Feminist critiques of Habermas use the public sphere to “to explain and critique the marginality of women in politics”.<sup>18</sup>

Seyla Benhabib, Nancy Fraser and Iris Marion Young have added feminist lenses to Habermas that highlight how gender hierarchies are reinforced through the public sphere. For example, amidst increasing recognition that women do have political concerns and are involved in institutional politics, the tendency is to construct this in ways that situate men and their concerns as ‘naturally’ public, where women are ‘brought into the public’.<sup>19</sup>

This has roots in John Locke's *Second Treatise* where he made a distinction between civil society and political power.<sup>20</sup> Central to this thinking was that husbands were ‘naturally’ dominant over their wives.<sup>21</sup> The more public space became synonymous with ideas of power and action; women became barred from the public because it was outside the home and sites of family.<sup>22</sup> This speaks to an evolution in understandings of the public sphere. It is only in modern social organisation that public space is considered permeable (where issues can be brought ‘in’ or taken ‘out’).<sup>23</sup>

As this thesis will demonstrate, ‘bring’ abortion into the public sphere does not necessarily include women in public life. Feminist considerations of the public sphere trouble the false dichotomy between the public and the private. Women's lives and concerns have been

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<sup>16</sup> Seyla Benhabib, “The Embattled Public Sphere: Hannah Arendt, Jürgen Habermas and Beyond”, *Theoria: A Journal of Social and Political Theory*, (1997), pp. 63-66

<sup>17</sup> Alan McKee. *The Public Sphere: An Introduction*, (Cambridge: Cambridge University Press, 2004), pg. 35

<sup>18</sup> Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards and Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press, 2002), pg. 222

<sup>19</sup> Janet Siltanen and Michelle Stanworth, “The Politics of Private Woman and Public Man”, *Theory and Society* 13(1), (1984) pp. 91-94

<sup>20</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women's Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013) pg. 43

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Alan McKee, *The Public Sphere: An Introduction*, (Cambridge: Cambridge University Press, 2004), pg. 35

constructed as ‘belonging’ to private and domestic worlds, but in many instances (such as abortion), women’s bodies are the subject of public debate.<sup>24</sup>

## **The Emergence of Abortion as Public Interest Issue in South Africa**

Invoking public interest in abortion is a way to justify legal regulation into what was once “a very real private” part of women’s lives.<sup>25</sup> In keeping with Fraser and Benhabib’s thinking about the public sphere and the state, calling on public participation legitimised the democratic regime’s role in using the law to control abortion. Abortion laws are directly linked to abortion as a social ‘issue’. Abortion as a public interest issue emerges in the middle of the 20<sup>th</sup> century alongside international trends that either liberalised or formalised abortion laws.

Britain’s 1967 Abortion Act is a significant example of this relationship.<sup>26</sup> In the making of the law, politicians arguing in favour claimed that draft bills emerged out of “public demands” to change the existing repressive law.<sup>27</sup> In Britain and the USA, the strengthening of medical gatekeeping was a significant part of the push to liberalise abortion laws.<sup>28</sup> Though abortion featured within the public sphere in the late 50s and early 60s, interest was limited to “a few scattered reformers, theologians” and those in the medical profession.<sup>29</sup> This meant that public controversy about abortion at that time was minimised and instead concentrated on medical interests and monopolies around abortion.<sup>30</sup>

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<sup>24</sup> Carole Joffe, *Dispatches from the Abortion Wars: The Costs of Fanaticism to Doctors, Patients, and the Rest of Us*, (Boston: Beacon Press, 2011), pg. 14

<sup>25</sup> Kristin Luker, *Abortion and Politics of Motherhood*, (California: University of California Press, 1984), pg.1

<sup>26</sup> Carole Joffe, *Dispatches from the Abortion Wars: The Costs of Fanaticism to Doctors, Patients, and the Rest of Us*, (Boston: Beacon Press, 2011), pg. 17

<sup>27</sup> *Ibid*, pg. 17

<sup>28</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011)

<sup>29</sup> Kristin Luker, *Abortion and Politics of Motherhood*, (California: University of California Press, 1984), pg.1

<sup>30</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 66; Medical interests are worth noting here because they have a direct impact on the liberalness of abortion; in contexts where medical professionals want to maintain their status as gatekeepers, reforms tend to be much more restrictive.

## Doctors and Damsels

While apartheid SA was incredibly insular, conversations around women's reproduction were emerging in the public realm.<sup>31</sup> In SA, doctors were aware of these developments. According to historian Susanne Klausen, the medical profession in SA "pulled clandestine abortion from the margins to the centre of public life".<sup>32</sup> There was a major response to the British reforms in SA and local doctors reported increasing numbers of women asking for ToPs.<sup>33</sup> Though developing, these discourses were constrained by the conservative ideology of the regime.<sup>34</sup>

The issue of abortion put the apartheid regime in an awkward position. On the one hand, the notion of abortion was fundamentally at odds with the Calvinist and isolationist underpinnings of Afrikaner nationalism. One member of the NP, Dr P. J van B. Viljoen, said at the time that "we in South Africa are on a higher level than most western countries...[and] are in a position to apply our own moral principles when it comes to" abortion.<sup>35</sup> At the same time, there was an anxiety that the black population of SA would demographically 'take over' and pose a bigger political threat.<sup>36</sup>

The public meanwhile were engaging with abortion as medical and sexual scandal. The trial that prompted Lin Menge to write about "the sleeping dog" of abortion in SA was that of Dr Laurence van Druten.<sup>37</sup> van Druten was acquitted after being charged with terminating the pregnancy of a 15-year-old girl who had been raped by her brother.<sup>38</sup> In the media, van Druten was portrayed as a sympathetic doctor who took pity on the girl's tragic circumstances. This refrain about desperate women and sympathetic doctors dominated the public discussion. Though Dr van Druten's acquittal was controversial at the time, it marked a shift in public

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<sup>31</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015)

<sup>32</sup> *Ibid*, pg. 84

<sup>33</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980).

<sup>34</sup> Helen Bradford, "'You call that democratic?': Struggles Over Abortion in South Africa since the 1960s", *History Workshop*, (Johannesburg: University of the Witwatersrand Press, 1994)

<sup>35</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Books, 1993) pg. 13.

<sup>36</sup> Rebecca Hodes, "The Medical History of Abortion in South Africa, c.1970-2000", *Journal of Southern African Studies*, vol. 9, no. 531, (2013).

<sup>37</sup> Lin Menge, "Unborn, Unwanted: What is South Africa Going to Do About Abortion?", *Rand Daily Mail* (Johannesburg), 9 October 1971.

<sup>38</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015), pg. 105

perception about abortion. Abortion was promoted from public unmentionable to an acknowledged social ill.

## **Abortion as a Woman's Right?**

Court cases like van Druuten's were making headlines in the years before ASA. These portrayals were sympathetic to doctors who took pity on women but importantly, this lens seldom extended to the aborting women themselves. As Klausen argues, though doctors were the subject of legal trials, aborting women were harshly judged in the court of public opinion.

One organisation, ARAG, pushed for law reform that would favour women whilst also pandering to medical interests. Dr Margaret Hoffman joined ARAG in the 1970s. In our interview, she attributed this to her exposure to the reproductive struggles of "poor whites and coloured" women.<sup>39</sup> Hoffman remembered that she joined ARAG at "the same time as feminism was developing overseas".<sup>40</sup> She adds, "Not that I was a feminist. It missed me, the whole feminist movement. I was in South Africa, and I didn't know much about it at all".<sup>41</sup> Hoffman alluded to the framing of abortion both in her mind and in the public. Abortion in the 1970s was not constructed as a feminist concern in public discourse. Another interviewee shared a similar sentiment saying that "you never thought [during apartheid] that as a woman you had the right to abortion".<sup>42</sup>

One legal commentator on ASA asked: "does the law give the right to a woman to demand an abortion where her circumstances fall within the law?".<sup>43</sup> The idea that women could request abortions from their doctors was unpopular and dismissed by the apartheid government. The legal thinking at the time stressed that any changes to abortion laws should give power to "the medical practitioner who is to procure the abortion and not by the woman herself".<sup>44</sup>

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<sup>39</sup> Interview with Dr Margaret Hoffman, Interviewed by Ronel Koekemoer, Cape Town (via Zoom), 2020, recording with author

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Interview with Rita, Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020, recording with author

<sup>43</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd.,1980), pg.230

<sup>44</sup>S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980), pg. 232

Feminist notions of abortion as reproductive rights were not a significant part of the SA conversation. The contest over abortion was about how professionals should manage women's sexual and reproductive lives.<sup>45</sup> Women's sexuality was positioned as a deviance contributing to the social ill of abortion.

## **Spectacular and Tragic Abortions After ASA**

In the years between the passing of ASA and the end of apartheid, abortion was constructed as an unfortunate and tragic reality. Though the public discourse was more sensitive to the dangers of backstreet abortions, this was framed as public health concern rather than injustice.

The absence of women in this conversation was pronounced. Women-led organisations were hesitant to support abortion on request. Dr Sallie Woodrow, in a presentation to the National Council of Women in January 1979 titled 'The Humane Answer to the Trap of Unwanted Pregnancy', spoke about the "countless 'cri de Coeur' of...desperate [women] to which I have listened during a long medical career".<sup>46</sup> She went on:

Listened with growing anger and bitterness against church, state and society for allowing such human suffering and hardship to continue, for encouraging reverence for the fertilised ovum, no matter how irreverently the sperm and ovum were joined.<sup>47</sup>

Another angle of tragedy was the eugenic underpinnings of the apartheid regime's family planning efforts. In black media in the 80s, abortion was portrayed as a racist plot to eliminate the black population. As Chapter 3 will elaborate, those supporting this view argued that abortion was 'unAfrican'. One Black woman wrote to the editor of a popular newspaper that abortion was being used to "eradicate our culture and traditions" and cause "our race to go extinct".<sup>48</sup> This was especially insidious, according to the writer, as "abortion is a violation of black women's moral standards".<sup>49</sup>

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<sup>45</sup> Rebecca Hodes, "The Medical History of Abortion in South Africa, c.1970-2000", *Journal of Southern African Studies*, 39(531), (2013), pg. 527; I will be exploring these expert publics in much more detail in the next chapter.

<sup>46</sup> National Council of Women Newsletter, January 1979, ZA UCT BC1051\_CC\_CC3, Abortion/Women/Religion, Dot Cleminshaw Papers University of Cape Town Libraries: Special Collections (Manuscripts and Archives), Cape Town.

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> "Abortion Blessing or Crime?" in *The Sowetan*, 27 July 1983

By the early 90s, abortion was reported in the public sphere mainly in sensationalist terms. In March 1994, the *Sunday Times* reported on a court case where a woman (“a rehabilitated bulimic”) had undergone what she thought was a legal abortion in 1991. The *Sunday Times* went on to report:

Now in a legal first in South Africa, the 26-year-old unmarried Randburg mother instituted a claim of nearly R800 000 against Sandton Clinic gynaecologist for the botched abortion which resulted in the birth of her daughter Amy.<sup>50</sup>

When abortions were not spectacular, they were portrayed as tragic. In April 1996, the daughter of political activist (and later chairman of the National Council of Provinces) Mosiuoa Lekota hanged herself. The report emphasised that Lekota’s daughter was both pretty and young. However, the real story was the fact that she “killed herself because she was afraid of undergoing a second abortion”.<sup>51</sup>

In the media, there was a recurrent “slippage between abortion, trauma and grief”.<sup>52</sup> This constructed abortion as inherently negative. This was problematic because, even in contexts where abortion is constructed as choice, that choice was negative. This is tied to anti-abortion notions of abortion as harm, a notion that persisted amongst aborting women. In the CTOP parliamentary debate, one member of the NP presented ‘evidence’ that:

If passed, the Bill has the potential of producing a full generation of women with severe gynaecological and social problems...of women who have had abortions, it is reported that 61% have increased their use of alcohol, 65% are suicidal, 69% are sexually inhibited, 73% have flashbacks of the abortion, 77% experience and inability to communicate, and 81% experience frequent crying.<sup>53</sup>

Under the guise of caring for the health and well-being of women, there is this continued emphasis that in pregnancy, the woman is already a mother to a child.<sup>54</sup> Perhaps the most extreme iteration of this argument was the idea that babies are born alive and then killed which one minister referred to during the Parliamentary debate, saying “it is said that the two most dreaded complications for an abortionist are a dead mother and a live baby”.<sup>55</sup>

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<sup>50</sup> Jocelyn Maker, “Mother Sues her Gynecologist for Botched Abortion”, *Sunday Times* (Johannesburg), 13 March 1994.

<sup>51</sup> Andre Jurgens, “Abortion Fear that Drove Lekota’s Daughter to her Death”, *Sunday times* (Johannesburg), February 16 1997.

<sup>52</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 173

<sup>53</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10

<sup>54</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pp. 136-41

<sup>55</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10

In many of the pro-life and anti-abortion iterations, the aborting woman was already a mother. Those against the Bill repeatedly called the aborting woman “the mother” to “the unborn child”, the “infant” or “the baby”.<sup>56</sup> For my one interviewee who had been raped and had an abortion as a result, her belief about abortion was that “they should be allowed and everything like that, but they’re not good for you”.<sup>57</sup>

Those in support of the Bill were not immune to these public perceptions. Unapologetically in favour of the CTOP Bill, Dlamini-Zuma reiterated in parliament:

For every woman it is painful to have to consider an abortion. She will not take the decision lightly, knowing that the grief of her unborn child will remain a constant companion. Only the prochoice legal framework enables the individual woman to wrestle with the decision as a matter between her and God.<sup>58</sup>

The public were engaging with abortion by the 1990s, but the debate was framed by spectacle and tragedy.

## **Abortion and the Public in the South African Parliament<sup>59</sup>**

Abortion law reform in SA has been the subject of parliamentary debate twice.<sup>60</sup> ASA was debated in the apartheid parliament in 1975 and, 21 years later, abortion was again debated by parliament, this time by the newly established GNU. Both regimes drew on public interest to support their stance.

### **Venues of Law Reform**

The parliamentary arena of law reform was deliberate. In the months before the 1994 election, the press was filled with articles, opinion pieces, interviews, and panel discussions, all speculating about how the new SA would be remade. The law’s role in the restructuring and

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<sup>56</sup> Ibid

<sup>57</sup> Interview with Penelope Dodge, interviewed by Ronel Koekemoer, Cape Town, May 2019, audio recording with author.

<sup>58</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col. 4763

<sup>59</sup> Parliament operated under an interim constitution and was in the process of writing a new final constitution. The lower house was renamed the National Assembly in 1994; the upper house remained the Senate but became the National Council of Provinces in 1997.

<sup>60</sup> For an overview of the making of legislation is done in SA, visit <https://www.parliament.gov.za/how-law-made> for an infographic and brief description.

transformation process was a significant part of this coverage. The ways the law would, should and could be used was a pivotal way the abortion discussion was facilitated.

Many wagered that the coming Constitutional Court would be instrumental in SA's restructuring.<sup>61</sup> According to this paper trail, it is evident that public perception about the ConCourt was that it was tasked with the controversial and difficult issues.<sup>62</sup> Arguably, abortion was foremost amongst these.

SA's *Sunday Times* suggested that the ConCourt "may find itself at the centre of a stormy controversy over the legality of abortion soon after it is established".<sup>63</sup> Similarly, an article in *The Sowetan* in 1996 signalled to how the new constitution could be defended in the ConCourt:

This new constitution renouncing the racism of the past and guaranteeing equal rights in South Africa...outlaws the death penalty and has several privacy clauses that could lay the groundwork for legal abortion.<sup>64</sup>

## Abortion in the Constitutional Court?

The prospect of dealing with abortion through the newly established ConCourt was unappealing to many of those in support of liberal law reform. In a submission to the Technical Commission on the Bill of Rights, ARAG expressed that "women's rights to autonomy in decisions affecting their own reproduction, specifically the right to abortion" be protected.<sup>65</sup> However, they did not want this to be the task of "a court not yet in existence".<sup>66</sup> They justified this by suggesting that giving the ConCourt decisional authority on the matter was an anti-abortion "postponement" and would inevitably "accumulate more misery through backstreet abortion".<sup>67</sup>

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<sup>61</sup> Ray Hartley, "Row Looms Over Abortion Law", *Sunday Times* (Johannesburg), 23 January 1994

<sup>62</sup> 'ConCourt' is a recognized shorthand for 'Constitutional Court' in South Africa and is used in this context for ease of reading

<sup>63</sup> Ray Hartley, "Row Looms Over Abortion Law", *Sunday Times* (Johannesburg), 23 January 1994

<sup>64</sup> Suzanne Daly, "SA's New Beginning", *The Sowetan* (Johannesburg), 6 December 1996

<sup>65</sup> Abortion Reform Action Group Statement, 1994, ARAG archives June Cope Papers, 896707439, Killie Campbell Library Africana Collection, UKZN, Durban

<sup>66</sup> Ibid

<sup>67</sup> Ibid

Those in favour of liberal law reform were also being strategic. At an ARAG meeting held on 8 April 1994, members debated the option of challenging ASA in the new ConCourt.<sup>68</sup> The notion was ultimately rejected because it could stall change but also because ARAG had limited resources to fight in court.<sup>69</sup> According to Albertyn, the RRA similarly felt that “the courts were a complete unknown quantity”.<sup>70</sup> For Albertyn, the position of feminist lobby groups was:

We were coming out of apartheid with apartheid judges and we really weren't clear if the Constitutional Court was a feminist court because there were only two women on it...Also, we really didn't know which way [the Constitutional Court] would go with abortion and we really did know that we could push a law through parliament.<sup>71</sup>

Those tasked with setting up the ConCourt were also hesitant to deal with abortion. According to Professor Hugh Corder, anxiety over public opinion on issues like abortion and the death penalty informed both the judiciary and the incoming government. At the time, the PAC and “the ANC was strongly opposed to capital punishment” but “the average South African supported the death penalty”.<sup>72</sup> Corder remarked that “none of the political parties had the appetite to go there”.<sup>73</sup> To avoid public outcry, the GNU agreed that deciding the implications of the right to life on abortion and the death penalty “should be left to the Solomonic wisdom of the Courts”.<sup>74</sup>

That reform came through Parliament rather than the ConCourt is testament to the effectiveness of the feminist lobby. “Without question, law reform is best done through parliament”, reflected Albertyn, “just a court finding that says abortion is no longer criminal doesn't help you”.<sup>75</sup> Instead, passing legislation through Parliament allowed the pro-choicers to put a “regulatory framework in place”.<sup>76</sup> Albertyn elaborated that ConCourt law reform could only happen

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<sup>68</sup> ARAG meeting minutes, ARAG archives June Cope Papers, 896707439, Killie Campbell Library Africana Collection, UKZN, Durban

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Interview with Professor Cathi Albertyn, interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April 2020, audio recording with author

<sup>71</sup> Ibid

<sup>72</sup> Interview with Professor Hugh Corder, interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>73</sup> Interview with Professor Hugh Corder, interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>74</sup> Ibid

<sup>75</sup> Interview with Professor Cathi Albertyn, interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April 2020, audio recording with author

<sup>76</sup> Ibid

If a doctor was criminally prosecuted [...] And what then would have happened is they would have said: ‘he’s not guilty of an offence because abortion is...it’s unconstitutional to have abortion as a crime and therefore the provisions that criminalise abortion need to be struck down. So, we would have decriminalised abortion, but we wouldn’t have had a regulatory framework to deliver it.’<sup>77</sup>

The regulatory framework to which she is referring is crucial when thinking about the consequences of the process of law reform on law in practice. It also speaks to the fact that raw activism was shaped into a strategy in such a way that the group interests could be incorporated into the reform as well: by choosing parliament as the venue for change, the ideals of the group can become a part of the new law, they could have more control over how a law works in practice by instituting a regulatory framework that they had participated in shaping. But they are also the result of compromise.

To denaturalise institutions and investigate their legacies, it is valuable to examine how the internal characteristics of movements interact and adapt to their external environments.<sup>78</sup> This is one of the reasons that the pro-choice lobby found favour against the pro-life camp in the making of CTOP. They were able to recognise which venue would be more favourable to their cause. Albertyn noted that the pro-choice lobby “had such strong alliances with women in parliament and women in government...You know we had been comrades a few months before”.<sup>79</sup> Not only were the pro-choice lobby well-networked, but they were also strategic in their approach to the parliamentary venues. Penn-Kekana spoke about how: “I remember we did these 1 page—you know this idea that MPs can only read 1 page—so we were summarising this report [for the politicians] because we knew it was that information that was important”.<sup>80</sup>

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<sup>77</sup> Ibid

<sup>78</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg.22

<sup>79</sup> Interview with Professor Cathi Albertyn, interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April 2020, audio recording with author

<sup>80</sup> Interview with Loveday Penn-Kekana, interviewed by Ronel Koekemoer via Zoom, Mowbray, 10 April 2020, audio recording with author

## Getting at The Public

The participation of the public was much more important in the making of CTOP than it had been under ASA. In August 1994, the Ad hoc Select Committee on Abortion and Sterilisation was established to investigate “the efficacy” of ASA.<sup>81</sup> The Committee was also tasked with recommending amendments to ASA that would fit with the agenda of the new SA.<sup>82</sup>

To do this, the Committee asked for public submissions on the legislation. The interest was so varied that, by April 1995 the Committee further invited people to “present oral evidence”.<sup>83</sup> In the subsequent report, efforts to reach SA’s new, diverse public were detailed. Calls for submissions and oral testimony “was prepared in all 11 languages and received coverage in the press and through the electronic media”.<sup>84</sup> Public hearings were held between 9 May and 8 June 1995, and funds were secured from Parliament to cover travel expenses for those who could not afford to get to the public hearings.<sup>85</sup> The Committee noted that “particular emphasis was placed on ensuring the participation of women’s groups, rural women and the youth”.<sup>86</sup>

According to the Committee’s report, “there were more ‘pro-life’ than ‘pro-choice’ submissions”.<sup>87</sup> However, the report highlighted those pro-choice submissions were more representative of the publics the Committee was eager to include and “came from a more diverse” sample.<sup>88</sup> Even so, “distressingly little evidence [came] from black people”.<sup>89</sup>

Black women’s perspectives on abortion were lacking in the final report. Of the few black women who made “oral submissions, all but two were in the ‘pro-choice’ camp”.<sup>90</sup> The absence of Black women’s input was especially troubling given that they were foregrounded in the fight for post-apartheid abortion law reform.

Those involved in the pro-choice groups almost always made mention of this and insisted that they tried to elevate voices of black women. ARAG said “ARAG has genuinely tried to

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<sup>81</sup> “Changes in Abortion Law Recommended.” *Agenda: Empowering Women for Gender Equity*, no. 26 (1995): 51–59

<sup>82</sup> *Ibid*, pg. 51

<sup>83</sup> *Ibid*

<sup>84</sup> *Ibid*, pg. 51

<sup>85</sup> *Ibid*

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*, pg. 52

<sup>88</sup> *Ibid*, pg. 53

<sup>89</sup> “Changes in Abortion Law Recommended.” *Agenda: Empowering Women for Gender Equity*, no. 26 (1995): pp. 51–59.

<sup>90</sup> *Ibid*, pg. 53

ascertain rural women's opinion. We have met with many small groups of black women and health workers and participated in many conferences over the past 20 years".<sup>91</sup> In the transitional lead up to the 1994 election, ARAG admitted in their submission to the technical committee on fundamental rights during the transition that:

We do not know whether rural women in fact hold conservative views about abortion. But should this be so, knowing that anti-abortion views do not address the problems of backstreet abortions, infanticide, abandoned children etc., should those views be allowed to determine the rights and lives of millions of South African women who do not share them?<sup>92</sup>

In black print media, abortion certainly took up space. In 1990, Dr Jiyane Mbere, the chairman of the Soweto Family Help Centre, sent a memorandum to the government imploring them to "change the law so that black women will be able to have legal abortion".<sup>93</sup> Mbere's memorandum reads like a pro-choice Bill that would come later. He suggested women over 40 be permitted to have abortions for "economic reasons", as well as for teenagers under the age of 16 and women "whose contraceptive measures fail".<sup>94</sup>

In the key parliamentary debate on the Bill, the ACDP and the NP were the main opponents of the Bill, and the major speakers invoked the perceived immorality of abortion saying that "the moral fabric of our society is being ripped apart strand by strand".<sup>95</sup> In response to this, ANC parliamentarian Pregs Govender highlighted the hypocrisy of this critique of the Bill, emphasising that CTOP was not about the legalisation of abortion".<sup>96</sup> Govender asked, "was abortion acceptable

when 70% of those who had access were urban, middle-class, and white women? Was it acceptable when those who died, over 400 every year, *for lack of access* [my emphasis] were African, Indian and coloured women?<sup>97</sup>

ANC parliamentarian N B Gxowa said in the same debate:

The main criticism of ASA was the issue of access. The statistics show that the majority of women who manage to procure legal abortions are white, but the majority of women who present themselves at hospitals with septic abortions are black. Is it right, in the new non-racial SA, that women who have access to safe abortions in hospitals are still overwhelmingly white, while those who only have access to 'aunties' and backstreet

<sup>91</sup> ARAG November 1994 submission to parliamentary select committee on abortion.

<sup>92</sup> Ibid

<sup>93</sup> Ike Motsapi, "Pleas for Abortion Law Changes Widely Hailed", *Rand Daily Mail*, 12 September 1990

<sup>94</sup> Ibid

<sup>95</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col 4761

<sup>96</sup> Ibid, col. 4792

<sup>97</sup> Ibid, col. 4792

abortions, or who attempt to perform an abortion on themselves, are overwhelmingly black?

## Invoking the Public in Parliament

On the 29<sup>th</sup> of October 1996, the CTOP Bill had its second reading debate in the South African parliament.<sup>98</sup> In her opening remarks, then health-minister Dr Nkosazana Dlamini-Zuma thanked “members of the public for giving such unprecedented attention to this Bill”.<sup>99</sup> Dlamini-Zuma said “I do not think there has been anything that has gone through this parliament that has been debated with such conviction and passion by the public.”<sup>100</sup>

Though not claiming outright public support for the Bill, Dlamini-Zuma’s nod to public participation communicated that there was great public interest in the Bill. In doing this, she managed to suggest that the high level of public participation and engagement signified the success of SA’s fledgling democracy.

This framing is evident in the policy document used in the drafting of CTOP. It stated that:

With a democratic government in place, South Africa is looking forward to the development and upliftment of its people and a new respect of human rights...In this time of transition and transformation...we need to recognise that the right to decide when and whether to have children, including access to safe and legal abortions for women is both a social need and an individual right.<sup>101</sup>

CTOP was part of ambitious legal reforms that deliberately sought to establish the ‘New South Africa’ as not only a democracy, but also as foil to the apartheid past.

Similarly, abortion as a subject of public interest was evident in the ASA debate held on 10 February 1975. Recall Lin Menge’s plea for public investment in the abortion debate in 1971. By the time of the ASA debate, public interest was piqued. In this era, public participation was attributed to the controversial nature of abortion. Dr E. L Fisher, who first motioned for an

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<sup>98</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10: The second reading is important because it happens after public consultation on a particular bill and when amendments have been put forward by the relevant portfolio committee.

<sup>99</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col 4761

<sup>100</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10

<sup>101</sup> Women’s Health Project. *Health in Our Hands: Proceedings and Policies of the 1994 Women’s Health Conference*, (Johannesburg: University of Witwatersrand, 1994), pg. 121

investigation into possible abortion law reform, reminded the MPs that abortion is “a matter that is very delicate and we [MPs] have to expect that various opinions will be expressed, not only by members of the House, but also from people outside”.<sup>102</sup>

The similarity in the way the public was cited in both debates is interesting. In the case of ASA, Dr C V van der Merwe said that

After the preponderance of evidence, therefore, left this commission no option but to decide that the people of this country do not want abortion on demand. Faithful to the principles of my party in this democratic land of ours, I have no choice but to do what the voters of this country expect me to do.<sup>103</sup>

At the second reading of the CTOP Bill, Dr S A Nkomo (another champion for the CTOP Bill), reiterated Dlamini-Zuma’s sentiment saying,

I firmly believe that the portfolio committee has contributed to a true people’s parliament...this is the framework in which the Bill is introduced...We have listened to the people.<sup>104</sup>

The similarities in how the public is invoked to justify the respective Bills is illuminating for what it highlights about the relationship between the respective regimes to the public sphere. It highlights that abortion had a public life in both contexts of law reform. The ‘delicacy’ of abortion communicated that there was public interest in abortion, even if public participation in conceptualising reform was not given the same weight as Dlamini-Zuma claimed it had in 1996.

## **Contesting Public Participation**

Dlamini-Zuma and Nkomo’s adducing of the public did not go unchallenged by other parliamentary members. Reading the CTOP debate, there are multiple examples of how SA’s nation-building utilised legislation to ‘undo’ the discrimination of the apartheid past, and the CTOP Bill was one such legislative opportunity. This is evident in the language used to promote CTOP by invoking how it heralds change from an oppressive past:

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<sup>102</sup>NA Deb (Abortion and Sterilisation Bill), 1975,col. 479

<sup>103</sup> NA Deb (Abortion and Sterilisation Bill), 1975,col. 486

<sup>104</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col 4767

Nobody is suggesting for a moment that we have a flawless democracy...today we are confident that this Bill will improve the lives of millions of South Africans. After decades of oppression the women of this country are to have freedom of choice.<sup>105</sup>

Using public participation to legitimise a stance on abortion was strategic and political. What exactly public participation meant for the Bill was contested throughout the CTOP debate.

In opposing the Bill, PW Grobelaar from the Freedom Front Plus disputed the claim that CTOP was the product of “robust” public debate.<sup>106</sup> Grobelaar acknowledged that there was widespread public interest in abortion and that this was made evident through the amount of submissions to the parliamentary committee. He went on to say that his “concern is that all the submissions did not change the bill one iota. From the outset, there was an agenda, and that agenda was followed”.<sup>107</sup>

Grobelaar’s sentiment was a common critique of the ANC dispensation. In many cases, these critiques pointed to anxieties by those formerly in power. If CTOP continues to be seen as a form of forging a democratic state through the empowerment of women, Grobelaar’s opposition can be dismissed. However, if we recognise that CTOP is part of a broader problem in the inaccessibility of abortion, what Grobelaar said next is significant. He asked:

Was the opportunity to make submissions given to create the impression among the public that there was transparency and that they were being given an opportunity to have a say in the Bill?<sup>108</sup>

This is not to say that public opinion on abortion should dictate abortion laws. NP MP S Camerer articulated her opposition to the Bill through this lens. Camerer argued that “the ANC has insisted on bulldozing this through”, suggesting that their claims of public participation were misleading, saying that “evidence in all the major opinion polls to the effect that a large majority of South Africans, including a large majority of ANC supporters, are against this [interjections] look at the polls!”.<sup>109</sup>

Whatever the outcomes of abortion opinion polls, Grobelaar’s statement is important because it raised the notion that laws are packaged in certain ways to legitimise broader political agendas. The ‘public’ and ‘public participation’ are not apolitical or ahistorical.

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<sup>105</sup> Ibid

<sup>106</sup> Ibid, col 4775

<sup>107</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col 4775

<sup>108</sup> Ibid

<sup>109</sup> NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, 4768

To be clear, to find fault with CTOP is not to be anti-democratic or anti-abortion. Instead, if viewed in context, it becomes clear that CTOP's progressiveness should not be taken for granted. Rather this is a deliberate construction that effaces the way the law limits potential abortion practices. Grobelaar's question in this regard is important as he suggested that while the public are meaningful enough in the new regime to be called upon, this should not lull people into thinking that the Bill was an unmitigated will of a majority. Even after CTOP had been enacted "the debate still rages on whether the law is in the public interest".<sup>110</sup>

## Conclusion

The public concerns structures of public space and activities including deliberation, involvement, and participation. It is also about the extent to which the public sphere influences a society and guides governance.<sup>111</sup> Using the public life of abortion as a lens is useful in thinking about how modern liberal democracies operate, which SA was striving for during the transition.<sup>112</sup> Crucially, the public life of abortion is a valuable analytic because of its recognition that CTOP was informed by both a national and political context, as well as very specific understandings of abortion at that time. With the emergence of a public life for abortion, public interest became a key justifying factor both for restricting and liberalising abortion law.

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<sup>110</sup> Africa Information Afrique, "SA Can't Cope with Abortions", *The Sowetan* (Johannesburg), 25 March 1997

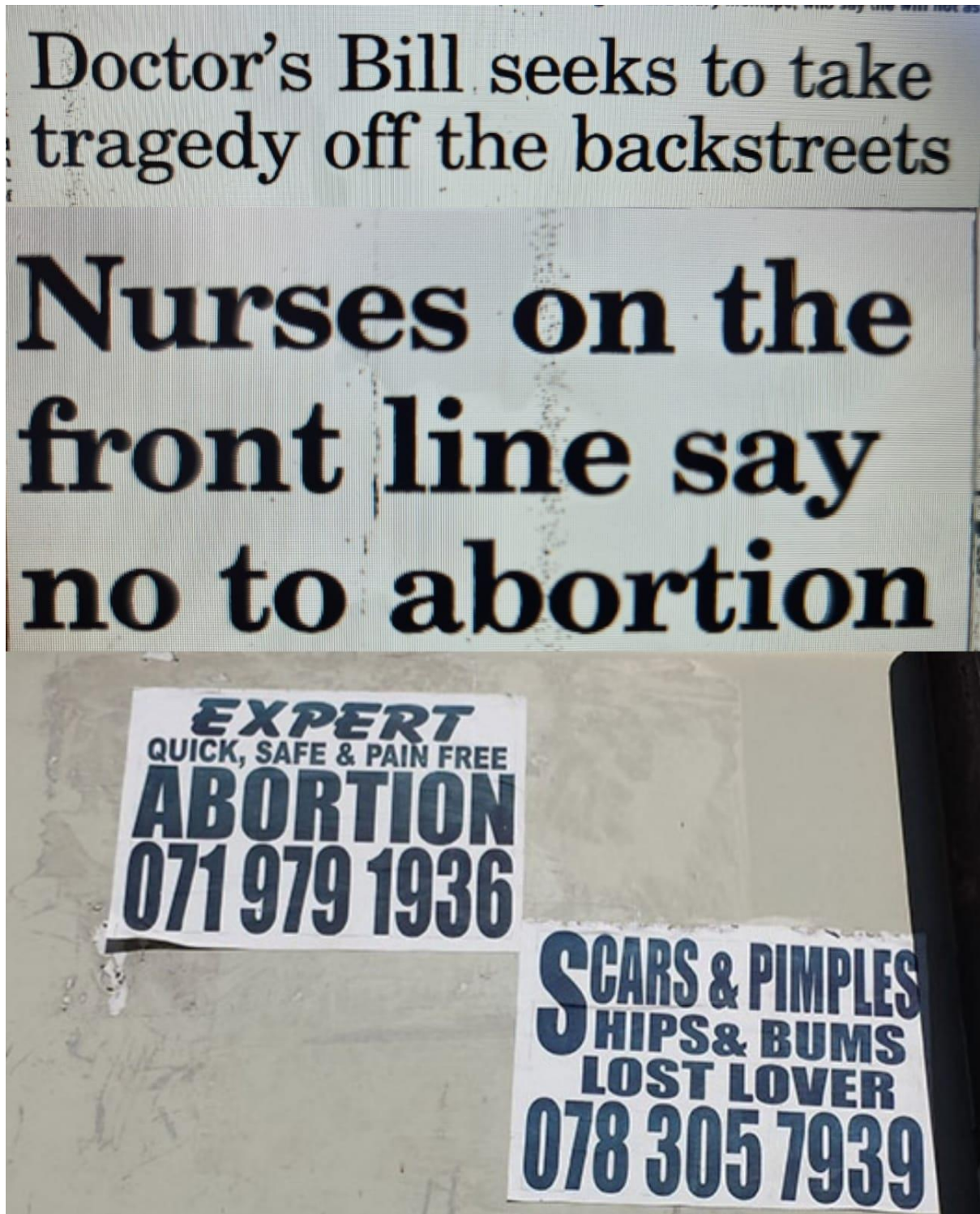
<sup>111</sup> Alan McKee, *The Public Sphere: An Introduction*, (Cambridge: Cambridge University Press, 2004), pp. 4-6

<sup>112</sup> *Ibid*, pg. 6

## Chapter 2

*“I Never Knew a Doctor Who Was Pro-Choice”:*

Expert Publics



*A montage of newspaper article titles and a poster advertising illegal abortion in SA, 1984-present.*

Central to public discourse on abortion is “who should have legitimate control over” it.<sup>1</sup> Abortion was widely presented as a public health issue which has meant that the state, the law, and the medical institution have enjoyed decisional authority over abortion.<sup>2</sup> Though CTOP framed abortion as a woman’s right to choose, it was still highly medicalised. This is often overlooked in evaluating CTOP because of how the relationship between medical expertise and abortion has been naturalised.

However, as this chapter will highlight, medical control over abortion was strategic and deliberate in the making of CTOP. This is significant because healthcare workers and burdensome medical infrastructure are a major barrier to abortion access under CTOP. Abortion access is compromised not because of “lack of medical knowledge” but because of infringements on human rights.<sup>3</sup>

## Doctors and Abortion

Doctors were not always considered reproductive experts. This dominance of doctors over reproductive healthcare only emerges in the early 20<sup>th</sup> century. As Bradford highlights, most doctors operating in SA were foreign and spent “much of the nineteenth century waging a fruitless vendetta against midwives, chemists and unqualified healers”.<sup>4</sup> Professor Margaret Hoffman similarly spoke about “women in the community” who were not doctors or medical professionals but who were trusted with “delivering babies” and who “also helped women who were in difficulties”.<sup>5</sup>

In the 1960s, medical doctors became the prominent and authoritative figures in “healthcare division of labour”.<sup>6</sup> As a result, doctors gained increased clinical autonomy.<sup>7</sup> This gave them relative freedom to assert power over patients and other healthcare workers because of their

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<sup>1</sup> Dorothy E McBride Stetson, *Abortion Politics, Women’s Movements, and the Democratic State: A Comparative Study of State Feminism*, (Oxford: Oxford University Press, 2001), pg. 2

<sup>2</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 9

<sup>3</sup> Rebecca J Cook, “Reproductive Health and Human Rights”, *Studies in Family Planning* vol 24, no. 2 (1993), pg. 32

<sup>4</sup> Helen Bradford, *Herbs, Knives and Plastic: 150 Years of Abortion in South Africa*, in T Meade and M Walker (eds), *Science, Medicine, and Cultural Imperialism* (London: Macmillan, 1991), pg.6

<sup>5</sup> Interview with Rita, Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020, recording with author

<sup>6</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg.67

<sup>7</sup> Ibid

level of medical expertise.<sup>8</sup> This expertise, which doctors invoked to establish authority and autonomy, was difficult to question or override by lay publics. Solving the ‘abortion problem’ became the jurisdiction of doctors and, because of their medical expertise, they only had to answer to others with specialist knowledge.<sup>9</sup> Medical doctors maintained and bolstered this by emphasising that they were ruled by a code of ethics that made them both knowledgeable and trustworthy in using this knowledge on or over patients.<sup>10</sup>

This is reflected in how abortion laws such as ASA and CTOP were designed. The British example established abortion as the jurisdiction of the medical profession.<sup>11</sup> The 1967 Abortion Act created a legal defence of abortion in the UK.<sup>12</sup> This development was credited with a major shift in abortion and its relationship with the law.<sup>13</sup> While it still criminalised abortion in many instances, it made an allowance for therapeutic abortion based on physical and psychological health.<sup>14</sup> So, while abortion on request remained illegal, medical professionals could now determine whether a woman was eligible for abortion.<sup>15</sup> Though a feminist issue in the US at the time, the women’s movements in the UK were not as pronounced on abortion. Britain’s law, therefore, was designed to protect doctors providing abortion rather than women seeking them.<sup>16</sup>

SA doctors were aware of these international developments and sought more clarity and control over the abortion issue. This was especially important in the context where doctors were being apprehended, as mentioned in Chapter 1. For one woman who sought an illegal abortion, she remembered that “it was somebody that knew somebody that knew somebody and a lot of times you also heard there’s also not a guarantee that the doctor will do it because the doctors were also afraid then that it was a trap”.<sup>17</sup>

The pressure also came from fears about population growth. One editorial in the South African Medical Journal posited that “if human populations are to be controlled and disasters avoided,

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<sup>8</sup>Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 67

<sup>9</sup> Ibid

<sup>10</sup> Ibid, pg. 67

<sup>11</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 6

<sup>12</sup> Ibid

<sup>13</sup> Rebecca Hodes, “The Medical History of Abortion in South Africa, c.1970-2000”, *Journal of Southern African Studies*, vol. 9, no. 531, (2013).

<sup>14</sup> Ibid

<sup>15</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 6

<sup>16</sup> Ibid, pp. 5-6

<sup>17</sup> Interview with Rita, Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020, recording with author

contraception is not enough. Whether we like it or not we have to look at more drastic measures of abortion”.<sup>18</sup>

In this context, the first ever national symposium on therapeutic abortion by SAOG was held in April 1968.<sup>19</sup> Despite the medical emphasis of the conference, abortion law was a major focus. One attendee, law professor S.A Strauss presented a paper that argued for a change in abortion law.<sup>20</sup> Strauss stressed that “it is a known fact that in South Africa there are respectable medical practitioners who would in extreme cases come to the rescue of desperate women”.<sup>21</sup>

Strauss constructed doctors as being victimised by the law’s lack of clarity.<sup>22</sup> He went on to assert that “the medical profession is entitled to demand from society that a safe judicial framework be provided” so that doctors could perform abortions without risking prosecution.<sup>23</sup>

Abortion became a feature of public debate partly because of medical interests and legalising abortion in 1975 reflected this. In the debate over the ASA Bill, Dr E L Fisher said that

Anyone voting against the Bill will be voting for the status quo.... In South Africa abortions are not allowed. That is the end of it...doctors have taken it upon themselves to do abortions when they felt it was necessary...hoping that the law would be on their side.<sup>24</sup>

The public life of abortion in this context was tempered by specialist involvement. For ARAG member and “feminist” Dolly Maister, medical interest in abortion “was like an alarm going off on civilisation’s time-clock”.<sup>25</sup>

As aforementioned, however, it was medical rather than feminist interest that drove apartheid-era abortion law reform. Other than lacklustre support for feminism, medical interest in abortion was also driven by anxieties that legalising abortion threatened clinical autonomy. Abortion laws could limit medical practices and position doctors as “mere” service providers

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<sup>18</sup> Rebecca Hodes, “The Medical History of Abortion in South Africa, c.1970-2000”, *Journal of Southern African Studies*, vol. 9, no. 531, (2013), pg.531

<sup>19</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, (Oxford: Oxford University Press, 2015)

<sup>20</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980) pg. 214-217

<sup>21</sup> S.A Strauss, *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980), pg. 214

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup>RSA, 1975, *Parliamentary Debates*, Abortion and Sterilisation Bill, col. 480

<sup>25</sup>Letter from ARAG member Dolly Maister, ARAG archives June Cope Papers, 896707439, Killie Campbell Library Africana Collection, UKZN, Durban

to the demands of patients.<sup>26</sup> Within the medical field, there was anxiety that “the gynaecologist would become a mere technician performing abortions at the behest of others”.<sup>27</sup> One of the most explicit examples of this is the contestation over terms like abortion on “request” versus “demand”.<sup>28</sup> Historically, ‘on request’ was favoured over the term ‘on demand’ because of the way ‘on demand’ suggested women could expect abortion services regardless of the doctor’s professional opinion.<sup>29</sup>

This kind of professional gatekeeping mattered in the context of women’s health and abortion. Reproductive health was less disease-orientated than other forms of medicine and so doctors were dealing with mostly healthy subjects.<sup>30</sup> This shifted the patient-provider dynamic to one where the patient was more participatory.<sup>31</sup> Similarly, women have often been treated in medicine as “a means in the process of reproduction, and as targets in the process of fertility control”.<sup>32</sup> Reproductive medicine considered women’s healthcare needs to be “submerged in their needs as mothers”.<sup>33</sup>

To abort under ASA, women required approval from multiple medical professionals. ASA protected medical interests and clinical autonomy by subjecting women to excessive medical gatekeeping. The state motivated this by saying that those who deserved abortion would be separated from those seeking to abuse the law. In saying this, the state recognised that medical experts are people and so required multiple expert opinions to confirm an applicant’s eligibility.

ASA legalized abortion and—in part—responded to high rates of maternal morbidity associated with dangerous backstreet abortions.<sup>34</sup> As almost all historians of abortion in SA have shown, however, ASA did little to quell these dangers. Abortion provider and proponent of CTOP, Dr Eddie Mhlanga, highlighted that the “stringent” conditions of ASA could only be met by women “in urban and well-resourced areas”.<sup>35</sup> For white women who did not meet these

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<sup>26</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 67-68

<sup>27</sup> Ibid

<sup>28</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017).

<sup>29</sup> Ibid, pg. 121

<sup>30</sup> Rebecca J Cook, “Reproductive Health and Human Rights”, *Studies in Family Planning* vol 24, no. 2 (1993), pg. 38

<sup>31</sup> Ibid

<sup>32</sup> Ibid, 45

<sup>33</sup> Ibid

<sup>34</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Books, 1993)

<sup>35</sup> RE Mhlanga, “Abortion: Developments and Impact in South Africa”, *British Medical Bulletin* vol. 67, (2003), pg. 116

criteria, they had significantly more non-legal routes than black women.<sup>36</sup> While Black women in rural areas could also benefit from the provisions of the Act, the rural areas in which they lived did not have the necessary medical infrastructure.<sup>37</sup>

For example, if a women sought to procure an abortion because “the continued pregnancy endangers her life”, she would have to get the approval from two medical practitioners other than the practitioner who would perform the abortion.<sup>38</sup> ASA stipulated that abortions could only be procured under a specific set of circumstances and, in all cases, the two practitioners who gave their approval could “in no way participate in or assist with the abortion” and that their approval would “not be valid if issued by members of the same partnership or by persons in the employ of the same employer”.<sup>39</sup> Women seeking ToPs in rural areas thus had to get approval from three separate practitioners in hospitals “for blacks” that were under-resourced, and “where only one or two doctors were present”.<sup>40</sup>

In the making of ASA, critics of the Bill highlighted the unduly burdensome provisions of the Bill. The NP’s response to this complaint was dismissive:

This business of having to take the child [who was claiming to be raped in order qualify for a legal abortion]in front of the magistrate or in front of this one or in front of that one and the embarrassment that it causes do not exist. In practice, is it worse than a girl going from one doctor to another to find out which one will do the abortion? No embarrassment for these people but when it is done legally, it suddenly becomes an embarrassment.<sup>41</sup>

## Abortion, Doctors, and the Law

One of the ways we see abortion being intrinsically linked to the law is the perception that the law as an institution is the appropriate place for abortion to be ‘housed’. This is rooted in the perception that laws are forged through disciplinary methods that have traditionally been associated with rationality and fairness.<sup>42</sup> The result is a trust (or in the very least, an obedience) to legal systems because they are viewed as an institution with a basis in reasoning,

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<sup>36</sup> Ibid

<sup>37</sup>Ibid

<sup>38</sup> *The Abortion and Sterilization Act No.2 of 1975, (RSA) Section 3, Government Gazette*

<sup>39</sup> Ibid

<sup>40</sup> RE Mhlanga, “Abortion: Developments and Impact in South Africa”, *British Medical Bulletin* vol. 67, (2003), pg. 116

<sup>41</sup> *RSA, 1975, Parliamentary Debates, Abortion and Sterilisation Bill, col. 482*

<sup>42</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980).

fairness and ‘neutrality’.<sup>43</sup> It is this perception which also serves to establish the law as conveying authority and legitimacy.

Under CTOP, the law’s ability to create and enforce the right to abortion access gives an appearance of access.<sup>44</sup> This is because the law can demarcate physical spaces and boundaries that in the abstract, allow women access to ToPs.<sup>45</sup> In reality, the spaces where struggles for access and for the meaning of abortion occur “are fraught with complex dynamics that laws...cannot completely control”.<sup>46</sup>

To return to Strauss’ address at the SASOG conference, he readily admitted that the law was not a neutral institution, cautioning the medical professionals<sup>47</sup> He called medical expectations of the law “sometimes one-sided”, overestimating the objective “nature of law and the legal profession”. Strauss illustrated that the law’s interests were not always to accommodate emerging ways of medical thinking or incorporate the experiences of physicians.<sup>48</sup> He emphasised this by saying that “in the same way as the layman is inclined to expect miracles from medicine, the physician may expect miracles from the law”.<sup>49</sup>

His appraisal of the relationship between abortion and the law is that “of all the disciplines that are involved in therapeutic abortion, the law has been the least outspoken and probably the most negative in its approach”.<sup>50</sup> His paper partly argued that the law cannot be viewed “as a discipline which may be utilised to serve [the physicians’] interests or those of his science”.<sup>51</sup> Strauss warned that the law would not handle therapeutic abortion in the same spirit of the doctors. Strauss said that while the symposium signalled the willingness of the medical fraternity to debate and revisit their position on abortion, the law would not be as easily influenced. His reasoning for this is that “more than any other disciplines [the law is] rooted in

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<sup>43</sup> Iain Currie, Johan de Waal, Pierre de Vos, Karthy Govender, & Heinz Klug, *The New Constitutional & Administrative Law, Constitutional Law: Constitutional Law vol. 1*, (Lansdowne: Juta Law, 2002), pg. 5-9

<sup>44</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women’s Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013) pp. 64 and 72

<sup>45</sup> Ibid.

<sup>46</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women’s Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013), pg.72

<sup>47</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980) pg .207

<sup>48</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980) pg .207

<sup>49</sup> Ibid, pp. 207-208

<sup>50</sup> Ibid, pg. 207

<sup>51</sup>S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980) pg .207

the past”.<sup>52</sup> He emphasised this by saying the law “glorifies the past and infrequently is it reluctant to break with it”.<sup>53</sup> Strauss’s paper provides insight into the thinking of the medical fraternity as well as the nature of the law. He recognised that there are certain perceptions about the law and tried to correct this by suggesting that the fundamental foundation of law was the past, rather than changing positions based on other disciplinary knowledges or expertise.

Legal scholar Nicky Priaulx also speaks about a certain faith in the law’s ability to provide the fairest interpretation of abortion.<sup>54</sup> She expresses a discomfort with this that becomes apparent when she teaches law students about abortion legislation.<sup>55</sup> She described that while her teaching strategy signals to certain disciplinary demands: she does not assert her own opinion but allows her students to “search for answers” through “the thrill of the debate, the tallying up of reasons in either direction as to where the balance of interests should lie”.<sup>56</sup> She goes on to say that while this may appear “harmless enough” because it is “part and parcel of our disciplinary method, of argument, contestation and adversarial practice”; she also suggests that this creates a perception of objectivity and neutrality that is false.<sup>57</sup> This, she argues, is because ideas about abortion and law “were arrived at by a very different set of materials which students rarely get a look into”.<sup>58</sup>

The assumption that the law is the legitimate realm for regulating (or producing) abortion practice is because of the illusion that the disciplinary method of law produces fairness and acts as *the* vehicle for justice.<sup>59</sup> Legislative and judicial disciplines involve methodologies that centre contestation, debate, reasoning and the balancing of interests, all of which are assumed to make laws as unbiased or as fair as possible.<sup>60</sup>

However, the fundamental problem with this assumption is that it obscures the ‘human’ forces that are seismic in the making of laws. Despite even the best efforts to be neutral or objective, the very fact that it is in law that the infrastructure of abortion is prescribed, is the product of

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<sup>52</sup> Ibid, pg. 207

<sup>53</sup> S.A Strauss. *Doctor, Patient and the Law: A Selection of Practical Issues*. (Pretoria: J L van Schaik Pty Ltd., 1980) pg .207

<sup>54</sup> Nicky Priaulx, “The Social Life of Abortion Law: on Personal and Political Pedagogy”, *Medical Law Review* vol. 25, no. 1 (2017), pp. 73-98.

<sup>55</sup> Ibid

<sup>56</sup> Nicky Priaulx, “The Social Life of Abortion Law: on Personal and Political Pedagogy”, *Medical Law Review* vol. 25, no. 1 (2017), pp. 75-76

<sup>57</sup> Nicky Priaulx, “The Social Life of Abortion Law: on Personal and Political Pedagogy”, *Medical Law Review* vol. 25, no. 1 (2017), pp. 74-76

<sup>58</sup> Ibid, pp. 74-76

<sup>59</sup> Ibid, pp. 73, 76

<sup>60</sup> Ibid

social, political, and institutional influences.<sup>61</sup> Forces that—because of the perceived ways laws are made and operate—get taken for granted and so often go unexplored.

Resorting to experts is a way to limit potential controversy. The knowledge and competences experts have grant them stronger epistemic authority and so they are perceived to make more informed decisions for the benefit of their communities

However, even if we accept that abortion is chiefly a medical term, it still has public—rather than specialist—meanings. Experts are a part of ‘the public’ too, and they are not immune to its discursive influence. According to Dr Chris Warton,

If you were a doctor [in 1970s SA] and you got struck off the register so you couldn’t practice [it was because of] the three As: which was adultery—don’t commit adultery with your patients—um, alcoholism and abortion. And if you did an abortion or a number of abortions in that context, you would be struck off the register.<sup>62</sup>

Dr Warton’s quote shows that, even if abortion has a medical meaning that differs from its social one, it still simultaneously carries the crude moralistic millstone that dominates its public life.

## **Expertise and Navigating Public Opinion: The First Trial of the New Constitutional Court**

Seeking abortion law reform through Parliament rather than the ConCourt was a deliberate strategy. The Right to Life in the Bill of Rights meant that abortion as well as capital punishment were potential issues for the court to pronounce on.<sup>63</sup>

Survey results from the 1970s and into the early 90s indicated that most of the SA population was “in favour of the death penalty”.<sup>64</sup> According to Hugh Corder, popular opinion informed how the Technical Committee on Fundamental Human Rights During the Transition handled the issue. The Technical Committee “deliberately refrained from pronouncing on the legality

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<sup>61</sup>Ibid.

<sup>62</sup> Interview with Dr Chris Warton, interview by Ronel Koekemoer, Plumstead, 30 October 2019, audio with author

<sup>63</sup> Interview with Professor Hugh Corder, Interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>64</sup> James Midgley, “Public Opinion and the Death Penalty in South Africa”, *The British Journal of Criminology* vol 4 (1974), pp.345-358; Interview with Professor Hugh Corder, Interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

of the death penalty” and felt that “this question should be left to the post-apartheid Constitutional Court”.<sup>65</sup>

The capital punishment question was the first case heard in the newly established ConCourt. In February 1995, the 11 Justices heard the case brought by two inmates on death row, T Makwanyane and M Mchunu.<sup>66</sup> The *State v. Makwanyane and Another* was well covered in the press and overwhelmingly, public opinion polls showed continued support for the death penalty. Despite this, on 6 June 1995, Chief Justice Chaskalson gave the unanimous judgment that the death penalty was unconstitutional.<sup>67</sup> This meant that the death penalty was inconsistent with SA’s 1993 Interim Constitution.<sup>68</sup> Specifically, they ruled that the death sentence amounted to “cruel, inhuman, or degrading treatment or punishment” which violated section 11(2) of the Constitution.<sup>69</sup>

For Corder, this pronouncement has a direct relationship to the issue of abortion at the time. Corder recalled that, “the Justices knew that the ToP issue was going to be coming up at some point [and so] relied less on the right to life than on three other rights”.<sup>70</sup>

Corder remembered that, as a legal professional, he found that interesting. Corder recalled professional opinion at the time, , where him and his colleagues speculated on the relationship between the death penalty judgement and abortion:

Because, um, are they [the ConCourt] keeping their powder dry for when somebody challenges abortion?...it allowed them, when the abortion issue came before them, to say, you know, ‘we’re not compromised by anything we said during the death penalty decisions.’<sup>71</sup>

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<sup>65</sup> Interview with Professor Hugh Corder, Interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>66</sup> P Chaskalson, “S v Makwanyane and Another”, *Southern African Legal Information Institute*, 6 June 1995, <http://www.saflii.org/za/cases/ZACC/1995/3.html>, pg. 1

<sup>67</sup> Ibid; Interview with Professor Hugh Corder, Interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>68</sup> Ibid

<sup>69</sup> P Chaskalson, “S v Makwanyane and Another”, *Southern African Legal Information Institute*, 6 June 1995, <http://www.saflii.org/za/cases/ZACC/1995/3.html>; Specifically Justice Chaskalson said the death penalty was “an inhuman punishment for it involves, by its very nature, a denial of the executed person’s humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state”.

<sup>70</sup> Interview with Professor Hugh Corder, Interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>71</sup> Ibid; eventually CTOP was challenged by Doctors for Life, but the ConCourt ruled that CTOP “was a reasonable and justifiable limitation on the right to life. And particularly, that it was an important factor in terms of gender and sex equality and the position of women in society”

For the purposes of this chapter, what also makes this case interesting is what it revealed about the law's role in mediating public opinion with expertise. Though "all 11 judges knew their opinion would be unpopular", they leaned on their expertise and its disciplinary parameters to legitimise their position.<sup>72</sup> The ConCourt relied on legal structure to support their position, however unpopular, as the perception was that "there are circumstances in which the courts, the judiciary must take a kind of morally principled stance".<sup>73</sup> Justice Chaskalson acknowledged public opinion in his judgement but highlighted that the court was not ransom to public opinion saying that "if public opinion were to be decisive then there would be no need for constitutional adjudication".<sup>74</sup>

In the context of the emerging democracy, this was especially important. Justice Bess Nkabinde said of the Makwanyane case that this was "the court saying, business is not going to be business as usual, we are now moving and changing our mind-set into the future".<sup>75</sup>

In an opinion piece published days before the court gave its judgment on the death penalty, Ken Owen tried to highlight that people must look beyond "questions like abortion and euthanasia where trendy opinion is likely to run counter to feelings on the death penalty".<sup>76</sup>

In seeking abortion law reform through parliament, public input was constructed as more desired than if it had been fought in the ConCourt. Halfmann suggests that "policies made in court are often less sensitive to public opinion and are often attacked by critics as undemocratic".<sup>77</sup> This is because justices and judges are appointed rather than elected and courts rely on legal precedence to guide their decisions. Conversely, political officials are elected and so are more receptive to "mass and elite opinion and more constrained by it".<sup>78</sup>

While the courts may not be seen as more democratic, court cases certainly attract public interest. When asked if implementing CTOP was policed in the hospital she worked in, Dr Janet Giddy said that the attitude of the staff was "bring it on, bring it on. If you want to take

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<sup>72</sup> Interview with Professor Hugh Corder, Interviewed by Ronel Koekemoer, Rondebosch, 12 July 2019, audio recording with author

<sup>73</sup> Ibid

<sup>74</sup> P Chaskalson, "S v Makwanyane and Another", *Southern African Legal Information Institute*, 6 June 1995, <http://www.saflii.org/za/cases/ZACC/1995/3.html>

<sup>75</sup> P Chaskalson, "S v Makwanyane and Another", *Southern African Legal Information Institute*, 6 June 1995, <http://www.saflii.org/za/cases/ZACC/1995/3.html>

<sup>76</sup> Ken Owen, "Judgement Day for Law's Right to Kill", *The Sunday Times* (Johannesburg), 19 February 1995

<sup>77</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg.24

<sup>78</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 207

me to court...we'll have a trial that will publicise the issue. And I think the health department and the government were reluctant to...it was far too sensitive".<sup>79</sup> Abortion on was not viewed so overwhelmingly favourably by the SA public. The decision to fight for CTOP in parliament speaks to the desire not only for there to be a regulatory framework around the legislation, but also to create or maintain the perception that liberalising abortion was part of the SA reconstruction as a liberal democracy.

## Medical Interests in the Making of CTOP

In the making of CTOP, ideology was tempered by medical expectation. Professor Cathi Albertyn of the RRA remembered that there was "a bit of a compromise" around the gestational limitations.<sup>80</sup> According to Albertyn "some people would have wanted much stronger request rights".<sup>81</sup>

"Request rights" were central to liberalising the abortion law. Under ASA, women could only terminate pregnancies for very specific reasons. CTOP differed from ASA by allowing for abortion *on request*. This meant that women could request a termination within a certain timeframe without having to provide a reason or prove anything. Albertyn highlighted that "some of [those involved] would have wanted abortion on request, I think, for a longer period than 12 weeks".<sup>82</sup> ARAG, for example, were adamant in their comment on the 1996 draft CTOP Bill that "second trimester terminations should be available to 22-24 weeks gestational age".<sup>83</sup> CTOP ultimately limited second trimester abortions at 20 weeks, and there is little archival evidence to suggest that those drafting the CTOP Bill did much to answer ARAG's concerns "about the second trimester clause as...it is not in the women's best interest".<sup>84</sup> For Albertyn:

We wanted to take away the procedural requirements, but we would have liked to enhance the ability of women to decide for longer. So we might have wanted to put

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<sup>79</sup> Interview with Dr Janet Giddy, interviewed by Ronel Koekemoer, Mowbray, February 2020, audio on record with author

<sup>80</sup> Interview with Professor Cathi Albertyn, interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April 2020, audio recording with author

<sup>81</sup> Ibid

<sup>82</sup> Ibid.

<sup>83</sup> *ARAG Comment on Draft CTOP Bill*, Abortion Reform Action Group (ARAG) Records, Killie Campbell Africana Library, University of Kwa-Zulu Natal, Durban; D Constant, J Kluge, J Harries, & D Grossman, "An Analysis of Delays Among Women Accessing Second-Trimester Abortion in the Public Sector in South Africa", *Contraception* vol.100, no. 3, (2019), pp. 209-213.

<sup>84</sup> Ibid

greater emphasis on abortion on demand or abortion on request beyond 12 weeks. Obviously, it has to have a health practitioner to actually do it for you, but you could have emphasised, I think you could have emphasised women's choice more.<sup>85</sup>

Pro-choice lobby groups compromised on this to retain support from the experts, because their support gave them authority they would not have had otherwise.

Albertyn pointed to a conversation with Dr Helen Rees of Planned Parenthood SA who argued

Very strongly, saying that if we wanted the society of gynaecology and obstetricians on board, [the trimester system] was the way we had to go. We had to balance doctor's obligation with women's rights and the trimester system was the best way to do it.<sup>86</sup>

Limiting request rights based on the trimester system has been controversial for pro-choice advocates. Legal scholar Joanna Erdman has argued that the "legal regulation of abortion by gestational age, or length of pregnancy, is a relatively undertheorized dimension of abortion and human rights".<sup>87</sup> Gestational limits have less to do with evidence-based health regulation and are predominantly about "struggles over ethical and political values, authority and power".<sup>88</sup>

Trimester limitations have significantly acted as a barrier to access. However, the arbitrary nature of these restrictions is hidden behind the guise of expertise that the lay public are not necessarily privy to. This is another example of how historicising CTOP highlights how different institutions biased the law in ways that hamper access.

Expert input is subject to similar subjectivities which have real world consequences for abortion access. The law and the medical field were not neutral institutions that have specialist knowledge that allows them to control abortion. For example, in the weeks leading up to CTOP's enactment, the old rules still applied. Women who would have been able to legally request abortion come CTOP's enactment on 1 February 1997, did not meet ASA's criteria. As one journalist mused:

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<sup>85</sup> Interview with Professor Cathi Albertyn, interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April 2020, audio recording with author

<sup>86</sup> Ibid

<sup>87</sup> JN Erdman, "Theorizing Time in Abortion Law and Human Rights", *Health Human Rights* vol. 19, no. 1 (2017), pg. 29

<sup>88</sup> Ibid

Even though it would be safer, cheaper and morally less controversial to terminate their pregnancies sooner, women who present themselves in two weeks' time will have been unable to do so earlier because they did not qualify under the old laws.<sup>89</sup>

As aforementioned, the trimester of pregnancy dictates not only why and how an abortion must be performed but also *by whom*. A medical doctor was the only person allowed to perform an abortion after 12 weeks of gestation.<sup>90</sup> What this has meant in practice is that doctors who are willing to provide surgical abortions in the public sector have had to exclusively become 'abortionists' because the demand for their services is so high.<sup>91</sup>

Crucial to note is that the preoccupation with gestational stage is not mainly about potential morbidity. Rather, the different elements that make TOPs so time-sensitive are determined by legislation, making abortion one of the few health-care procedures that is governed and regulated by a specific law.

Abortion remains inaccessible today because public facilities are overburdened and understaffed; women seeking TOPs must wait to access these services. According to an abortion provider at Marie Stopes, this waiting time is the main reason people resort to access in the private sector, despite the financial implications.<sup>92</sup>

Another provider echoed this:

Initially the main reason people didn't want to go to a public facility was because of the stigma. It's moved beyond that. Now, they don't want to go—there's still stigma that arises—but the main problem, the main reason right now is this whole delay in getting the service.<sup>93</sup>

Despite the perceived neutrality of expertise, CTOP's reliance on a pro-choice healthcare system and gestational restrictions generated structural barriers to access. Even when women arrive "6 to 7 weeks [pregnant]...the patient will only be seen 6 weeks later".<sup>94</sup> By which time, the procedural requirements and criteria for access have changed.

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<sup>89</sup> Carmel Rickard, "Abortion D-Day Looms Too Late for Many Women", *The Sunday Times* (Johannesburg), 19 January 1997

<sup>90</sup> RSA, 1997, *Choice on Termination of Pregnancy Act*

<sup>91</sup> Public facilities are concentrated in urban areas and information about which hospitals do and do not provide abortions is often incorrect as the health department has not been able to consistently track service provision. In a study from 2017, it was found that out of a possible 5048 facilities legally capable of providing abortion, less than 200 were performing terminations.

<sup>92</sup> Interview with MS, interview by Ronel Koekemoer, Belville, 3 August 2019, audio recording with author

<sup>93</sup> Interview with Pamela Moodley, interviewed by Ronel Koekemoer, Hout Bay, October 2019, audio with author

<sup>94</sup> Interview with MS, interview by Ronel Koekemoer, Belville, 3 August 2019, audio recording with author

Women seeking abortions also go to private facilities in the hope that they can abort even though they are over the gestational limit. Another provider from Marie Stopes described how a patient “may say that she’s approximately 5 weeks pregnant...but then she gets here and she is already over 12 weeks”.<sup>95</sup>

According to a provider for Marie Stopes, people try to thwart the medical restrictions often by seeking private healthcare:

Many people that come in here [to Marie Stopes] are over 20 weeks [pregnant] and if I say ‘you must go book at the antenatal clinic’, you can see the disbelief in their face...And they become adamant and say ‘I am not so far along! Sometimes they say to you ‘I’ve taken the pills [to induce a medical abortion] already’ then I have to say ‘I’m sorry but you’ll have to figure that out for yourself, because if you’re going to abort, and you get caught, you’re going to prison.’<sup>96</sup>

ToPs are an extremely time-restricted health-care procedure. The gestational stage of the pregnancy determines the methods used to end the pregnancy, the kind of professionals allowed to perform the ToP, the reasons motivating the ToP, and the health risk to the pregnant individual.<sup>97</sup> The time-sensitive nature of the procedure means that obstacles to accessing abortion have consequences for the multiple lives involved in considering, undergoing, and performing ToPs.<sup>98</sup>

This structural barrier is directly related to CTOP. CTOP’s construction as a law to emancipate women from ASA (and apartheid) has meant that its constitutive and coercive elements has gone unexplored. Liberal laws like CTOP, whose purpose is to “achieve or maintain the health” of a person”, remains coercive.<sup>99</sup> Those seeking abortions, even though they have a right to do so, must adhere to the state’s rules.<sup>100</sup>

This is because of public perception that the law as discipline follows specific academic conventions and so can apply this knowledge to abortion in a way that is rational and fair and apolitical. It could be argued that law as an academic discipline is the subject of much debate and critique and there remains a widely held public faith in it as a neutral social institution that

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<sup>95</sup> Interview with MS, interview by Ronel Koekemoer, Belville, 3 August 2019, audio recording with author

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup>Frederick Schauer, “Chapter 3. The Possibility and Probability of Noncoercive Law’ in *The Force of Law*. (Massachusetts: Harvard University Press, 2015): pg. 27

<sup>100</sup> Ibid

represents authority and legitimacy.<sup>101</sup> Especially in a country which wants to be a democracy and takes on a constitution which provides legitimacy for the state system, in this way “law legitimises the existence of and power of the state...by suggesting that the state’s power comes from an external, impersonal source and not from the state itself”.<sup>102</sup>

## Who Counts as an Expert?

Despite the recognised centrality of abortion to women, women were not considered knowledgeable enough to be a part of the development of ASA. While this was met with criticism, then Minister of Health Dr Munnik said that

It is not necessary for women to serve on a committee if we want to sound the conscience of a nation. If one wanted to abolish capital punishment, one would not appoint a bunch of murderers to go into the matter.<sup>103</sup>

Similarly, in the parliamentary debate on ASA, Dr Fisher makes a similar claim in response to the “great deal of fuss [that] was made...about the fact that only men were appointed to the commission of enquiry” into abortion.<sup>104</sup> Fisher tried to claim that, at the time the commission was being set up, there were no women in parliament in the required positions to make up the committee. Helen Suzman, then the only woman in parliament, responded to Fisher<sup>105</sup>:

**Suzman:** *That is nonsense*

**Fisher:** *You said you did not want to serve on it.*

**Suzman:** *Nobody asked me”.<sup>106</sup>*

Dr Van Der Merwe from the National Party cuts through their exchange saying, “while those two honourable members settle that point, I want to say that I want to be honest...we did not ask the honourable member from Houghton [Suzman]. We did not need her”.<sup>107</sup> He goes on to

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<sup>101</sup> Iain Currie, Johan de Waal, Pierre de Vos, Karthy Govender, & Heinz Klug, *The New Constitutional & Administrative Law, Constitutional Law: Constitutional Law vol. 1*, (Lansdowne: Juta Law, 2002), pp. 5-9

<sup>102</sup> Ibid

<sup>103</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Books, 1993), pg. 40

<sup>104</sup> RSA, 1975, *Parliamentary Debates*, Abortion and Sterilisation Bill, col.487

<sup>105</sup> Ibid

<sup>106</sup> Ibid

<sup>107</sup> Ibid, col 487

say that while “the commission went out of its way to gather evidence from as wide a spectrum as possible” they “experienced...a general opposition to abortion on demand”.<sup>108</sup>

Though women were considerably more involved in the making of CTOP, there was still strong ideas about who could be considered an expert in reproductive rights and realities. ARAG wanted the law to only allow doctors to perform abortions.<sup>109</sup> The RRA felt that this would “limit women’s access to abortion facilities, especially in rural areas”.<sup>110</sup> Who was specialised enough to perform abortions was disputed.

According to Dr Eddie Mhlanga, SA Society of Obstetricians and Gynaecologists responded to ARAG’s draft Bill saying

We applaud this Bill and uh, we want to make [abortion] accessible. However, we think that parliament have gone the wrong way by saying registered midwives should also be allowed to terminate pregnancy. We believe that yes, [abortion] is a field where gynaecologists can work on, but we don’t think it would be safe for registered midwives to actually provide the service...actually the expertise that they had would not be what the midwives had.<sup>111</sup>

This expertise in the context of CTOP is especially important to consider. Mhlanga reminded me that in those early years of democracy “the manual vacuum aspiration was not yet popular; it had just been piloted in Zimbabwe”.<sup>112</sup> MVA abortions were significantly safer than the D & C method of abortion that was being used in SA. Mhlanga described it as “a blind procedure which, even in the best of hands, there could be complications”.<sup>113</sup> These complications were so common that Mhlanga recalled “there’s a saying that you’re never a gynaecologist until you have perforated a uterus”.<sup>114</sup>

However, some within the medical profession claimed that their expertise was grounds for them to refuse abortion as well as publicly decry it. One doctor commented that “it is vital that legislators do not arrive at the impression that consensus exists in the profession and second,

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<sup>108</sup> Ibid, col. 487

<sup>109</sup> ZA UCT BC1051\_CC\_CC3, Abortion/Women/Religion, Dot Cleminshaw Papers University of Cape Town Libraries: Special Collections (Manuscripts and Archives), Cape Town.

<sup>110</sup> ARAG Freedom of Choice Bill Draft, May 1995, ZA UCT BC1051\_CC\_CC3, Abortion/Women/Religion, Dot Cleminshaw Papers University of Cape Town Libraries: Special Collections (Manuscripts and Archives), Cape Town.

<sup>111</sup> Interview with Dr Eddie Mhlanga, interviewed by Ronel Koekemoer via phone call, Mowbray, August 2020, audio recording with author

<sup>112</sup> The North Carolina based Ipas were responsible for popularizing the MVA technique of abortion. 24:02

<sup>113</sup> Interview with Dr Eddie Mhlanga, interviewed by Ronel Koekemoer via phone call, Mowbray, August 2020, audio recording with author

<sup>114</sup> Worth noting is that registered midwives in SA are some of the only in the so-called ‘third world’ that must be registered nurses.

and most importantly, the public must not assume that the conclusions of the report suggest a new understanding of Hippocratic medicine”.<sup>115</sup>

Engagement is a crucial component of theorising the public because—even if we hold that anyone can enter the public sphere—the influence of their participation depends on how they are able to navigate the terms and quality of engagement within the public.<sup>116</sup> In Habermas’s historicisation, he argues that “the same economic situation” that made it desirable for “the masses” to participate in the political aspects of their lives that had previously been a preoccupation of an elite “denied them the level of education that would have enabled them to participate...on the level of bourgeois readers”.<sup>117</sup> What this means is that not all who participate have equal sway and a big part of this is the quality of engagement and an understanding of the rules of contestation.<sup>118</sup> But people who could not always participate on the same level can either learn these rules of engagement or they can disrupt them. And crucially as we shall see in the context of abortion, the arguments formed in the discursive interactions often accuse the ‘other side’ of a weaker quality of engagement by way of dismissing their particular point of view.

In terms of abortion, an interesting intersection of identities emerged that was able to gain authority and voice in the public. In the SA context, white men have held a very specific space of privilege in that their subjectivities have long been constructed as objective and so their expertise is seldom in question.<sup>119</sup> Doctors Claude Newbury and Chris Warton both drew on their expertise as medical doctors as well as the way they engage in public discourse to legitimise their pro-life views and activism. Both had qualified as doctors during apartheid (1964 and 1975 respectively) and both established that it was mainly this qualification that gave them the authority to not only hold a view on abortion, but to also articulate that view in the public arena.

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<sup>115</sup> Ashley Frank, “Legal Abortions Will Not Solve a Wider Social Ill”, *The Sunday Times* (Johannesburg), 11 June 1995

<sup>116</sup> Alan McKee, *The Public Sphere: An Introduction*, (Cambridge: Cambridge University Press, 2004), pp. 4-6

<sup>117</sup> *Ibid*, pp. 102-103

<sup>118</sup> *Ibid*

<sup>119</sup> Kristin Luker, *Abortion and the Politics of Motherhood*, (Berkeley: University of California Press, 1984), pp. 41-43

Doctor Warton emphasised throughout our interview that he was approaching the issue of abortion “as a medical doctor”.<sup>120</sup> Within the first two minutes of our interaction, he justified his involvement in pro-life activism by emphasising that while he held pro-life beliefs “as a religious person”, it was his medical knowledge that fuels his stance against abortion:

I got involved in the thing [the pro-life ‘side’ of the debate] because I’m an anatomist and have been teaching embryology for nearly 40 years and so the development of the embryo—I’ve written a couple of manuals on...I got involved in [the pro-life cause] because of—as a religious person too—I thought, I know as much about this as anybody can in terms of what you look like before you are born.<sup>121</sup>

It was Warton’s expertise that gave him the necessary clout to be a voice in the debate. As the above excerpt highlights, this expertise is medical and importantly that is enough. Warton’s notion that his involvement was warranted because he knew “as much about [foetal development] as anybody can”, speaks to how abortion is seen as being the domain of doctors. This is why a lot of the dominant language around abortion and the way the law sets up protocols about how abortion is to be managed is highly medicalised. Medical discourse has been appropriated by pro-choice, pro-life and politicians.

Importantly, it allowed doctors to take an interest in abortion without being suspected of ulterior motives or shameful secrets. Nurses, who were also presumed to have a level of knowledge about abortion, could not claim this knowledge on profession alone. Their gender complicated their relationship to abortion expertise. One interviewee who worked as a nurse said that though the nurses did know who to speak to, “it wasn’t the good girls or the good nurses that knew about these things or would say anything”.<sup>122</sup> Women are expected to be invested in abortion because of their personal reproductive potential. Dr Claude Newbury recounted a debate with a “female lawyer...in a television recording” and he took issue with the fact that “she [was] saying how absolutely normal abortion is and it’s of no consequence and it’s not, for example, a human being in the womb”.<sup>123</sup> His response to her was to ask if she had had an abortion. He

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<sup>120</sup> Interview with Dr Chris Warton (Pro-Life activist and medical doctor), interview by Ronel Koekemoer, Plumstead, 30 October 2019

<sup>121</sup> Interview with Dr Chris Warton (Pro-Life activist and medical doctor), interview by Ronel Koekemoer, Plumstead, 30 October 2019

<sup>122</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>123</sup> Interview with Dr Claude Newbury (founder of Pro-Life SA and medical doctor), interview with Ronel Koekemoer over phone call, 13 April 2020

went on to say : “she was so utterly shocked that I should ask her such an evil question! I said, you are advocating abortion, why are you finding it so shameful, why?”<sup>124</sup>

Newbury’s question is poignant, but not in the way he thought. It is not necessarily shame that the lawyer was responding to, but the idea that she had to have a private experience to validate her position and vocality about abortion. It is a part of the way these men assumed their ability to engage in the public arena, and the assumption that when women engage, their demands “are regarded as reflections of moral or familial commitments rather than on an authentically political stance”.<sup>125</sup> Even when women do get to engage in the public sphere, the issues and quality of engagement is seen as less sophisticated and come less out of “the seeds of radical consciousness” and more from concerns that are “distinctive to their sex”.<sup>126</sup>

## Medical Experts as Law Enforcement

In abortion, the specialist realms of law and medicine intersect in unexpected ways. The involvement of healthcare workers and institutions had unpredictable consequences for abortion access. Access to the required number of medical professionals was complicated and ASA essentially made healthcare workers act as law enforcement. One of the ways we can assess a law’s impact on abortion practice, is how experts get called on to police ToP t.<sup>127</sup>

In contexts where abortions are banned, or in ASA’s case, are legally limited, medical practitioners as law enforcement becomes an issue in that it is at odds with “the oldest of ethical principles—patient confidentiality”.<sup>128</sup> Another major problem with this is that there is not a standardised or even guaranteed way to tell if a woman is presenting with a self-induced abortion or a miscarriage.

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<sup>124</sup> Ibid

<sup>125</sup> Janet Siltanen and Michelle Stanworth, “The Politics of Private Woman and Public Man”, *Theory and Society* vol. 13(1), (1984), pp. 91-94

<sup>126</sup> Ibid

<sup>127</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018) pg. 46

<sup>128</sup> Ibid, pg. 47

Kathleen Dey identified as “pro-choice” and worked under Professor Eleanor Nash who was a renowned supporter of abortion.<sup>129</sup> As a psychiatric social worker, Dey worked at Groote Schuur Hospital’s Pregnancy Advisory Unit. There, she was charged with screening women who applied for abortions on psychiatric grounds. Dey explained that she had a method that was more permissive than her predecessors:

I had these sort of...little indicators for myself, when I interviewed people. Where I didn’t exactly say to them “will you go for a backstreet abortion if I don’t grant you this?”...subtly trying to illicit if that was something that would happen...If someone was just like ‘I’m just going to go for a backstreet abortion if you don’t give me this’ It meant that she would probably damage her mental health by the decisions that she made.<sup>130</sup>

However, despite her pro-choice politics, Dey admitted that she “actually refused quite a few abortions as well which was very hard”.<sup>131</sup> Her broad interpretation of the mental health clause drew attention from hospital leadership. She described being “called in to the head of the psychiatry department’s office” where she was chided for “granting a very high number of abortions”.<sup>132</sup> In order to measure her professional choices, the department head decided to “pick randomly one of your patients from the list” to see if they met the legal requirements for abortion.<sup>133</sup>

Dey felt that she “wasn’t just granting abortions because I was pro-choice”.<sup>134</sup> Rather, she “was actually being a proper little psychiatric social worker and furiously assessing the mental health of my patients and I had by then seen enough to compare one another”.<sup>135</sup> Dey recalled that when the HoD picked a test patient, and she knew “we were safe as houses” because of the severity of the patient’s mental illness.<sup>136</sup> However, Dey says what struck her was where the scrutiny came from:

The reason why there was this whole investigation was because the nurses complained. They now had a longer list of abortions to perform...And they hated it. They just had this horrible horrible job of doing all these abortions and I was the source of their pain

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<sup>129</sup> Interview with Kathleen Dey (a social worker working under ASA), interviewed by Ronel Koekemoer, Observatory, 16 May 2019

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> Ibid

<sup>135</sup> Interview with Kathleen Dey (a social worker working under ASA), interviewed by Ronel Koekemoer, Observatory, 16 May 2019

<sup>136</sup> Ibid

in a way. So they wanted to find out “who is this bitch who is making our lives such a fucking misery?”<sup>137</sup>

Dey’s story speaks to the complex and very human dynamics at play in the process of approving or denying abortion.

Abortion was one of the few medical procedures that required healthcare professionals to act as law enforcement. In other instances where doctors witnessed the effects of illegal behaviour, they did not call in or act as the police. In fact, for Dr Janet Giddy, what she saw as a doctor made her even more suspicious of the police. While working at King Edward Hospital in Durban, Giddy explained that:

People would be brought in who had been shot in townships, IFP and ANC, and you tried to put them in separate wards...there was a lot of political tension, a lot of the effects of the apartheid state were seen in hospitals.<sup>138</sup>

This fostered “a suspicion of the police...amongst the people [she] worked with. The police were not our friends”.<sup>139</sup> This had ramifications for women who presented with complicated abortions.

**RK:** *Were you called on to report these women to the police? Did people do that?*

**JG:** *Nobody supported the state. That’s why we didn’t rat on these women.*

## Healthcare Providers and Conscientious Objection

Chief among the barriers to abortion access was “the failure by the government to regulate what’s known as conscientious objection where health providers refuse to provide abortions”.<sup>140</sup> The issue of conscientious objection was contentious in the making of CTOP.<sup>141</sup> The RRA did not support how the government drafters were wording or conceptualising a

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<sup>137</sup> Ibid

<sup>138</sup> Interview with Dr Janet Giddy (medical doctor who worked at King Edward Hospital) Interviewed by Ronel Koekemoer, Mowbray, February 2020

<sup>139</sup> Ibid

<sup>140</sup> Amnesty International, “Barriers to Safe and Legal Abortion in South Africa” 1 February 2017, available at <http://www.refworld.org/docid/5891b0f94.html>, accessed 24 June 2017.

<sup>141</sup> Rachel Rebouché, “The Limits of Reproductive Rights in Improving Women’s Health”, *Alabama Law Review* 63 (2011), pg. 28; while conscientious objection was not in the final draft of CTOP, provincial health departments have included their own form of a refusal clause. For example, in the policy guidelines in the Western Cape, the issue of conscientious objection is framed as a constitutional right and they are required to “respectfully refer” the woman on.

refusal clause.<sup>142</sup> A 1995 draft of the law included a conscientious objection clause.<sup>143</sup> It stipulated that a medical practitioner had no “legal duty...to participate in an abortion to which [they] have a conscientious objection”.<sup>144</sup> However, it also prescribed that the refusing practitioner “shall be obliged to refer the woman”.<sup>145</sup> The notion of referring women met resistance by pro-life medical practitioners. One doctor explained that she did not “want to be involved in any way whatsoever, and if I refer somebody to somebody else, I haven’t done it but I have sort of set that process in motion”.<sup>146</sup> Legal scholar Rachel Roubche argues that the omission of a conscientious objection clause means that constitutes conscientious objection is unclear.<sup>147</sup> Charles Ngwenya argued that those wishing to refuse participation could lean on an interpretation of their constitutional rights.<sup>148</sup> For Dr Claude Newbury, the absence of a refusal clause meant he left the country for fear of having to be involved in a ToP referral.

One of the legacies of the law was a lack of healthcare-worker participation from nurses. The result was that, when the law came into effect, there was (and remains) a major problem in finding enough personnel to perform abortions to meet the demand. Pen-Kekana remembered this challenge when trying to implement the law saying that nurses and midwives voiced that “nobody really wanted to [perform abortions], so if [a nurse or midwife was] prepared to do it, then [they] got lumped with doing it all the time, got stigmatised in the facilities and [they said that] maybe just because you were prepared to do it sometimes didn’t mean that you wanted to do it all the time”.<sup>149</sup> She sums this up by saying that while some “were prepared to do it...they didn’t want it to be their full time job”.<sup>150</sup>

The state responded to this major staff shortage by encouraging primary healthcare workers to attend Values Clarification Workshops. In the words of my interviewee Loveday Penn-Kekana, who said that calling the workshops “values clarification” “was such a weird

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<sup>142</sup> Ibid

<sup>143</sup> Abortion Reform Action Group (ARAG) Archive, University of Cape Town Manuscripts and Archives, Cape Town

<sup>144</sup> Ibid

<sup>145</sup> Ibid

<sup>146</sup> Interview with Dr Janet Giddy (medical doctor who worked at King Edward Hospital) Interviewed by Ronel Koekemoer, Mowbray, February 2020

<sup>147</sup> Rachel Rebouché, “The Limits of Reproductive Rights in Improving Women’s Health”, *Alabama Law Review* 63 (2011), pg. 28

<sup>148</sup> Charles Ngwenya, “The History and Transformation of Abortion Law in South Africa”, *Acta Academia*, vol.3 (1996), pg.34

<sup>149</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>150</sup> Ibid

terminology”.<sup>151</sup> While she held that the workshops were important, she says that the labelling was an appeal to peoples values “to make you do things” was uncomfortable from a pro-choice perspective.<sup>152</sup>

## **Abortion Without Experts:**

### **Backstreet Abortions in the Making of CTOP**

The dangers of ‘backstreet abortions’ was central to justifying CTOP. The argument was that abortions occur regardless of legality. If abortion laws criminalise or severely restrict access, people wanting to terminate pregnancies will have to do so illegally and through channels that could put their health and lives at risk.<sup>153</sup> This section examines how this argument was used as a political tool. The backstreets, where illegal and often unsafe abortions were happening, also represented a venue of law reform in the making of CTOP that has had legacies for abortion access.

This backstreet abortion argument was the main offensive of the pro-choice lobby and the ANC. Professor Rachel Jewkes headed the MRC at the time and was involved in the “absolute key research to generate knowledge around...termination of pregnancy and legal abortion”.<sup>154</sup> This research was to inform “the policy debates that were going to take place around new legislation”.<sup>155</sup> The MRC’s project primarily investigated the public health ramifications of incomplete abortions. So, while the aim was to find data to inform policy on legal abortions, the framework for that research was mainly focussed on the impacts of backstreet abortions. Jewkes described the different components of the research:

There was a national study of incomplete abortions that was collected in a random sample of hospitals...looking at pregnancy and morbidity women were experiencing [by having backstreet abortions]...and then there was an economic piece that was trying

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<sup>151</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>152</sup> Ibid

<sup>153</sup> RE Mhlanga, “Abortion: Developments and Impact in South Africa”, *British Medical Bulletin* vol. 67, (2003), pg.116

<sup>154</sup> Interview with Professor Rachel Jewkes (head of MRC and pro-choice activist, medical doctor). Interview by Ronel Koekemoer, Matroosfontein, 9 July 2019

<sup>155</sup> Ibid

to do modelling around the costs to the health sector of treating incomplete and complicated abortions.<sup>156</sup>

From this research, the MRC estimated that of the women presenting at hospitals with incomplete abortions, “425 die every year as a result of septic abortions, and 12 847 can be regarded as having undergone an abortion in unsafe conditions”.<sup>157</sup> The ad hoc Committee on Abortion leaned on the “specialist” knowledge generated from this research to appraise the “conflicting claims” coming from public submissions.<sup>158</sup> The Committee used the MRC’s findings to support their recommendation for law reform.

In 2001, Professor Cathi Albertyn published a detailed account of how advocacy groups were involved in ‘gendering’ the political agenda during the transition.<sup>159</sup> Albertyn, who was involved in the lobbying process, said that her account was written “at a time when the law was working, and the results coming out of the law were positive”.<sup>160</sup> These positive results were that “maternal deaths had gone down” and more women were accessing legal abortion services.<sup>161</sup>

Backstreet abortions were indisputably dangerous were a direct consequence of ASA’s restrictiveness. However, very little research on abortion in SA acknowledges that the backstreet abortion argument was also a powerful political tool. Recognition of this is crucial as reliance on this argument had consequences for how medical expertise was grounded in CTOP. There are consequences for abortion practices when they are regulated by law; both when abortion is constructed as a crime or as healthcare.<sup>162</sup>

Changes in reproductive medicine has drastically reduced the need for medical infrastructure. Misoprostol, mifepristone, MVAs, and ultra-sound technologies have drastically altered the safety of abortion and consequently, abortion has become more accessible outside of biomedicine. Even in countries that prohibit abortion, the illegal availability of abortion drugs

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<sup>156</sup> Ibid

<sup>157</sup> Agenda, “Changes in Abortion Law Recommended”, *Agenda: Empowering Women for Gender Equity* (1995) pg. 53

<sup>158</sup> Agenda, “Changes in Abortion Law Recommended”, *Agenda: Empowering Women for Gender Equity* (1995), pg. 53

<sup>159</sup> Professor Albertyn is a legal scholar and activist and was one of the founding members of the Reproductive Rights Alliance (RRA), a civil society organisation who were instrumental in drafting CTOP, pushing it through parliament and monitoring its implementation in the early years of the law.

<sup>160</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

<sup>161</sup> Ibid

<sup>162</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 15

has made legal abortion “a non-issue”.<sup>163</sup> Today, according to abortion provider Dr Alblas, “going to the dentist might be more dangerous” than terminating a pregnancy.<sup>164</sup>

CTOP was developed before these advances were popular in SA.<sup>165</sup> Crucially, these advances were unpopular because of their potential to dilute clinical autonomy. Mifepristone, for example, had been used in France since the 1980. Misoprostol and mifepristone were being used in SA’s backstreets. When the ad hoc Committee on abortion invited submissions in 1995, the pro-life lobby took issue with the “use of prostaglandins and RU486”.<sup>166</sup> In early 1998, then health minister Dr Nkosazana Dlamini-Zuma was embroiled in a “battle of wills” between her and the Medicines Control Council.<sup>167</sup> A part of the conflict was over Misoprostol, an “anti-ulcer agent” that was much cheaper and safer than D & C procedures.<sup>168</sup> The medicines control council refused to approve misoprostol’s safety.

Similarly, D & Cs were preferred in SA over the MVA method of termination.<sup>169</sup> The reluctance to embrace more demedicalised technologies had much to do with fears about taking abortion out of clinical settings.<sup>170</sup> Despite being used successfully as an illegal abortifacient in many parts of the world, SA’s medical institutions were reluctant to experiment with the legal possibilities of these technologies.<sup>171</sup>

Awfulising illegal abortions was instrumental in liberalising abortion laws in multiple contexts. Importantly, however, this further naturalised the relationship between medical expertise and abortion. This, in turn, has stifled developments that could make abortion more accessible. Didier Fassin warns that moral sentiments that “nourish” and “legitimise” the practices of humanitarian governments ascribe victimhood to aborting women by fixing them within an analytic of “the disadvantaged and the dominated”.<sup>172</sup> This will be further explored in Chapter

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<sup>163</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018) pg. 8

<sup>164</sup> Interview with Dr M Alblas (a second trimester abortion provider who was involved in implementing CTOP). Interview by Ronel Koekemoer. Observatory, Cape Town, 2019.

<sup>165</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd, 2017), pg.10

<sup>166</sup> Agenda, “Changes in Abortion Law Recommended”, *Agenda: Empowering Women for Gender Equity*, (1995), pg. 54

<sup>167</sup> Chris Barron, “Why Zuma Wants to Sign Medicines Council’s Death Certificate”, *Sunday Times*, 29 March 1998

<sup>168</sup> Ibid

<sup>169</sup> Ibid

<sup>170</sup> L.L Wynn & Angel M. Foster, *Abortion Pills, Test Tube Babies, and Sex Toys: Emerging Sexual and Reproductive Technologies in the Middle East and North Africa* (New York: Vanderbilt University Press, 2016), pg. 54

<sup>171</sup> Ibid, pg. 20

<sup>172</sup> Didier Fassin, “Humanitarianism as a Politics of Life”, *Public Culture* vol. 19(3), (September 2007)

4, but for the purposes of the backstreet abortion argument, constructing aborting women as victims undermines the autonomy that laws like CTOP seemingly enable.

The ‘backstreets’ were not homogenous spaces. Methods of termination varied.<sup>173</sup> “Backstreet abortionists” could be anyone; from medical doctors, matriarchs, opportunistic laypeople, to traditional leaders.<sup>174</sup> Many women ‘started the process’ themselves by using laxatives, over-the-counter medicine, herbs, and house-hold cleaning products.<sup>175</sup> While these self-induction methods were no doubt dangerous, they also reflected shifts in knowledge about ToP practices.

Jewkes spoke about this in our interview. She recognised that “the interesting framing at the time” was grounded in “previous historical work” about dangerous backstreet abortions.<sup>176</sup> In doing the research, came “the realisation that, um, people inducing their own abortion...had been going on throughout history”.<sup>177</sup> Part of this realisation was that the ‘dangerous backstreet argument’ was a construction in a particular context. She goes on to say:

Although we sort of think about that backstreet abortions, of that...image of, you know, the coat hanger...in fact, that isn’t what had been taking place. What had largely been taking place mostly involved, um, some form of ingestion of medical substances...[in many cases] abortion was...seen as a bodily issue that needed to be dealt with...that wasn’t really very different from the ingestion of medicine for any other health problem.<sup>178</sup>

Similarly, women would induce their own abortions but involve the formal medical arena in ways ASA did not intend. Commonly, women would ingest substances or “do enough damage” and start bleeding and “end up going to the doctor anyway. But then it’s already done”.<sup>179</sup> A significant portion of the illegal abortion industry in SA in the early 90s was institutionalised and very different from visions of bicycle spokes or knitting needles.

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<sup>173</sup> Didier Fassin, “Humanitarianism as a Politics of Life”, *Public Culture* vol. 19(3), (September 2007)

<sup>174</sup> Ibid

<sup>175</sup> Ibid

<sup>176</sup> Interview with Professor Rachel Jewkes (head of MRC and pro-choice activist, medical doctor). Interview by Ronel Koekemoer, Matroosfontein, 9 July 2019

<sup>177</sup> Ibid

<sup>178</sup> Ibid

<sup>179</sup> Interview with Angel (woman who had illegal abortion under ASA). Interviewed by Ronel Koekemoer, Edgemoor, 20 January 2020

Many of those interviewed sketched the extensiveness and variety of the backstreet. One aborting woman mentioned that her and her girlfriends “used to go to this flat in Sea Point”.<sup>180</sup> Other women found ways to self-administer abortions at home.

Abortion under ASA also highlighted this. Despite the existence of one law, Professor Rachel Jewkes speaks about the abortion landscape in the early 1990s, dividing it by “a sector of the people who were doing it in extremely dangerous contexts with women dying and um, then there was this pretty ineffectual law [under which] there weren’t very many people at all who terminated and then there was the rich group who went to London”.<sup>181</sup>

Michelle Berg was a white woman who had an illegal abortion under ASA in 1992. Berg described the process of finding an abortionist as “easy”.<sup>182</sup> In Berg’s telling,

I was told about this doctor...you could go there and get a pill and it was at a healthcare clinic in a Black township. As a white woman, when I walked in, immediately [the doctor] kind of just said to me “when was your last period?”. And I said like, ‘you don’t even know why I’m here’. He said: “I know exactly why you’re here”.<sup>183</sup>

Crucially, Berg’s story highlights what law reformers already knew when advocating for CTOP: that restrictive abortion laws do not stop abortions, they make it harder for aborting women who are not white.

It is not necessarily these backstreets that the pro-choice lobby were referring to. However, it is important to highlight that there were spaces where women were having illegal abortions safely and, to a certain extent, on their own terms. The story of women being desperate was pervasive, but the story of women finding a way to procure a procedure that was not only illegal but also heavily stigmatised gets lost in that narrative.

Not seeing the dominance of tragic abortions as political distorts the reality and ignores the very real strategic and political elements of these narratives in the context of abortion law reform. Arguably, the backstreet where the public were accessing abortion and the backstreet where the public were accessing *abortion discourse* could be different. But it is the tragic backstreets that informed the legislative context of CTOP. In my interview with Rachel

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<sup>180</sup> Ibid

<sup>181</sup> Interview with Professor Rachel Jewkes (head of MRC and pro-choice activist, medical doctor). Interview by Ronel Koekemoer, Matroosfontein, 9 July 2019

<sup>182</sup> Interview with Michelle Berg (woman who had abortions in the 90s before CTOP). Interviewed by Ronel Koekemoer, Claremont, 9 January 2019

<sup>183</sup> Ibid

Jewkes, she said that “the key thing that made this touch the hearts of so many people at the time was the fact there were so many people who knew...who had school friends and whatever...who had died. There were so many stories”.<sup>184</sup> When we look at the backstreets as a venue of law reform, we can also get at why the law looks the way it does. Despite CTOP’s deliberate move away from the ‘red-tape’ of ASA that restricted access, CTOP is still a highly medicalised law that firmly situates abortion in the medical arena.

It was doctors who drove abortion law reform in 1975, and in the 1990s, doctors were a crucial part of the change again. However, this time, the narrative was one of personal experience before professional protection. In this way, the backstreets—however diverse in space and safety—were a crucial venue of change because they acted as a catalyst for many of the activists that would be involved in the making and implementation of CTOP.

Dr Eddie Mhlanga, who would become one of the major medical doctors involved in the making of CTOP has told the story of how he came to care about abortion. “A friend of mine” he said “died from a sceptic abortion”.<sup>185</sup> The fallout from the abortion had been so severe that she “collapsed” and was rushed to theatre.<sup>186</sup>

After her surgery, Dr Mhlanga’s friend was put in intensive care where he would visit “everyday...I would hold her hand and pray. After 10 days, she died”.<sup>187</sup> Dr Mhlanga has told this story publicly many times to defend his involvement in abortion law reform and his decision to be an abortion provider.

At the memorial service...that’s when it struck me that no woman deserves to lose her life and no mother deserves to lose her daughter, no child deserves to lose their mother because of an unwanted pregnancy. And that’s what changed me, because even during my prayers I would say “Lord, but I am no better than she is, she is a sinner and I am no less of a sinner”.<sup>188</sup>

This narrative is the product of a particular context. In this context, abortion—however morally wrong—can still gain sympathy from the public. In Mhlanga’s telling, the focus is not on an isolated alleyway or a backstreet butcher. Instead, the emphasis is on the physical aftermath of

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<sup>184</sup> Interview with Professor Rachel Jewkes (head of MRC and pro-choice activist, medical doctor). Interview by Ronel Koekemoer, Matroosfontein, 9 July 2019

<sup>185</sup> Interview with Dr Eddie Mhlanga (medical doctor, member of ANC committee of Health, pro-choice activist). Interviewed by Ronel Koekemoer via phone call, August 2020

<sup>186</sup> Ibid

<sup>187</sup> Ibid

<sup>188</sup> Ibid

a backstreet abortion. Mhlanga described that, during the surgery “we examined her and found that actually her uterus was now rotten...we found that the infection had spread, up behind the kidneys up to the diaphragm. We had to remove everything”.<sup>189</sup>

Another doctor swayed to the urgency of abortion law reform, Dr Margaret Hoffman, similarly described her encounter with backstreet abortion as “a turning point for me”.<sup>190</sup> She described how:

I think every third night, you would just be falling asleep, and you’d be on call to come to casualty [she mimics] “Dr Margaret Hoffman you’re wanted in casualty” and I would rush off—and now this is late in the evening. [There would be] a woman lying in casualty, in pain, shocked, very emotional, and I would try and reassure her and say she should calm down and we would try and help her as much as we could.<sup>191</sup>

But Dr Hoffman’s ‘turning point’ was not just the emotional suffering of these women. Doctors were witness abortions as physical traumas. Hoffman went on:

I would examine these women. And usually, you would find on pelvic examination, you would find gaping in the cervix, blood clots coming out, bleeding profusely and often the woman was writhing in pain. These were backstreet abortions.<sup>192</sup>

It was the physical trauma of these backstreet abortions that “made [her] decide”: “I had to do something about women’s health...we had to somehow get women to have safe abortions”.<sup>193</sup>

Marion Stevens, a nurse who was part of the WHP, described her experiences with backstreet abortions as “really traumatic”.<sup>194</sup> When women would present to the ward with complications from an incomplete abortion, she remembers that some of the medical staff would say, “you’re dirty, you’re evil, look what you’ve done to yourself”. Stevens felt “disjuncture between the hate of my peers” that “is very much why I still do the work I do today” in reproductive justice advocacy.<sup>195</sup>

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<sup>189</sup> Interview with Dr Eddie Mhlanga, interviewed by Ronel Koekemoer via phone call, Mowbray, August 2020, audio recording with author

<sup>190</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>191</sup> Interview with Dr Margaret Hoffman (Medical doctor involved in the making of CTOP and member of ARAG). Interviewed by Ronel Koekemoer via Zoom. Mowbray

<sup>192</sup> Interview with Professor Margaret Hoffman (Member of ARAG and medical doctors, pro-choice activist), interviewed by Ronel Koekemoer, Mowbray, via Zoom, May 2020

<sup>193</sup> Ibid

<sup>194</sup> Interview with Marion Stevens (reproductive justice activist and advocate, member of the WHP). Interviewed by Ronel Koekemoer, 2019

<sup>195</sup> Ibid

These arguments about the physical harms and traumas of abortion are important because protecting women from physical harm has been used by the state to both deny abortion and allow abortion.

Examining these narratives illustrated what Didier Fassin called “the inequality between these lives at the level of their meaning”.<sup>196</sup> This is not to say that backstreet abortions were ‘not that bad’ or to criticize the “good faith” of those who worked to end backstreet abortions.<sup>197</sup> However, these discourses dismember aborting women and reconstruct them as reproductive parts; a rotten womb or a damaged cervix. As Fassin argued, this “essentializes the victims: against the thickness of biographies and the complexity of history”.<sup>198</sup> The backstreet abortion argument as a political tool, while no doubt effective, reinforced aborting women as pawns in public debate rather than centring them as people in public life.

The way the backstreet was constructed as a venue that radicalised even the most religious doctor is significant. The aborting woman was a cause rather than an agent in these narratives. In Fassin’s critique, he recognised that often these “victims” accept the “logic of this construction, and they anticipate its potential benefits”.<sup>199</sup> Women seeking abortions have undeniably benefitted from more liberal laws and have been spared the potential horrors of the backstreet. However, a significant part of this reflected “a complex ontology of inequality”.<sup>200</sup> Where experts could use abortion as a cause, aborting women were not given the same parameters in which to forge meanings for abortion in the public debate.<sup>201</sup> In Fassin’s rendering, narratives like those mentioned above “establishes lives that can be narrated in the first person (those who intervene) and lives that are recounted only in the third person”.<sup>202</sup>

As will be elaborated on in Chapter 4, the first-person narratives of aborting women nuance the debate about abortion, whether legal or illegal. One aborting woman who had a backstreet abortion in 1989 described how:

Suddenly I started bleeding and I went to the bathroom and sat on the toilet for a while...bleeding and bleeding and there were really...pieces of blood coming out and it wasn’t good and I couldn’t see if anything else was coming out. I wasn’t sure what

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<sup>196</sup> Didier Fassin, “Humanitarianism as a Politics of Life”, *Public Culture* vol. 19(3), (September 2007), pg.507

<sup>197</sup> Ibid

<sup>198</sup> Ibid, pg. 512

<sup>199</sup> Ibid

<sup>200</sup> Ibid

<sup>201</sup> Ibid, pg. 519

<sup>202</sup> Ibid

was happening so...I got my measuring cup to see how much I'm bleeding and I was bleeding quite a bit.<sup>203</sup>

Saint had to be taken to hospital after the extensive blood loss. This illegal abortion was no doubt dangerous. Importantly, however, this did not detract from more positive emotions about the experience.

**Interviewer:** How did you feel? Seeing all the blood like that? Had you thought about how dangerous those kinds of abortions could be?

**RS:** I very clearly remember seeing all that blood and thinking, "Oh thank God this is happening! It's working. It's happening".<sup>204</sup>

## Conclusion

By the late 1960s, abortion put medical doctors and the apartheid state in an uncomfortable position.<sup>205</sup> Klausen and Hodes both highlight the role of the medical fraternity in dealing with abortion.<sup>206</sup> In the making of CTOP, the medical profession was similarly central to law reform. The significant shift is that they were less obvious about it. The dominance of medical expertise in both laws has had lasting impacts on the law and its implications for abortion access. Despite even the best efforts to be neutral or objective, the very fact that it is in law that the infrastructure of abortion is prescribed, is the product of social, political and institutional influences.<sup>207</sup> Professional knowledge is never neutral. Framing abortion as healthcare has been essential to reforming restrictive abortion laws in both democratic and non-democratic states. This is evident not only in the debates themselves, but in the research generated on

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<sup>203</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>204</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>205</sup> Ibid

<sup>206</sup> Rebecca Hodes, "The Medical History of Abortion in South Africa, c.1970-2000", *Journal of Southern African Studies*, vol. 9, no. 531, (2013)

<sup>207</sup> Nicky Priaux. "The Social Life of Abortion Law: on Personal and Political Pedagogy", *Medical Law Review*, vol. 25(1), (February 2017), pg. 76

abortion in SA that has focussed on health-related issues and framings of abortion.<sup>208</sup> This speaks to how different civil society actors and institutions like professions insert themselves or are inserted into policy debates.<sup>209</sup> Medicalising abortion allows the health professionals to exercise control over their roles as gatekeepers of abortion.<sup>210</sup>

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<sup>208</sup> C Macleod & T Feltham-King, "Young Pregnant Women and Public Health: Introducing a Critical Reparative Justice/Care Approach Using South African Case Studies. *Critical Public Health*, vol. 30 (2019), <https://doi.org/10.1080/09581596.2019.1573313>, pg. 55

<sup>209</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 66

<sup>210</sup> *Ibid*, 66



Where Dr Dlamini-Zuma called the abortion debate “robust”, popular media described it as “acrimonious”, “sterile”, and “bitter”.<sup>1</sup> Though abortion in SA did not draw the lethal fanaticism of North America’s ‘abortion wars’, the public debate was split along pro-choice and pro-life ideologies.<sup>2</sup> This has yet to be meaningfully discussed in academic work on CTOP. The preoccupation of this chapter is that, while the pro-choice vs. pro-life division is an oversimplification, the vocabularies and beliefs concomitant with these stances informed the making of CTOP. Similarly, abortion became part of the new regime’s agenda largely because of the pro-choice lobby’s strength and strategy.

## Contouring the Debate

From 1994, television programmes, magazines, newspapers, and radio shows dedicated substantial airtime to the question: “Is South Africa Pro-Life or Pro-Choice?”<sup>3</sup> This question, and the cultural wars it denotes, were an explicit consequence of the public life of abortion.<sup>4</sup> Along these two strands, stakeholders put forward arguments about abortion to convince and persuade others (central to Habermas’s conception of the public sphere).<sup>5</sup> The lexicons and beliefs of these two camps were mainstreamed in the making of CTOP in a way they had not been before ASA. This signalled an evolution from abortion being primarily a specialised issue, as discussed in Chapter 2.

Various scholars have argued that this bifurcation is reductionist. They rightly establish that pro-choice and pro-life social movements do not have stabilised, homogenous, and resolute views about abortion.<sup>6</sup> Portrayal in the public sphere suggests that people’s feelings about abortion fall exclusively within these parameters. Oral history, and its fascination with motivations destabilises this assumption. For example, in the making of CTOP, some of the

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<sup>1</sup> “Letters to the Editor”, *The Sunday Times*, 28 July 1996

<sup>2</sup> For more detail on the “abortion wars” in the North America context see Carole Joffe, *Dispatches from the Abortion Wars: The Costs of Fanaticism to Doctors, Patients, and the Rest of Us*. (Boston: Beacon Press, 2010)

<sup>3</sup> “Letters to the Editor”, *The Sunday Times*, 28 July 1996 & 11 June 1995

<sup>4</sup> One of the most comprehensive accounts of this is Kristin Luker, *Abortion and the Politics of Motherhood*, (Berkeley: University of California Press, 1984), where she examines the development of pro-life thinking.

<sup>5</sup> Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards and Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press, 2002), pg, 217

<sup>6</sup> Ziad Munson, *The Making of Pro-Life Activists: How Social Movement Mobilisation Works*, (Chicago: University of Chicago Press, 2008), pg. 2

pro-choice lobby felt strongly that ToP facilities “should be staffed by people really committed to providing abortions and not gynaecologists who were trying to earn extra money doing shift stuff”.<sup>7</sup> In reality, abortion providers do not necessarily have an ideological or moral commitment to women’s choice, nor would they describe themselves as feminist. In one exchange with an abortion provider for Marie Stopes:

**RK:** *When you were studying nursing, did you go in with a pro-choice mindset?*

**MS:** *To be honest, it was actually a thing of, nobody is going to tell me what to do. It wasn’t really about abortion. It was more a fact of ‘you’re not going to tell me what to do! So I will be for [abortion]’<sup>8</sup>*

Similarly, for Cheryllyn Dudley who joined the ACDP to fight the pro-life cause in Parliament, the relationship between her beliefs about abortion and what the law should do about it evolved.

My understanding of all these things...I would say (sighs) came out of fairly shallow understanding of the real issues on the ground. It was the principle, which was absolutely correct: that life is precious and sacred. But then applying that to the realities, you can’t stay that shallow or ignorant when you are dealing with the realities.<sup>9</sup>

This nuance is important for my purposes. Ideas that pro-life or pro-choice e camps have fixed beliefs suggests that, when they participate in law-making, they present their issues unaltered. The implication is that it is then the state that warps and misrepresents their position.<sup>10</sup> The consequences of this are that social movements as political institutions are not acknowledged.

While there is a shared recognition that *something should be done* about abortion, what exactly that is depends on differing ideologies.<sup>11</sup> To gain authority, many of these role-players use the law to legitimise their meaning of and strategy for abortion. Civil society groups representing pro-choice or pro-life ideologies are strategic in their engagement with the state. In this way,

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<sup>7</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray, audio recording with author

<sup>8</sup> Interview with Anon (abortion provider in the public sector), interviewed by Ronel Koekemoer, Khayelitsha, 10 March 2021, audio recording with author

<sup>9</sup> Interview with Cheryllyn Dudley (Former MP for the ACDP and pro-life activist), Interviewed by Ronel Koekemoer, Panorama, 17 July 2019

<sup>10</sup>Ziad Munson, *The Making of Pro-Life Activists: How Social Movement Mobilisation Works*, (Chicago: University of Chicago Press, 2008), pg. 2

<sup>11</sup> Dorothy McBride Stetson, *Abortion Politics, Women’s Movements, and the Democratic State: A Comparative Study of State Feminism*, (Oxford: Oxford University Press, 2001), pg. 2

pro-choice and pro-life movements are institutions that bias policy. These movements do not have resolute views on abortion. Rather, social movements and interest groups have multiple stakes and choose to foreground some over others to be politically strategic.

The language of these groups works to mobilise public support.<sup>12</sup> Part of this is to demonise the immoral ‘other side’ and in doing so, both stances position themselves as being under attack from the other.<sup>13</sup> This is key to why debating along these lines quickly becomes stagnant. Efforts by these camps have gone from making legislative change in the spirit of their ideology, to being primarily concerned about what the opposition is going to do next and how to foil these strategies.<sup>14</sup> Typical of these movements is to reduce complex ideas into opposing and irreconcilable paradigms. At the level of the word, pro-choicers and pro-lifers have differing positions and ideologies. What for pro-choicers is a foetus, pro-lifers call a baby, infant or ‘the unborn’. What the latter construe as murder, pro-choicers deem choice and empowerment. These competing vocabularies demonstrate how these camps are fundamentally at odds.. Ecofeminist Val Plumwood argued that by constructing their respective worlds as “oppositional and exclusive”, these groups position themselves as being dominant and morally correct where subordinate position is morally dubious.<sup>15</sup> This weakens one side of this dualism and distorts both.<sup>16</sup>

According to the report released by the Ad Hoc Committee on Abortion, the pro-life position could be distilled to the conviction that “life begins at conception (or even before) and that abortion therefore constitutes murder”.<sup>17</sup> Overwhelmingly, the figureheads of the pro-life lobby were white Christian men. Alongside using religious scripture to support their arguments, the group emphasised the physical harm the aborted baby would endure, saying that TOPs involved “cutting the foetus into pieces...crushing its head”.<sup>18</sup> Put in another way by one doctor I interviewed, she, though sympathetic towards aborting women,

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<sup>12</sup> Ziad Munson, *The Making of Pro-Life Activists: How Social Movement Mobilisation Works*, (Chicago: University of Chicago Press, 2008), pp.756-757

<sup>13</sup> Ken Plummer, *Telling Sexual Stories: Power, Change and Social Worlds*, (London: Routledge, 1995), pg. 165

<sup>14</sup> C Macleod & T Feltham-King, “Young Pregnant Women and Public Health: Introducing a Critical Reparative Justice/Care Approach Using South African Case Studies. *Critical Public Health*, vol. 30 (2019), <https://doi.org/10.1080/09581596.2019.1573313>, pp.1-17.

<sup>15</sup> Sigridur Gudmarsdottir, “Rapes of Earth and Grapes of Wrath: Steinbeck, Ecofeminism and the Metaphor of Rape”, *Feminist Theology*, 18 (2), (2010), pg. 20

<sup>16</sup> Ibid

<sup>17</sup> “Changes in Abortion Law Recommended”, *Agenda: Empowering Women for Gender Equity*, no. 26 (1995), pg. 54

<sup>18</sup> Ibid

My basic premise is kind of quite simple. I think I am intrinsically a pro-life kind of person, and I feel like foetuses are small children and they don't have rights. I don't think I intrinsically buy a woman's right to choose. Because I think it's like a woman and a baby.<sup>19</sup>

This belief encapsulates the parameters of the abortion debate. Each side adopts what they believe is a “simple” and intuitive belief about abortion and, in motivating their belief, they draw on the perceived failings of the other side.

Despite the ways the pro-choice lobby seemed unbothered by the pro-life movement, the archival records of Dot Cleminshaw reveal a more nuanced picture where there was a cognisance of the pro-life lobby. In Dot Cleminshaw's papers, a majority is devoted to what she called “religious crazies”.<sup>20</sup> The papers are organised according to prominent pro-life activists (most notably Peter Hammond and Dr Claude Newbury) as well as the pro-life lobby in North America and opposition to abortion by the Catholic Church.<sup>21</sup> Similarly, Professor Cathi Albertyn of the Reproductive Rights Alliance also commented that it was part of the pro-choice strategy to discredit individuals within the pro-life camp saying that “at that early stage it was a few white mostly male advocates. If you look at the people who challenged the law [in the Constitutional Court] were three Christian male organisations, the one had actually been involved in gun-running under apartheid in Mozambique. We had lots of dirt on them”.<sup>22</sup>

One paper in Cleminshaw's collection, a submission from *Students for Life* reads “A major factor which makes the incidence of pregnancy from forcible rape almost non-existent is that medical research indicates that women subjected to emotional trauma will not ovulate even where, under normal circumstances they would”.<sup>23</sup> Responding to this, Cleminshaw has written “Bosnia? Mary?”.<sup>24</sup>

In different historical contexts, one group is ultimately more successful in influencing state policy and public narrative. This has less to do with the ethics of a particular camp than with

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<sup>19</sup>Interview with Dr Janet Giddy (medical doctor who worked at King Edward Hospital) Interviewed by Ronel Koekemoer, Mowbray, February 2020

<sup>20</sup>Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa

<sup>21</sup>Ibid

<sup>22</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

<sup>23</sup> Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa.

<sup>24</sup> Ibid

politics and mobilisation. In the American case, the ongoing strength of the pro-life movement can be attributed to the “intensity of commitment” of its members and the way this has translated into resources.<sup>25</sup> Similarly, in various contexts, pro-life supporters make their beliefs about abortion “the sole determinant” in deciding who to vote for.<sup>26</sup>

In the making of CTOP, the pro-choice lobby was more impactful politically. Their devotion to the issue and their willingness to organise behind it meant that they had more success in both shaping and being involved in the policy-making process. A liberal abortion law was won partly because it was one step in “a vision of women’s potential and [the role of] reproductive autonomy in helping that along”.<sup>27</sup>

However, to echo Stoler’s premise, these categories are worth investigating as conventions of a time that are apt for historical analysis.<sup>28</sup> While research on abortion sidesteps these stances as populist narratives that oversimplify the issue, the assumption that these are well-tread ground with “predictable stories” and “familiar plots”, misses an opportunity for historic analysis. Similarly, to decry certain beliefs as populist and sensationalist, “seriously underestimates the power of the pro-life moral vision”.<sup>29</sup>

Abortion is an ideal ‘social issue’ where religion, science, and patriarchy compete for possession “over individuals’ sexual and reproductive lives”.<sup>30</sup> Casting abortion as ‘social issue’ means that there is a predictable vocabulary that forces people into either a ‘pro-choice’ or ‘pro-life’ stance. In setting up abortion as intrinsically polarising, it forces those who disagree with a particular idea to ‘pick a side’. However, as this thesis argues, being consigned to a stance is very often a oversimplification of individuals’ actual attitudes on the particular

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<sup>25</sup>Ziad Munson, *The Making of Pro-Life Activists: How Social Movement Mobilisation Works* (Chicago: University of Chicago Press, 2008) and see Kristen Luker, *Abortion and the Politics of Motherhood*, (Berkeley: University of California Press, 1984)

<sup>26</sup>Kristen Luker, *Abortion and the Politics of Motherhood*, (Berkeley: University of California Press, 1984), pp. 217-218

<sup>27</sup>Ibid

<sup>28</sup>Anne Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*, (Princeton: Princeton University Press, 2008)

<sup>29</sup>Anne Laura Stoler. *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*, (Princeton: Princeton University Press, 2008)

<sup>30</sup>L.L Wynn & Angel M. Foster, *Abortion Pills, Test Tube Babies, and Sex Toys: Emerging Sexual and Reproductive Technologies in the Middle East and North Africa* (New York: Vanderbilt University Press, 2016), pp. 7-9

issue.<sup>31</sup> It also says little about how their individual beliefs will be translated into policy or political participation.

One of the consequences of this is that this dualistic language “finds its way into court documents, oral arguments, and, ultimately, court opinions” and legislation.<sup>32</sup> Crucially, the setting up of abortion as an ‘issue’ that requires ‘choosing a side’ has an end-goal of establishing authority over that issue.<sup>33</sup> One of the ways this is done is to have state-backing. Law-making is crucial in this regard because it is in legislation “where moral economy meets political economy”.<sup>34</sup>

## **Between Foreign Lesbians and Religious Crazies<sup>35</sup>:**

### **Pro-Choice and Pro-Life Activists in the Making of CTOP**

In the American context, Carole Joffe argues that “the most fanatical elements of the anti-abortion movement have established the contours of the abortion wars”.<sup>36</sup> In SA, a similar thing was at play. It was the so-called “true-believers” who shaped the discourse around abortion.<sup>37</sup> Those with ‘strong opinions’ about abortions were the ones willing to put in effort to get involved in the policy-making process.<sup>38</sup> Similarly, people not as ‘concerned’ about abortion were less likely to raise ‘their voices’ as loudly for different positions at all.<sup>39</sup> So while the actors and organisations are not an exhaustive list of those involved in the debate, they represent key voices in the public sphere at the time.

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<sup>31</sup> Denise Ackerman, “Reproductive Rights and the Politics of Transition in South Africa”, *Journal of Feminist Studies in Religion*, vol.11, (1995), pg. 122

<sup>32</sup> Vincent Vecera, “The Supreme Court and the Social Conception of Abortion”, *Law and Society Review*, vol. 28, (2014), pg. 297

<sup>33</sup> L.L Wynn & Angel M. Foster, *Abortion Pills, Test Tube Babies, and Sex Toys: Emerging Sexual and Reproductive Technologies in the Middle East and North Africa* (New York: Vanderbilt University Press, 2016), pg. 8

<sup>34</sup> Ibid

<sup>35</sup> According to SA’s Students for Life organisation, “a suspicious number of [pro-choice] activists are foreign and/or lesbians”. Conversely, Pro-Choice activist Dot Cleminshaw referred to Pro-Life activists as “religious crazies”

<sup>36</sup> Carole Joffe, *Dispatches from the Abortion Wars: The Costs of Fanaticism to Doctors, Patients, and the Rest of Us*. (Boston: Beacon Press, 2010), pg. Xiv

<sup>37</sup> Ibid

<sup>38</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018), pp. 92-93

<sup>39</sup> Ibid

## The Pro-Choice Lobby

The major bodies involved in drafting the Bill that would eventually become CTOP were the Abortion Rights Action Group (ARAG), the Reproductive Rights Alliance (RRA) and the Women's Health Project (WHP). I was able to identify key role-players within these groups and interview them or consult archival material connected to them. These witnesses were credible because of how active they were in campaigning for CTOP and it is a process which was successful. In keeping with Joffe's argument, many of this group were interested in telling their story because of the way they prioritised the abortion issue in their political involvement.

ARAG had been active during the apartheid era and was the main group pushing not only for law reform, but also one that would be "women friendly". As June Cope documents, ARAG were unsuccessful in influencing the law in the 1970s.<sup>40</sup> However, in the 1990s, other activists seeking abortion law reform borrowed from ARAG's strategies and their proposed bill was more developed than other groups' (like the Black Sash) suggestions for a new law. Professor Albertyn, who had been a part of the RRA, spoke about the importance of learning from ARAG and that the two groups worked well together saying that "ARAG were just so delighted that there were young women coming in and driving this...they just thought we were fabulous, we were doing the thing that they could never do".<sup>41</sup> She goes on to highlight that "that particular group saw us as the end product of what they had been fighting for their whole lives. I don't think they felt that their turf was being taken, I don't think they were being territorial at all. They were kind of, handing over the mantle in a way".<sup>42</sup> Albertyn's sentiments speak to both continuities in existing interest groups as well as how future groups with similar interests build on and redefine issues based on and in response to the successes and failures of previous movements. A critique of the law because of its impact on abortion access is not to critique a movement or way of thinking about abortion after the fact. Instead, as Albertyn highlighted, these movements can be measured by how they compare to what has come before, what they have achieved in their time, as well as the longer legacies of their impacts.

The abortion conversation in the 1990s needs to be seen in the broader transitional context. Women's interest groups mobilized to ensure that women would be involved in political leadership. Similarly, these groups fought to ensure that women's interests were prioritized and

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<sup>40</sup> June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, (Pietermaritzburg: Haded Books, 1993)

<sup>41</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

<sup>42</sup> Ibid

protected by new legislative apparatus.<sup>43</sup> CTOP exemplifies a shift from a fight for women's involvement in the state as well as having their interests protected.<sup>44</sup>

The pro-choice lobby was informed by feminist politics, becoming politically active in the broader context of gendering the new SA. ARAG was the only explicitly single-issue advocacy network. The WHP were simultaneously involved in public health related issues like HIV/AIDS and violence against women. For the RRA, new abortion legislation was one part of a more comprehensive "reproductive rights package".<sup>45</sup>

For Albertyn of the RRA, abortion was the key issue to make feminism a part of the political agenda:

Intuitively to me it seemed the core issue of women's equality and liberation, that if we couldn't control our own bodies, then we were never really free...I mean, a lot of my colleagues went into GBV. It intuitively wasn't as important to me as abortion was. And it wasn't personal. I hadn't had an abortion. I hadn't sought an abortion in in the backstreet. It just seemed to be profoundly central to equality.<sup>46</sup>

However, to see abortion as "intuitively" feminist does not fully represent the history of feminism's relationship to abortion. That the pro-choice position is inherently feminist obscures how abortion was used for a wider social movement agenda. In the Marjorie Spruill's book *Divided We Stand*, she highlights how the reproductive rights 'issue' was one of the most divisive within the US women's movement of the 1970s.<sup>47</sup> At the National Women's Conference in 1977, activist Ann O'Donnell gave a speech saying "it is the antithesis of the feminist women's movement to oppress the less powerful. It is therefore absolutely ridiculous for people who call themselves feminists to suggest they kill their unborn children to solve our social problems".<sup>48</sup> She went on to say that "if we do not drive this flaw [abortion access] from

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<sup>43</sup>"Changes in Abortion Law Recommended", *Agenda: Empowering Women for Gender Equity*, no. 26 (1995)

<sup>44</sup> Ibid

<sup>45</sup> While there were many actors involved in this 'win' for women's reproductive health rights, this section will look specifically at these three organisations because they were the most prominent pro-choice social movements/interest groups in the making of CTOP. They are also important in the context of this research as they put forward and supported a precursory Bill that would later develop into CTOP.

<sup>46</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

<sup>47</sup>Marjorie Julian Spruill, *Divided We Stand: the Battle over Women's Rights and Family Values that Polarized American Politics*, (New York: Bloomsbury Publishing, 2017), pp. 246-261

<sup>48</sup> Ibid, pg. 247

what is called the feminist movement, this flaw would be responsible for the death of the women's movement".<sup>49</sup>

Similarly, in 70s SA, women's groups were by no means unified under the pro-choice stance. In a letter to the National Council of Women in 1978, Dolly Maister of ARAG accused the NCW of "evading responsible decision".<sup>50</sup> The NCW had stipulated they would not push member organisations to take a pro-choice stance.<sup>51</sup> According to Maister, this had political ramifications for changing the abortion law. Maister implored the NCW to take a pro-choice stance saying that

Recommendations [on law reform] must come from recognized women's groups—of which the NCW is best known, perhaps the largest in SA...it is up to you! Don't wait for the authorities to act while the authorities wait for you.<sup>52</sup>

Maister's appeal speaks to the power of civil society groups in influencing government. She ended the letter:

While our harping on the subject may be boring and seem insensitive, NCW must appreciate that the far-reaching crucial importance of women being able to legally, safely, limit their progeny surely warrants a thorough shaking of the NCW tree.<sup>53</sup>

The NCW responded to Maister's letter in December 1978. The letter reaffirmed their stance on individual organizational choice and betrayed a more conservative opinion. The letter reiterated that, according to the NCW,

The grounds for abortion should be those set out in its resolution of 1969...The NCW is opposed to any extension of these, and in particular strongly resists any legislation legalizing abortion on demand. The NCWSA further is convinced that the decision whether an abortion should be performed should be left in the hands of the medical profession.<sup>54</sup>

In response, ARAG refused to be a part of a NCW annual review called "the Year of the Child". Maister wrote to the president of the NCW

Although ARAG's relevance to the Year of the Child is that of the very root of child health and happiness—its aim being the birth only of those children assured of love and

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<sup>49</sup>Ibid

<sup>50</sup> Abortion Reform Action Group (ARAG) Records, Killie Campbell Africana Library, University of Kwa-Zulu Natal, Durban

<sup>51</sup>Ibid, *Letter from Maister to Grieve*, 26 May 1978

<sup>52</sup> Emphasis in original letter

<sup>53</sup> Ibid

<sup>54</sup>Ibid

care—we have decided not to join in your review marking this year. Our decision rests on the heavy-hearted thought that 1979 has seen little real contribution by any organisation in SA towards ensuring this basic start to child health and happiness. We would reconsider our position if the review would be retitled ‘The Year of the Wanted Child’.<sup>55</sup>

ARAG got involved straight out the gate during the transition sending the Parliamentary Select Committee on Abortion “our proposed Freedom of Choice (Abortion) Bill” which was “originally drafted by ARAG...and then presented to individual members of other organisations, university faculties and individuals working in the area of women’s health and rights”.<sup>56</sup> Arguably, the pro-choice lobby were not only better organized, but also could stand on the shoulders of organisations (most notably ARAG) which had organised around Abortion Law reform under apartheid.

## The Pro-Life Lobby

The pro-life lobby were made up of mostly white, Christian men. While the lobby were not religiously homogenous, most pro-lifers who sent submissions to the Committee on Abortion “quoted from the Bible to support their stand”.<sup>57</sup> According to Albertyn, “the same people were on the TV shows, the radio chat shows, the portfolio committee”. These included Dr Claude Newbury, Reverend Peter Hammond and Dr Chris Warton, with The ACDP being the most outwardly pro-life political party.<sup>58</sup>

The racial demographic of the pro-life movement was a major weakness. According to Albertyn, it was “only later that the face of the anti-abortion lobby became much more diverse”.<sup>59</sup> The critique that “they were a bunch of white people!” was damning. While the pro-choice campaign was also dominated by white women, the pro-life lobby were also slow to lean on the shifting racial and power politics of the day. According to Loveday Penn-Kekana of the RRA:

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<sup>55</sup>Ibid

<sup>56</sup> Ibid, *ARAG Papers Letter to Parliamentary Committee*, April 1995

<sup>57</sup> “Changes in Abortion Law Recommended.” *Agenda: Empowering Women for Gender Equity*, no. 26 (1995), pp. 51–59

<sup>58</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

<sup>59</sup> Ibid

They were using the very standard pro-life arguments...it was these white people [and they] didn't manage to sort of historically situate the argument. So they were just like 'oh, its wrong, you're killing babies'...and [the pro-choice lobby and the ANC] were like 'what have you ever done for black children?...If you really cared about children—you know—then why did you support apartheid?'<sup>60</sup>



A cartoon that appeared in the *Cape Argus* in 1996.

## How Diverse Was the Pro-Life Viewpoint?

Abortion legislation and its culture wars had racial as well gendered elements<sup>61</sup> The most explicit Black pro-life sentiment was expressed through the idea that abortion was contrary to Black morality. In the 1980s, the incidence of maternal morbidity amongst Black women was contrasted by the idea that Black women do not seek abortions.

<sup>60</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>61</sup> Barbara Baird, "Maternity, Whiteness and National Identity: The Case of Abortion". *Australian Feminist Studies* vol 21, no. 50, (July 2006), pg. 197

For example, in a women's column in a traditionally Black newspaper, one man wrote "hats off to our women. They are chaste compared to [white] women who are so permissive it is sickening".<sup>62</sup> The writer was reporting on a trip they made to London where they witnessed the effects of the British Abortion Act. Adding to this, Black women's morality was amplified by their struggle, with the commentator bemoaning that "permissive" white women had their "lives...made easier by abortion".<sup>63</sup>

The writer did not acknowledge that Black women could technically procure legal abortions in SA. This spoke to the depth of abortion inaccessibility for Black women at the time. By some accounts, there was little evidence to suggest that rural women knew the difference between legal and illegal abortions at all. This did not mean that Black women were not seeking abortions. In an agony aunt column in the same newspaper, one reader asked: "I am four months pregnant, and my parents have said that when the child is born, I must leave school. Is there a doctor who can help me get rid of this baby?".<sup>64</sup>

In the making of CTOP, there was a similar sentiment about abortion being anti-Black: Spider Mthembu wrote for the *Sowetan* and spoke about how "There's a new new condom in town. It is called abortion" and that amongst other negative coverage, it was "Westerners [who] invented abortion".<sup>65</sup> He equates the democratic dispensation not with liberation, but with moral degradation saying that "You will also be shocked to learn how many women in Parliament are divorced. This is not African culture and is totally unacceptable".<sup>66</sup> He ends his piece imploring readers: "Let us go back to our roots and do the Black thing".<sup>67</sup> According to Hodes, this thinking was common in Black and white communities during the transition. Democratic freedoms were viewed with apprehension and considered a calculated campaign to undermine traditional values and authority.<sup>68</sup> Mthembu's piece condemns Black women seeking abortion as not only being immoral, but also pandering to whiteness. He warned Black women that they must not fall prey to "westerners fighting for abortion rights".<sup>69</sup>

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<sup>62</sup>Vatiswa Ntshanga, "Love in the Grass", *Indaba*, 13 October 1983

<sup>63</sup> Ibid

<sup>64</sup> Anonymous, "Going Out...But We Have Never Made Love" *Indaba*, 6 January, 1983

<sup>65</sup> Spider Mthembu, *Sowetan* 2 December 1996, pg. 13

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Rebecca Hodes, "Too Many Rights? Reproductive Freedom in Post-Apartheid South Africa", *University of Cape Town Aids and Society Research Unit*, (2017), pg 5

<sup>69</sup> Spider Mthembu, *The Sowetan*, 2 December 1996, pg. 13

Abortion here is constructed as both anti-Black but also that it is a calculated strategy of “the power of darkness: white women will come to [Black women] parading in costume of women’s liberation. These are tactics designed by the enemy to divide [the] Black community and we must refuse to be part of the conspiracy against ourselves”.<sup>70</sup>

The sentiment that certain subjectivities visibilized in liberal democracies are ‘unAfrican’ is part of a technology of shaming.<sup>71</sup> It is also, as Malvern Chiweshe and Catriona Macleod argue, a colonial hangover of homogenising Blackness and Black culture.<sup>72</sup> Similarly, this viewpoint furthers the idea that struggles with abortion access and stigma can be directly attributed to the failure of the state to implement a liberal law. This implies that African states or attempts at democracy cannot ‘keep’ up with the righteousness of the West.

Dube addresses a similar argument made in relation to the Bill of Rights. He critiques the notion that human rights are Eurocentric and so “irrelevant to the needs of South Africans” by highlighting that, the ANC’s African Bill of Rights of 1923 “marked the birth of a local human rights movement in South Africa”.<sup>73</sup> This instrument concentrated on demands for freedom and equality (with an emphasis on land tenure) that were guaranteed within structures of “the law and justice”.<sup>74</sup>

Claiming that abortion is unAfrican also dismisses the historical record and the reality of abortion as a method of fertility control. In the making of CTOP, the Select Committee on Abortion raised concerns that there was a noticeable lack of “opinion of rural Black women on legal abortion”.<sup>75</sup> In the same vein, the literature from the pro-choice lobby at the time emphasised their success in garnering Black women’s involvement where the pro-life groups struggled because they were “mainly white men!”.<sup>76</sup> Black South Africans who were pro-life shared similar politics to the white men represented in the public sphere. Traditional leaders used their power to make pronouncements against abortion.

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<sup>70</sup>Shireen Hassim, “Nationalism, Feminism and Autonomy: The ANC in Exile and the Question of Women.” *Journal of Southern African Studies* 30, no. 3 (2004): pp. 433–55.  
<http://www.jstor.org/stable/4133903>

<sup>71</sup> See for example, Marc Epprecht *Heterosexual Africa*

<sup>72</sup> C Macleod and M Chiweshe, “Cultural De-colonization versus Liberal Approaches to Abortion in Africa: The Politics of Representation and Voice”, *African Journal of Reproductive Health*, 22(2), (2019), pp. 49-59

<sup>73</sup> Felix Dube, “Neither Adopted nor Borrowed: A Critique of the Conception of the South African Bill of Rights”, *PER*, vol.23, (2020), pg. 43

<sup>74</sup> Ibid

<sup>75</sup> ARAG Comments on the Question of Rural Women’s Opinion on Legal Abortion, May 1995

<sup>76</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

Black women were emerging as voices to challenge notions of conservative Black culture based on their experiences as Black women. Professor Nomboniso Gasa, who was then on the ANC Commission for the Emancipation of Women chided one pro-life traditional leader who claimed abortion was unAfrican:

If one looked at what is really happening in humble villages, if you go to the dongas, there are abandoned children there, you leaders were never really confronted with poverty or the problems of raising children which women have to accept.<sup>77</sup>

An area where abortion was contested among Black women was within the ANC as a liberation movement.<sup>78</sup> The accusation that the ANC “bulldozed” CTOP through parliament speaks to the ANC’s receptiveness to the pro-choice lobby. This support was instrumental. As Dr Mhlanga described: “the [health] minister was very supportive [in the lobbying process]. Some cases she would say, ‘you leave that one to me, I will handle that’”.<sup>79</sup> Amidst calls that most of the country were not in support of abortion on request, the ANC claimed that, because abortion was a part of their ‘ticket’, the majority support they received supported their reproductive rights agenda.<sup>80</sup>

Dudley offered another explanation based off experiences she had had with women in the ANC (“who were clearly not women who would kill their children”), who were in support of aborting rather than putting children up for adoption.<sup>81</sup> She attributed this attitude to the “hurts [of] those who have had to have abortions during the struggle and were trying to push that out of their consciousness”.<sup>82</sup> She recounts a story of an ANC committee chair who “had aborted over the time of the struggle, because what were your options in the camps and things”.<sup>83</sup> These kinds of abortion stories were quite prevalent according to Dudley:

You were pretty much a soldier, you were underground, you were across the border, you were in camps...there was a lot of hardships and a lot of cruelty...what you were

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<sup>77</sup> ARAG Comment on options of rural women May 1995

<sup>78</sup> As opposed to a political party.

<sup>79</sup> Interview with Dr Eddie Mhlanga (medical doctor, member of ANC committee of Health, pro-choice activist). Interviewed by Ronel Koekemoer via phone call, August 2020

<sup>80</sup> Ed O’Loughlin, “South Africa Abortion Law Puts ANC in a Corner”, *The Christian Science Monitor*, 7 November 1996, accessible via: <https://www.csmonitor.com/1996/1107/110796.intl.intl.3.html>

<sup>81</sup> Interview with Cheryllyn Dudley (Former MP for the ACDP and pro-life activist), Interviewed by Ronel Koekemoer, Panorama, 17 July 2019, audio on record with author

<sup>82</sup> Ibid

<sup>83</sup> Ibid

doing was too important to think about [yourself]. It was survival mode and who would want their child to suffer.<sup>84</sup>

The ANC faces of the abortion lobby were then health minister Dr Nkosazana Dlamini Zuma, Dr Mantombazana Tshabalala-Msimang (then the deputy minister of Justice), Dr Abe Nkomo, and Dr Tshepo Motsepe. In June 1995, the ANC's *Mayibuye* newsletter, framed abortion according to the inaccessibility of ASA; citing statistics about the number of white women who had travelled to England to get abortions.<sup>85</sup> Highlighting that white women were able find safer means of getting around the restrictive ASA was part of the point that while ASA was largely inaccessible, the safety and ease with which women were getting backstreet abortions disproportionately disadvantaged and endangered the lives of disenfranchised Black women.<sup>86</sup>

Abortion law reform was part of the ANC's commitment to women's empowerment and gender equality.<sup>87</sup> But the relationship between reproductive politics and the ANC was a lot rockier in the lead-up to this commitment. After the 1976 generation entered the struggle in exile, there was a dramatic increase in the number of women and the authority of women's voices in struggle spaces.<sup>88</sup> Shireen Hassim argues that "the presence of women in MK had a major impact on gender debates inside the ANC".<sup>89</sup> In some ways, Dudley's anecdote about women seeking abortions within the context of the struggle has traces of this. Looking at reproductive politics within MK provides insight into how abortion eventually becomes a part of the ANC's women empowerment rhetoric.

Hassim further argues that women within MK who had been in exile were exposed to the reproductive rights conversations that were happening internationally and were not subject to the censure or conservatism of the apartheid state. Similarly, because many of these camps were in countries who had just achieved their own independence after struggle, there was consciousness of women in MK that "women's position did not automatically improve after

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<sup>84</sup> Interview with Cheryllyn Dudley (Former MP for the ACDP and pro-life activist), Interviewed by Ronel Koekemoer, *Panorama*, 17 July 2019

<sup>85</sup> Bathibile Dlamini, "The ANC's Approach to Abortion", *Mayibuye*, June 1995

<sup>86</sup> *Ibid*

<sup>87</sup> "South Africa: Black Women Demand Abortion Rights." *Off Our Backs* 20, no. 10 (1990), pg. 7 <http://www.jstor.org/stable/20833259>.

<sup>88</sup> Shireen Hassim, "'A Conspiracy of Women': The Women's Movement in South Africa's Transition to Democracy", *Social Research* 69, no. 3 (2002): pp. 693–732, <http://www.jstor.org/stable/40971570>

<sup>89</sup> Shireen Hassim, "Nationalism, Feminism and Autonomy: The ANC in Exile and the Question of Women." *Journal of Southern African Studies* 30, no. 3 (2004): pp. 433–55, <http://www.jstor.org/stable/4133903>

independence”.<sup>90</sup> Instead, women within these spaces questioned whether women would automatically gain equality with national liberation<sup>91</sup> MK leader Thenjiwe Mtintso said in an interview that “for women comrades, ‘normality’ meant going back to the kitchens. We began to be quite worried about what liberation was going to offer”.<sup>92</sup> Even with the presence and leadership of women, there were many ways that women remained excluded. Mtintso said that while men were called ‘the soldiers’, women were dubbed ‘*umzane*’ (the women).<sup>93</sup> In this context, ‘women’s issues’ was seen as trivial. Mtintso says “we only discussed [women’s issues] insofar as there are specific needs for women. We were not talking about politics”.<sup>94</sup>

The ‘specific needs for women’ cannot be ignored, and often, policies dealing with these make them political in bringing them in to the public sphere. A large part of these needs had to do with reproductive justice. The Women’s Section (a precursor to the ANC Women’s League) set up childcare for children whose mothers were in the camps. Similarly, there were rules in place that specifically applied to women’s reproduction. However, in terms of getting pregnant, Hassim states that “women members of MK were forbidden to fall pregnant”.<sup>95</sup> In Angolan liberation camps, women were “inserted with IUDs as a matter of policy”.<sup>96</sup> The justification for this, visible in the Women’s Section newsletter *Voice of Women*, was so that “Childbirth does not become the devastating route to demobilization”.<sup>97</sup> Another discourse within the MK Women’s Section was to “fight for...the Right to Mother-hood!” (second only to the ‘right to work’).<sup>98</sup> Interestingly, this right entailed the fight for maternity rights as well as abortion access.<sup>99</sup> The right to abortion was positioned as a form of reproductive freedom in that “all women must demand the right to choose whether to have a child or not!”.<sup>100</sup>

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<sup>90</sup> Shireen Hassim, “‘A Conspiracy of Women’: The Women’s Movement in South Africa’s Transition to Democracy”, *Social Research* 69, no. 3 (2002): pp. 693–732, <http://www.jstor.org/stable/40971570>

<sup>91</sup> Hassim, Shireen. “Nationalism, Feminism and Autonomy: The ANC in Exile and the Question of Women.” *Journal of Southern African Studies* 30, no. 3 (2004): 433–55. <http://www.jstor.org/stable/4133903>. Pg. 436

<sup>92</sup> Shireen Hassim, “Nationalism, Feminism and Autonomy: The ANC in Exile and the Question of Women.” *Journal of Southern African Studies* 30, no. 3 (2004): pp. 433–55, <http://www.jstor.org/stable/4133903>

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Kameron Hurley, *The Voice of Women? The ANC and the Rhetoric of Women’s Resistance, 1976-1989*, unpublished MA Thesis, pg. 48-49

<sup>99</sup> Ibid

<sup>100</sup> Ibid

Within SA, across racial and gendered lines, there was a variety of views on the pro-choice and pro-life spectrums. It also hints at the fact that the dominance of a particular discourse does not wholly dictate abortion practices. These elements need to be analysed because of the way these camps seek to change laws in such a way that reflects their position.

## **Abortion and the Right to Life**

Abortion attracted public opinion because it concerned “two of the most moralized areas of society”: sex and the beginning of life.<sup>101</sup> In chapter 2, I examined how the right to life was navigated in the case of the death penalty, and how the new ConCourt was sensitive to the potential of the right to life in the abortion debate. An extension of this sensitivity is evident in the right to life in the context of SA’s Bill of Rights. During SA’s transitional period, a Bill of Rights was developed as one of the first legal instruments to enshrine the liberal democracy.<sup>102</sup> Given the centrality of life to the debate, one of the first frontiers of SA’s abortion wars was over the right to life in the incoming Bill of Rights. The Technical Committee on Fundamental Human Rights during the Transition (The Rights Committee), called for public submissions on how to formulate different proposed rights.<sup>103</sup>

The right to life attracted pro-choice and pro-life submissions. The pro-choice submissions were concerned that this right could be used to limit abortion. Pro-choice groups urged for “access to legal abortion” be protected in the future Bill of Rights.<sup>104</sup> The submissions posited mainly two different ways of doing this: either making sure that the right to life did not interfere with a woman’s right to choose abortion or that the Bill of Rights should specifically include a clause protecting aborting rights.<sup>105</sup>

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<sup>101</sup> L.L. Wynn & Angel M. Foster, *Abortion Pills, Test Tube Babies, and Sex Toys: Emerging Sexual and Reproductive Technologies in the Middle East and North Africa* (New York: Vanderbilt University Press, 2016) 14

<sup>102</sup> See Felix Dube’s fascinating argument about the origins of this

<sup>103</sup> Interview with Professor Hugh Corder (Constitutional law professor involved in drawing up SA’s constitution and Bill of Rights). Interviewed by Ronel Koekemoer, Rondebosch, 2019

<sup>104</sup> *The Women’s Lobby Submission to Technical Committee on Fundamental Human Rights During the Transition*, 20 July 1993

<sup>105</sup> *Ibid*

The WHP sent a submission saying that “we would like to alert you the importance of dealing with the question of abortion in the Bill of Rights”.<sup>106</sup> The WHP were concerned that the right to life would be used by the pro-life lobby “to win either a tightening of the existing law, or to prevent it being relaxed”.<sup>107</sup>

The Black Sash called on the Rights Committee to add a clause that stipulated “the right to life should not derogate a woman’s right to choose an abortion should she wish to do so”.<sup>108</sup> This submission was sent in April 1993. By August that year, the pro-choice lobby were suspicious of ideological support from the Rights Committee. Jenny Clarence of the Black Sash sent correspondence to the committee saying that the way the right to life had been formulated with “grossly inadequate consultation with woman on the issue”.<sup>109</sup> The Black Sash insisted that “until appropriate abortion reforms are in place it [the right to life] be excluded from the Bill”.<sup>110</sup>

However, the pro-choice lobby were quick to point out that they were not necessarily pro-abortion. In a submission by Barbara Klugman to the Rights Committee, Klugman emphasised that:

While we are aware that the issue evokes debate from a religious perspective, we are also aware that thousands of women have abortions every year under unsafe conditions...The debate is thus not whether or not women should have abortions, but whether they should have safe or unsafe abortions.<sup>111</sup>

Klugman, as part of the WHP, saw the politics of choice from a public health perspective. However, other actors in the pro-choice group similarly downplayed more radical feminist politics. This, as aforementioned, is part of the structurally defensive position pro-choicers had to take. Though effective at the time, this would stain future efforts to strengthen reproductive freedom.

The right to life was a powerful site of battle between the pro-choice and pro-life groups. This highlights the value of examining the ideological underpinnings of these movements. Though

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<sup>106</sup> *Women’s Health Project submission to Technical Committee on Fundamental Human Rights During the Transition*, (26 July 1993)

<sup>107</sup> Ibid

<sup>108</sup> Black Sash Submission to technical committee on Fundamental Human Rights During the Transition,( 4 April 1993)

<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Ibid

reductionist, their languages make their way into fundamental apparatuses of state. Similarly, it shows the centrality of the law and rights-seeking to these stances.

## The Legal Battle Lines

For social movements to be politically impactful they must insert their conception of an issue into the broader policy agenda.<sup>112</sup> Accessing the policy debate in this way meant that they could inform both the content of the policy and be involved in the implementation thereof.<sup>113</sup> To do this, civil society organisations needed to first access the wider policy agenda and then tailor their issue to work within that framework.<sup>114</sup> If the social movements or civil society groups wanted to participate in the policy-making process or claim a place in this, the framing of their issue had to be constructed in relation to the policy-makers' agendas.<sup>115</sup> For Dorothy McBride Stetson this “is at the heart of democratic policy making”.<sup>116</sup>

With a new democratic regime came an ambitious nation-building project. Pro-choice and pro-life groups had to frame abortion in a particular way that would make it a priority for the new government. Similarly, if their stance on abortion was adopted politically, they could have input into the broader policy-making process.<sup>117</sup> Keeping this in mind, it is crucial to consider the interactions between civil society and political institutions and how this contributed to the framing of abortion in the legislation..<sup>118</sup>

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<sup>112</sup> Dorothy E McBride Stetson, *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism*, (Oxford: Oxford University Press, 2001), pg.4

<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> Dorothy E McBride Stetson, *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism*, (Oxford: Oxford University Press, 2001), pg. 4

<sup>116</sup> Ibid

<sup>117</sup> Ibid

<sup>118</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg.6

## The Pro-Choice Lobby and Women's Equality in the New SA

The pro-choice lobby in SA differed from Western counterparts in that arguments around women's choice and rights were foregrounded by the racist implications of the existing abortion law. The lobby constructed abortion on request as the answer to unsafe backstreet abortions and other issues that were considered to mainly impact disenfranchised Black women. They maintained that abortion was a matter of healthcare rather than about women's right to choose.<sup>119</sup>

On 9 May 1995, Dr Marg Dryer of ARAG gave an oral submission to the Select Committee on Abortion and Sterilisation.<sup>120</sup> Dryer focused primarily on the impacts of ASA rather than leaning on the language of choice or reproductive rights. Dryer specified that, under ASA, very few legal abortions were being performed. Instead, Dryer emphasized “thousands of backstreet abortions” were negatively impacted the health of “the young, poor—often black women”.<sup>121</sup> Dryer suggested that Black women were unable to procure abortions legally citing that “only 5% of amniocenteses were done on black women although 95% of births were to black women”.<sup>122</sup> Amniocenteses were performed to check for severe congenital abnormalities in fetuses—abnormalities that would make women eligible for legal abortions under ASA.

Marion Stevens's memory of hospitals in the late 80s is stratified by race and the different presenting problems in white and Black women.

The white wards...the white men had bone fractures and had been driving themselves drunk...the white women had been beaten up or had cancers...the white kids had like asthma and allergies...the Black kids had poverty and big swollen bellies...the women, the Black women had cervical cancer and abortion and were beaten up...the the Black men were just violence.<sup>123</sup>

Increasingly, much literature has argued that the post-apartheid political order is one “that is overwhelmingly state-centred and state-directed” and “masquerade[s] as democratic

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<sup>119</sup> Barabra Klugman's Letters, Dot Cleminshaw Papers

<sup>120</sup> ARAG summary of M Dryer oral submission, 9 May 1995

<sup>121</sup>/ibid

<sup>122</sup> Ibid

<sup>123</sup> Interview with Marion Stevens (reproductive justice activist and advocate, member of the WHP). Interviewed by Ronel Koekemoer, 2019

politics”.<sup>124</sup> To impose “the legitimisation of state directives”, R Ballard argues that the state makes use of *invited participation* where it “listens to some voices and not others”.<sup>125</sup>

## Pro-Lifers, the Law, and a Secular South Africa

Pro-life consensus was that the law should do something about abortion. However, what exactly that was remained unclear. Some pro-lifers advocated for harsh punishment for “mothers who kill their children”.<sup>126</sup> Others worried that a new law would criminalise pro-life beliefs. Amongst pro-life groups reluctant to prosecute aborting women, there was still a strong push that the law should prohibit abortion.<sup>127</sup> Differing pro-life views on abortion and the law had much to do with the proximity of a group to government.

Initially purely ideological, Cheryllyn Dudley attributed her stance on abortion law to her experiences in parliament.

What kind of government would the ACDP be? Would we be putting laws in place that were going to discriminate against people who didn't think like us or didn't understand what we understood?<sup>128</sup>

Cheryllyn Dudley remembered “protesting the proposed abortion laws” and that “we managed to get quite a lot of stirring up in those days”.<sup>129</sup> Dudley spoke about how “all or nothing” approaches to lobbying were ineffective in parliament.<sup>130</sup> She recalled

Just doing what you think is the right thing...and abortion was one of those things...Since the health budget accommodated abortion, well, you just voted against the health budget.<sup>131</sup>

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<sup>124</sup> Louise Vincent, “South Africa’s Abortion Values Clarifications Workshops-An Opportunity to Deepen Democratic Communication Missed”, *Journal of Asian and African Studies*, 46, (2011), pg.269

<sup>125</sup> Ibid

<sup>126</sup> Interview with Cheryllyn Dudley (Former MP for the ACDP and pro-life activist), Interviewed by Ronel Koekemoer, *Panorama*, 17 July 2019

<sup>127</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018) pg. 85

<sup>128</sup> Interview with Cheryllyn Dudley (Former MP for the ACDP and pro-life activist), Interviewed by Ronel Koekemoer, *Panorama*, 17 July 2019

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Ibid

For Dr Chris Warton, who was not a politician, he understood that criminalising abortion could see women seeking dangerous backstreet abortions. For him, “it’s a terrible thing that people should die because of backstreet abortions”.<sup>132</sup> He adds

As a pro-lifer I would say, respectfully, in an abortion, there’s always somebody who dies...How can you compare a new-born baby to its mother? There are many mothers who would risk their life for their baby and we would honour them for it.<sup>133</sup>

In historicising the law, we begin to see the more complicated realities at play in the different actors and movements. Their perceptions about what the law means for them becomes clear. CTOP is an interesting case study in this regard because CTOP did not legalise abortion in South Africa, ASA did. However, in the making of ASA, a pro-life movement was notably absent. For many of those involved in pro-life activism in the era of democracy, there was little recognition that abortion had been legal in SA for years.<sup>134</sup>

Dr Claude Newbury’s organisation, Pro-Life South Africa, was the exception. Newbury’s was “the only organisation in SA opposed to abortion”.<sup>135</sup> He recalled that while the Christian Doctors’ Association “opposed surgical abortion, they didn’t oppose medical abortions”.<sup>136</sup> For Newbury this is contradictory as “there are no medical reasons for abortion by the way”.<sup>137</sup>

Other than Newbury, there was little pro-life opposition to ASA. During the making of CTOP, however, an organised pro-life movement emerged. Amongst this movement, there was little recognition of the current legality of abortion and even less recognition that that law was morally wrong.<sup>138</sup> Dr Janet Giddy described the sentiment of the hospital she was working in at the time: “we wouldn’t support the new law, but the old law was fine”.<sup>139</sup>

In a 1996 critique of pro-life opposition to CTOP, Hugh Robertson articulated the pro-life position’s confusing relationship with abortion law. Robertson wrote

In spite of all their self-righteous posturing, they are not genuinely interested in preventing abortion at all. If they were, at least some of the more than 45000 women

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<sup>132</sup>Interview with Dr Chris Warton (Pro-Life activist and medical doctor), interview by Ronel Koekemoer, Plumstead, 30 October 2019

<sup>133</sup> Ibid

<sup>134</sup> For more on the development of the Abortion and Sterilisation Act, see Klausen

<sup>135</sup> Interview with Dr Claude Newbury (founder of Pro-Life SA and medical doctor), interview with Ronel Koekemoer over phone call, 13 April 2020

<sup>136</sup> Ibid

<sup>137</sup> Interview with Dr Claude Newbury (founder of Pro-Life SA and medical doctor), interview with Ronel Koekemoer over phone call, 13 April 2020

<sup>138</sup>RSA, NA Deb, (*Choice on Termination of Pregnancy Act*), 1996

<sup>139</sup> Interview with Dr Janet Giddy (medical doctor who worked at King Edward Hospital) Interviewed by Ronel Koekemoer, Mowbray, February 2020

who landed up in hospital this year alone with ‘incomplete abortions’ would have been behind bars. But not one of them is”.<sup>140</sup>

He went on to say that

The anti-abortion lobby are creating a monumental fuss to prevent changes to a law which they have made not the slightest effort to see enforced... What point do they see in resisting a change to the present law when they know, and the country at large knows, and they know the country knows, that nobody is going to lift a finger to put it into effect—least of all themselves, or their supporters in parliament? <sup>141</sup>

He finished with “what concerns many of them most is public relations rather than principle”.<sup>142</sup>

In another piece, Robertson wrote “If the pro-life lobby has neither the stomach to ensure the enforcement of what they are asking for, nor the compassion to look at the consequences of their demands, then by what arrogance do they presume the country should take them seriously”.<sup>143</sup>

Another reason pro-lifers organised in response to the CTOP Bill was a fear that *they* would be criminalised under the new law. In “an urgent call for prayer and action”, pro-life organisation ‘The Christian Voice’ said that the CTOP Bill “seeks to compel doctors who oppose abortion to refer...to others who are willing to kill their baby. Doctors who refuse to become accessories to murder in this way could face stiff fines or jail sentences!”. The poster goes on to highlight that it is not only professionals that will be criminalised, but pro-life activists saying “those who interfere in the ‘right of access’ to abortion clinics by protesting outside abortuaries would be liable for heavy fines and up to ten years in prison”.<sup>144</sup> For the His People Christian Church group, they took out advertisements in newspapers urging people to write (“IN YOUR OWN CAPACITY”) to object to the CTOP Bill.<sup>145</sup> The advertisement also advises how to oppose the Bill; encouraging people to complain about specific clauses as well as “the Bill in its entirety

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<sup>140</sup>Hugh Robertson, “Let’s Get to the Bottom of this Surprising Secret”, *Cape Argus*, 16 Oct 1996

<sup>141</sup> Ibid

<sup>142</sup> Ibid

<sup>143</sup> “Fear of Burning Witches”, *Cape Argus*, 13 June 1995

<sup>144</sup> Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa.

<sup>145</sup> Ibid

because abortion is the murder of a human being in the womb”.<sup>146</sup> The request ends with the following directive “Remember to use factual and rational arguments”.<sup>147</sup>

The most explicitly legal challenge to the proposed law change came from Newbury’s Pro-Life SA which put forward ‘The Unborn Children’s Protection Act’.<sup>148</sup> Submitted as part of the submissions to the Select Committee on Abortion and Sterilization, the stated aim of the Act was to “recognize and protect children from the time of conception to birth and to provide for incidental matters”.<sup>149</sup> From the outset, the religious foundations of the law are evident. The Unborn Children’s Protection Act held that “our laws should be in keeping with the constitution and the commandments of Almighty God”.<sup>150</sup>

Munson Zaid argues that the role of religion in pro-life movements is more complicated than typically thought. For Albertyn, “you scratched anyone who was against abortion... religion was the prevailing attitude”.<sup>151</sup> Zaid posits that pro-lifers become pro-life not only because of their religious beliefs but also to reinforce “the vitality of religious faith in their own lives and in their social worlds”.<sup>152</sup> In the making of CTOP, this was especially important.

SA’s democratic transition diluted Christian authority that had been central during apartheid. CTOP supporter Dot Cleminshaw kept a dossier on Reverend Peter Hammond.<sup>153</sup> Hammond’s literature signalled to this Christian anxiety. In 1992, Hammond wrote that this new South Africa “seems to be abandoning Biblical principles and embracing humanism at a breath-taking pace.”<sup>154</sup> By 1995, one Christian school described itself as “distinctly anti-establishment”

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<sup>146</sup> Ibid

<sup>147</sup> Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa.

<sup>148</sup> Agenda, ‘Changes in Abortion law recommended’, Agenda: Empowering Women for Gender Equity, 1995, pp.51-59

<sup>149</sup> Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa.

<sup>150</sup> Ibid

<sup>151</sup> Interview with Professor Cathi Albertyn (member of the RRA, legal scholar involved in the making of CTOP). Interviewed by Ronel Koekemoer via phone and zoom, Mowbray, 20 April, 2020.

<sup>152</sup> Ziad Munson, *The Making of Pro-Life Activists: How Social Movement Mobilisation Works*, (Chicago: University of Chicago Press, 2008), pg. 29

<sup>153</sup> Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa.

<sup>154</sup> Ibid

because the “dominant thrust” of their school was a “return to...conservative fundamentalism: creationism, nuclear family values, virulent opposition to socialism and ‘secular humanism’”.<sup>155</sup>

These anxieties reaffirm that the law matters. Alongside bemoaning humanism, this group took aim at the incoming legal apparatus that was designed to enshrine human rights. Hammond’s parish were weary of the constitution “which exalts itself above the laws of God”.<sup>156</sup> Instead, there was a sentiment that “the government of the day is pandering to a minority of atheists and, further, holds the Christian community in contempt and scorn”.<sup>157</sup> These players in the public realm articulated their loss of power by denouncing the “moral decay”.<sup>158</sup>

SA’s move to a “liberal democracy” reoriented the relationship between church and state. Christian dominance was not protected by the state in the same way it had been under apartheid. In this context, religious anxiety ran high and issues like abortion and the death penalty were used to reinforce religious identity.

In newspaper coverage of the 1990s, issues ranging from South Africa’s response to the Rwandan genocide to the new constitution were seen as threats to Christianity. Initially, the constitution came under fire with “people campaigning for the new South African Constitution to promote a Christian state”.<sup>159</sup> In a 1995 letter, Cleminshaw called this a strategic attempt at becoming “a major new player on the South African political scene”.<sup>160</sup> She further wrote that “some elements in the South African right wing have decided that the best way for them to rebuild their movement after the fall of apartheid is to concentrate on waging campaigns on so-called ‘moral issues’”.<sup>161</sup> Carl Niehaus—the ANC spokesperson at the time—shared this belief. In response to a Christian protest against the new constitution, Niehaus called it “nothing but political opportunism, political ignorance and the apparent will to divide this religiously plural, multicultural nation. It is a new form of minority baaskap”.<sup>162</sup> Initially an “unorganised ‘moral right’”, abortion became an ideal issue for actors to reassert themselves into public life at a time when they were no longer favoured in the political optics.

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<sup>155</sup>The aforementioned school, who lost black pupils as education opened up applauded this move, saying that black parents were incorrectly motivated saying “But that just goes to show. The parents’ motivation was just education in English, and not Christian education, which is what it should be”.

<sup>156</sup> *Cape Argus*, 9 May 1999

<sup>157</sup> *Ibid*

<sup>158</sup> Gavin Evans, “Learning the Christian Way”, *Mail and Guardian*, 10-16 Feb 1995

<sup>159</sup> Rehana Rossouw, “Niehaus Rejects Christian ‘Baaskap’”, *Sunday Times*

<sup>160</sup> Ken Vernon, “Millions to Unite to Fight Court Ruling on the Noose”, *Sunday Times*, 11 June 1995

<sup>161</sup> Newspaper cuttings on Rev. Peter Hammond, 1990-1996, ZA UCT BC1051\_CC\_CC4, Anti-Abortion/Religious Crazies, SA, USA Box, Dot Cleminshaw Papers, UCT Special Collections Library, Cape Town, South Africa

<sup>162</sup> Rehana Rossouw, “Niehaus Rejects Christian ‘Baaskap’”, *Sunday Times*

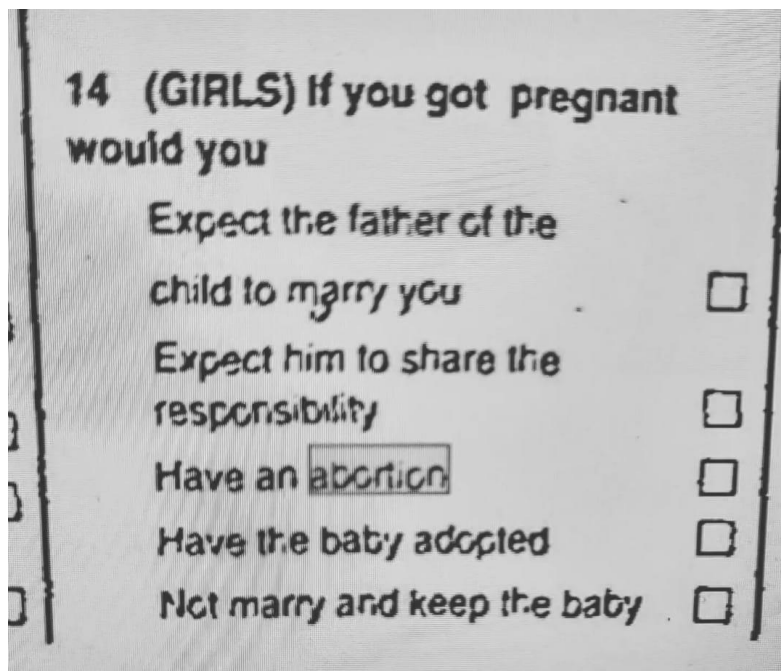
## Conclusion

Social movements and civil society groups are political institutions. Their lexicons infiltrate legal, medical, and political language. In the making of ASA, a pro-life movement was notably absent. For many of those involved in pro-life activism in the era of democracy, there was little recognition that abortion had been legal in SA since the 1970s. This chapter has textured the pro-life and pro-choice movements by looking at how they contoured the public abortion debate and how they influenced each other. The pro-choice lobby were more effective at gaining access to the policymaking arena, not because of the superiority of their convictions, but because of their ability to align themselves with political goals of the new democratic government.

## Chapter 4

*“The kind of person that the new government wanted to support and empower”<sup>1</sup>:*

### An Aborting Public



14 (GIRLS) If you got pregnant would you

- Expect the father of the child to marry you
- Expect him to share the responsibility
- Have an abortion
- Have the baby adopted
- Not marry and keep the baby

*A newspaper poll printed in 1994.*

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<sup>1</sup> Interview with Loveday Penn-Kekana (ANC member and RRA spokesperson) interviewed by Ronel Koekemoer, Mowbray, April 2020, audio with author

According to CTOP, “every woman” has the right to “an early, safe and legal termination of pregnancy according to her individual beliefs”.<sup>2</sup> During the law-making process in the mid-90s, however, “there were big issues about *who* [abortion] was for”.<sup>3</sup> RRA spokesperson Loveday Penn-Kekana explained that healthcare professionals “had this big thing about repeat abortions, that they didn’t want some people to be using abortion as a means of contraceptives”.<sup>4</sup>

Implicitly, while the law technically applied to everyone, only certain women *deserved* abortions. This chapter will highlight how the making of CTOP was heavily informed by the notion that some abortions were acceptable where others were not. It will detail the network of public discourses from the transition era that forged an ideal aborting woman who could legitimately terminate a pregnancy under CTOP. This is noteworthy because it augmented inherently anti-abortion sentiment and accordingly eroded ideals of reproductive freedom used to justify liberal law reform.

## The Ideal Aborting Woman and Abortion Narratives

The “some people” providers were especially concerned about in the 90s were “teenagers [who] were going to use it as a form of contraception”.<sup>5</sup> To mitigate this, Penn-Kekana remembered “one woman even suggesting that they did some little tattoo on the cervix so they could tell if women had been back for more and more abortions”.<sup>6</sup>

An examination of the making of CTOP contours an ‘ideal aborting woman’ that existed in the public imagination. This woman was disparate from the choosing and autonomous subject of the legislative text. It could be said that despite this discursive ideal, the law did not explicitly restrict women who fall short of the ideal aborting women. Women—including those who had had abortions under ASA—participated in the making of CTOP. Women’s participation in the making of this law is embedded in the idea that CTOP is a liberal law that foregrounds women

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<sup>2</sup> RSA *Choice on Termination of Pregnancy Act 1996*, preamble

<sup>3</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray, audio on record with author

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Interview with Loveday Penn-Kekana (ANC member and RRA spokesperson) interviewed by Ronel Koekemoer, Mowbray, April 2020.

in its regulation of abortion. As this chapter will show, however, the ideal aborting woman haunts the myriad of women who have abortions under CTOP.<sup>7</sup>

The ideal aborting woman was a spectre of the public life of abortion that developed from the 1970s until the end of apartheid. She represented a shift from a private individual to a subject of national and legislative debate. In the ‘new’ SA, aborting women became part of the conversation about maternity and nation-building. As a public object, she displaced the fact that various kinds of women have abortions and that “abortion has always and will always be a component of women’s reproductive lives, *regardless of laws regulating the practice*”.<sup>8</sup>

Erica Millar’s theorisation of ‘The Aborting Woman’ scaffolds this analysis.<sup>9</sup> Millar emphasises that public representations of abortion stabilise meanings of abortion and the women who have them.<sup>10</sup> Millar’s work tackles the discourse of choice and how it “conceals the rigid emotional script of abortion”.<sup>11</sup> Discursively, the ideal aborting woman betrays “broader cultural anxieties” instead of reflecting those who have abortions.<sup>12</sup> Abortion laws, the debates around them, and those who seek access under their guidance are heavily influenced by this figure.<sup>13</sup> In her book, *The Abortion Myth*, Leslie Cannold argued that how women feel about choosing and having abortions informs how they appraise their abortions. So, if an aborting woman feels relieved or happy about her choice, she may evaluate her abortion differently than an aborting woman who feels upset by or ashamed of her choice.<sup>14</sup> This response is largely guided by public discourses that invoke ideal aborting women who have certain feelings about their choice.<sup>15</sup> Even when women do not experience the “appropriate” emotions, women evaluate their abortions with these in mind.<sup>16</sup>

Michelle Oberman puts forward a similar concept she calls “the abortion minded woman”.<sup>17</sup> Oberman uses this to examine the “practical consequences” of anti-abortion laws.<sup>18</sup> This figure

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<sup>7</sup>Rachel E Johnson, “Haunted by the Somatic Norm: South African Parliamentary Debates on Abortion in 1975 and 1996”, *Signs: Journal of Women in Culture and Society* 39, no. 2 (2014), <https://doi.org/10.1086/673126>

<sup>8</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 257

<sup>9</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 17

<sup>10</sup> *Ibid*, pg. 13

<sup>11</sup> *Ibid*, pg. 5

<sup>12</sup> *Ibid*, pg. 19

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*, pg. 163

<sup>15</sup> *Ibid*, pg. 13

<sup>16</sup> Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make*, (New South Wales: Allen & Unwin, 1998)

<sup>17</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018)

<sup>18</sup> *Ibid*, pg. 97

is a helpful tool through which to see the decisions these women make in and outside of the law when seeking ToPs.<sup>19</sup> Importantly, as Oberman highlights, the abortion-minded woman can be convinced to carry her pregnancy to term, reinforcing the idea that abortion is always a last resort.<sup>20</sup> The ideal aborting woman and the abortion-minded woman are overwhelmingly represented as “the rape victim, the unwed teenager, the fetus with Down syndrome”.<sup>21</sup> In enshrining abortion within a reproductive rights framework, CTOP ‘protected’ abortion by affixing it to liberal democratic norms rather than external moral authorities.<sup>22</sup> Accordingly, those afforded human rights under SA’s Constitution could choose abortion.<sup>23</sup> However, hypothetical ideals undermined the “emancipatory potential of abortion” that was used to motivate for CTOP.<sup>24</sup>

The narratives of women who had had abortions in SA is an important addition to this history. This is not because it represents a more authentic telling.<sup>25</sup> Rather, abortion experience narratives highlighted how women made sense of and represent a personal experience that has very public meaning. Abortion stories prevalent in the public arena during the making of CTOP established when terminating a pregnancy was socially acceptable, and when it was not.

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<sup>19</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018), pg. 107

<sup>20</sup> Ibid, pg. 99

<sup>21</sup> Ibid, pg. 108

<sup>22</sup> Ibid; for this dissertation I am sensitive to the fact that ‘female’ refers to biological sex where woman refers to gender.

<sup>23</sup> Deborah Posel, ‘Getting the Nation Talking About Sex’: Reflections on the Politics of Sexuality and Nation-Building in Post-apartheid South Africa’ in Sylvia Tamale (ed.), *African Sexualities: A Reader* (Cape Town: Pambazuka Press, 2011), pg. 131. These external moral norms in SA are predominantly religious and cultural constructions of family units and faith-based hierarchy.

<sup>24</sup> C Macleod & T Feltham-King, “Young Pregnant Women and Public Health: Introducing a Critical Reparative Justice/Care Approach Using South African Case Studies. *Critical Public Health*, vol. 30 (2019), <https://doi.org/10.1080/09581596.2019.1573313>, pg. 59

<sup>25</sup> Claims to authenticity are beside the point and fall into a trap about older oral history ideas about ‘getting at’ the ‘real’ person.

***“They come and feel that they have to atone”<sup>26</sup>***

In the SA abortion debates of the 1990s, there was a preoccupation with the reasons why women abort. Embedded in these discourses are notions about who the law was “empowering” by increasing abortion access.<sup>27</sup> Staff judgements of a woman’s reason for seeking abortion could facilitate or restrict access to ToP services. Alblas described how, at Tygerberg Hospital in the Western Cape, service providers working after the enactment of CTOP would abstain from performing abortions but if “it was like, a rape case, or a very young girl, then they will say ‘okay’”.<sup>28</sup> Healthcare workers performed or refused abortions on a case-by-case basis under CTOP.<sup>29</sup> This had direct consequences for Alblas’s patients who came for second trimester abortions. Women would tell Alblas how they were “sent from pillar to post” because the medical practitioners did not feel that their reasons were “really very sad”.<sup>30</sup> While these aborting women were spared cervix tattoos, Alblas’s observation illustrated that beliefs about an ideal aborting woman have implications for abortion access in the CTOP-era.

All the aborting women I interviewed (both under ASA and CTOP) provided reasons for their abortions despite not being asked. Abortion providers experienced a similar trend. Even when unasked, women would explain why they had decided to abort. For an abortion provider working at Marie Stopes since the early 2000s, these confessions were frustrating:

They want to explain why they are having abortions but, to be honest with you, I don’t want to hear it. It’s your story, it’s got nothing to do with me. I will listen. But it’s got nothing to do with me.<sup>31</sup>

For Millar, the fascination with the circumstances that motivate abortion has a public health flavour.<sup>32</sup> Public health interventions that view abortion as a social problem identified

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<sup>26</sup> Interview with M S (registered nurse and abortion provider for Marie Stopes), interviewed by Ronel Koekemoer, Belville, 3 August 2019, audio on file with author

<sup>27</sup> This is very similar in both the British and Australian abortion law reforms: see Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 114

<sup>28</sup> Interview with Dr M Alblas (a second trimester abortion provider who was involved in implementing CTOP). Interview by Ronel Koekemoer. Observatory, Cape Town, 13 June 2019.

<sup>29</sup> The law does not allow for this at all; instead, if a health-care provider wishes to consciously object, they must sign a contract before they are employed in a hospital or clinic and not choose which cases they wish to object to.

<sup>30</sup> Interview with Dr M Alblas (a second trimester abortion provider who was involved in implementing CTOP). Interview by Ronel Koekemoer. Observatory, Cape Town, 13 June 2019.

<sup>31</sup> Interview with M S (registered nurse and abortion provider for Marie Stopes), interviewed by Ronel Koekemoer, Belville, 3 August 2019

<sup>32</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 113

individuals who are most “at risk” for a particular ill.<sup>33</sup> The idea being that once those at risk are identified, ways to prevent these risk factors can be established.<sup>34</sup> Societal and professional focus on the reasons why women have abortions is a way of identifying which women are most “at risk” for this lapse due to factors such as age, marital status and economic means.<sup>35</sup> This pattern of identifying ‘types’ of women ‘at risk’ of needing abortion constructs abortion as something to be prevented and therefore aversive.<sup>36</sup>

The women who shared their stories about their abortions under ASA or CTOP were comfortable with and/or conformed to the “intimate, revealing and confessional” styles that oral history seems to prefer and pursue.<sup>37</sup> As oral historian Ken Plummer highlights, how people talk about issues around sex (including abortion) has changed over time. Plummer describes the current trend in talking about sex as a time where there are “no sexual secrets”.<sup>38</sup> He asserts that if an alien were to visit Earth “they would probably muse that sex for humans lies more in the talking than the doing”.<sup>39</sup> Plummer outlines this change and argues that sex as subject/topic is no longer relegated to formal arenas of storytelling (like poetry or literature) but has come to dominate popular media that encourages people to talk about their sex lives and has created a sphere in which the assumption is that people find other people’s sex lives interesting.<sup>40</sup> In my interviews done in 2019 and 2020, women who had had abortions during apartheid or democracy exemplified this. The furnished me with details that spoke more to their personal actions and beliefs than to their experience with legislation.

Having to provide a reason or justification is built into the fabric of abortion law. Even the most progressive or permissive abortion laws demarcate themselves along why an abortion is being performed (even if just to determine what type of procedure is required). However, in my interviews with aborting women, they explained their reasons as a way to texture their personal story and not to show that they were adhering to or transgressing from legislative text.

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<sup>33</sup> Ibid, pg. 116

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pg. 116

<sup>37</sup> Ken Plummer, “Chapter 6. Getting and Doing Life Histories” in Ken Plummer, *Documents of Life 2: an Invitation to a Critical Humanism*, (Essex: Sage Publishing, 200), pg. 102

<sup>38</sup> Ken Plummer, *Telling Sexual Stories: Power, Change and Social Worlds*, (London: Routledge, 2002), pg. 9

<sup>39</sup> Ibid, pg. 9

<sup>40</sup> Ibid, pp. 6-9

## Choosing Abortion

The first criterion for the ideal aborting woman in the context of CTOP was that she was an autonomous, freed and choosing subject.<sup>41</sup> This iteration not only oversimplified notions of choice and autonomy, but also obscured the role of the law in legislating choice in such a way that allows the state to retain influence over women's abortion choices.<sup>42</sup> So while CTOP liberalised abortion law through an emphasis on autonomy and choice, CTOP's progressiveness also obfuscated that it was a state-sanctioned choosing and autonomous women at the core of the law.<sup>43</sup>

The pregnant woman whose 'choice' the law protected was a constructed entity.<sup>44</sup> While in the apartheid-era, the state gave medical practitioners control, the reproductively autonomous woman who was given choice under CTOP was a similarly state-sanctioned body. This alone is not the problem. The trouble with this is that there is a continued presence of the state in women's bodies, only now masquerading as 'women-minded' bodily autonomy.<sup>45</sup> In many ways, CTOP presented itself as much less prescriptive about who it was for. Partly because CTOP was positioned as the foil to a restrictive precursor, CTOP and those supporting it claimed that it was intended for *women who choose* abortion.<sup>46</sup>

## Aborting Women as Victims of the Law

Abortion policy and law exists at an intersection where women can access and participate in the public realm. Abortion provides this access because it allows women to control "private" aspects of their lives like pregnancy which had previously excluded them from political life.<sup>47</sup> Similarly, abortion law brings abortion into the public and there is an "inversion" of the private/public dichotomy; something constructed as deeply private—a woman's body—is made public and debated and legislated.<sup>48</sup> In terms of policy-making and legislation specifically

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<sup>41</sup>RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10

<sup>42</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd., 2017), pg. 15

<sup>43</sup> Ibid, pg. 15

<sup>44</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd., 2017), pp. 14-15

<sup>45</sup> Ibid, pg. 15

<sup>46</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd., 2017), pp. 14-15

<sup>47</sup> D Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada*, (Chicago: University of Chicago Press, 2011), pg.6

<sup>48</sup> Lori Brown, *Contested Spaces: Abortion Clinics, Women's Shelters and Hospitals Politicizing the Female Body*, (UK: Routledge, 2013) pg. 41

“through the making of publicness the issues around [abortion] are ultimately manipulated and changed into something about women’s bodies, women’s choice, or women’s safety but are used to benefit political parties own agendas”.<sup>49</sup>

During the ad hoc Committee public hearings in the 1990s, the pro-choice lobby invited women who “had been prosecuted for abortion” under ASA.<sup>50</sup> Loveday Penn-Kekana recalled that:

We found this young woman in Limpopo who had basically been raped by her teacher and then had an abortion and we got her to come testify at the hearings...she had been so messed about by this system [under ASA] and she’d had a backstreet abortion and it had all been awful.<sup>51</sup>

Penn-Kekana importantly points to this as a deliberate strategy saying that she “was exactly the kind of person that the new government wanted to support and empower”.<sup>52</sup> In terms of the law, there is encouragement by some legal scholars to publicly share stories of abortion to “incite the legal and cultural change required to ensure women can access abortion readily, lawfully and without fear of stigma”.<sup>53</sup>

These kinds of making public so that it could translate into legal consequence forefronts experience as the only “realistic and honest guide we have to what the unique phenomenon of abortion genuinely is, as opposed to what moralists, philosophers and legislators say it is”.<sup>54</sup> Penn-Kekana’s anecdote reveals that in the policy-making process, there is an ideal aborting woman. She also reflected on the fact that this construction may have consequences saying that “I always wonder about whether we really helped her...it was the first time she had been out of Limpopo”.<sup>55</sup>

This sentiment from Penn-Kekana is enormously important. It illustrates how relationships between the public and the law are brokered. In Mark Saunders’s book *Ambiguities of Witnessing*, he argued that there is an assumption by law reformers that people discriminated against under a certain legal system will have internalised victimhood. Thus, when they testify about their experience (as the aborting woman from Limpopo did) their testimony is articulated

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<sup>49</sup>Ibid, pg. 41

<sup>50</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>51</sup> Ibid

<sup>52</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>53</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice*, (London: Zed Books Ltd, 2017), pp. 274-275

<sup>54</sup> Ibid

<sup>55</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

within “the paradigm of human rights” that guided legislative reform in SA.<sup>56</sup> Saunders speaks about the way the TRC and that “soliciting testimony” within a human rights notion of victimhood “revealed ambiguities in cases that did not fit”.<sup>57</sup> This was because these ‘victims’ had not necessarily felt that they had been victimised by the old law.

One aborting woman expressed her surprise at being asked to testify at the hearings during the 90s. Rita Saint had undergone a backstreet abortion under ASA that resulted in dangerous complications. In spite of this experience, she did not necessarily feel victimised by ASA. She remembered her abortion being difficult:

You know [long pause]. It was terrible to go through that situation and to live through it...I just tried to think of the bigger picture and that is that I can't have this child.<sup>58</sup>

Her memory of the law was incongruent to the hardship of getting an illegal and dangerous abortion. For Saint, “I didn't even think...or blame the government or legislation at this stage”.<sup>59</sup> Saint's narrative of her abortion cast her as a victim of her own behaviour rather than the restrictive law. She accepted the situation saying:

That's the way it is so if you're out of line [in need of an abortion] then you just sort it out...You have, um, have choices to use family planning methods. If you didn't use it, it was your problem. You didn't have a right to an abortion or anything to be performed...it was due to your lack of protection and so on and then you must sit with it...there was family planning available [assertively] if you didn't use it then...sit with the consequences. So you didn't even think, you know, that it's so unfair that we don't have abortions in this country.<sup>60</sup>

Saint's narrative emphasises that the law facilitates the formation of different kinds of subjectivities (victim, criminal, empowered) not only in knowledge of or encounters with the law. Law is given personal and social meaning not only because of its power to sanction or punish. Crucially, it also generates victims based on the requirements of different historical contexts. This is especially evident in the case of abortion law reform in SA. While no doubt a restrictive law, constructing certain aborting women as ‘victims’ of ASA does not consider the aborting woman's relationship to the law or to abortion. This is significant because it uses

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<sup>56</sup>Mark Saunders, *Ambiguities of Witnessing: Law and Literature in the Time of the Truth Commission*, (Stanford: Stanford University Press, 2007), pg. 60

<sup>57</sup> Mark Saunders, *Ambiguities of Witnessing: Law and Literature in the Time of the Truth Commission*, (Stanford: Stanford University Press, 2007), pg. 60

<sup>58</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>59</sup> Ibid

<sup>60</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

languages of empowerment to smooth the complexities of these relationships and fit a political agenda.

In the making of CTOP and its emphasis on empowerment, it was not necessarily an encounter with or avoidance of a law that formed victim subjectivities.<sup>61</sup> Rather, in the context of being called to testify in hearings in support of reform, the legal is made “tangible” and personally meaningful “in the shape of the political”.<sup>62</sup> One of the well-researched barriers to access is that people do not know that *the law empowers them in this way*. People who were victimised under the previous law, “exactly the kind of person that the new government wanted to support and empower”, were imbued with a victimhood in a political arena and not necessarily in the moment of transgression or restriction. This has implications for how we view the “empowerment” agenda of CTOP. The view that CTOP should have personal meaning for women (that of empowerment) neglects to recognise how the law becomes a part of social and personal subjectivities. There is also a need to address how the relationship between the social and political can be brokered through the law.<sup>63</sup>

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<sup>61</sup> Rita Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa*, (Stanford: Stanford University Press, 2006), pg. 123

<sup>62</sup> *Ibid*, pp. 127-131

<sup>63</sup> *Ibid*, pg. 131

## Maternity, Race and Abortion in the New South Africa<sup>64</sup>

Erica Millar and Barbara Baird have focussed on the relationship between national identity and abortion law reform in Australia.<sup>65</sup> Millar argues that political optics and public debate construct abortion as “a nation’s shame”.<sup>66</sup> The discourse of shaming is the rhetoric of “too many abortions” which is aimed at particular bodied subjects.<sup>67</sup> These bodies betray or “fail” their nation by not reproducing.<sup>68</sup> In this construction, each individual who has an abortion or seeks to terminate their pregnancy is misusing the system.<sup>69</sup> Baird asks, “for if it is not [each aborting woman], then who is it who contributes to there being ‘too many’ abortions?”<sup>70</sup> Crucially, shaming women for not having children is reserved for those who belong to particular race, class, and age categories.<sup>71</sup> For Millar, “it is the abortions of a particular demographic” that fail the nation; some are reproached for having “too few children” and “too many” abortions where others are chided for having “too many children”.<sup>72</sup>

In her psycho-ethnographic work *Of Motherhood and Melancholia*, Lou-Marie Kruger writes about motherhood and its meanings in the context of “the slow violence of poverty” in Dwarsrivier Valley.<sup>73</sup> When mentioning her interest in motherhood and poverty: “the standard question is: ‘Why do “they” have so many children’... ‘Why don’t “they” just use contraception?’”.<sup>74</sup> She argues that the main moralistic assumption underlying questions like these is that poor people should not have children because they are expensive.<sup>75</sup> Alongside this is the notion that in bringing an expensive child into the world, poor mothers are irresponsible in their sexual behaviour.<sup>76</sup>

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<sup>64</sup> Barbara Baird identifies how, in the Australian context, motherhood as a part of national identity was racialised and conceptualised with “an imagined white maternal female subject”. See Barbara Baird, “Maternity, Whiteness and National Identity: The Case of Abortion”. *Australian Feminist Studies* vol 21, no. 50, (July 2006), pp. 198-221.

<sup>65</sup> Millar, *Happy Abortions*, pg. 211

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Ibid; and Barbara Baird, “Maternity, Whiteness and National Identity: The Case of Abortion”, *Australian Feminist Studies* vol 21, no. 50, (July 2006), pp. 198-221.

<sup>69</sup> Ibid

<sup>70</sup> Millar, *Happy Abortions*, pg. 212

<sup>71</sup> Ibid

<sup>72</sup> Millar, *Happy Abortions*, pg. 212

<sup>73</sup> Lou-Marie Kruger, *Of Motherhood and Melancholia: Notebook of a Psycho-Ethnographer*, (Pietermaritzburg: University of KwaZulu-Natal Press, 2020), pp.3-4

<sup>74</sup> Ibid, pp. 56-57

<sup>75</sup> Ibid, pp. 56-57

<sup>76</sup> Ibid

This discursive framework is useful in understanding the making of CTOP. Bemoaning “too many” abortions is “a technology of shaming” in that it portrays abortion as inherently negative, not only to the individual but also the nation.<sup>77</sup> In SA, where CTOP was argued for in the language of human rights and empowerment, this may seem counter intuitive. However, a closer look at the construction of abortion (and those having “too many” or “too few”) highlights antiabortion undercurrents which subvert CTOP’s potential.

## Too Many Abortions

In SA, there was real anxiety that if the law was too liberal and permissive it would significantly increase the number of abortions happening in the country. Rev Kevin Meshoe of the ACDP argued against the CTOP Bill saying that “in the USA abortion increased sixteenfold when it was legalised”.<sup>78</sup> Meshoe’s reference to the North American context is symptomatic of the extent to which the US pro-life movement had influenced the pro-life movement in SA (See Chapter 3). Mrs P W Cupido similarly said that CTOP “will lead, as it is clearly intended to, to the barbaric slaughter of millions of unborn infants”.<sup>79</sup>

Crucially, however, it was not only the pro-life camp who spoke of abortion in terms of “unacceptable excess”.<sup>80</sup> In the days after CTOP was enacted, newspaper reports about hospitals such as Baragwanath Hospital “announced that it is fully booked until next month”.<sup>81</sup> Another article published in March 1997 declared that “SA can’t cope with abortions” and that CTOP “opened a floodgate of patients”.<sup>82</sup> While not explicitly pro-life, this kind of language reinforced a public fear that CTOP would increase the number of abortions and that this increase would paralyse public institutions. Though not necessarily an anti-abortion sentiment, these kinds of portrayals disallowed any representation of abortion as a possible public good.

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<sup>77</sup> Millar, *Happy Abortions*, pg. 212

<sup>78</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col. 4785

<sup>79</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10,, col.4788

<sup>80</sup> Millar, *Happy Abortions*, pg. 212

<sup>81</sup> Sonti Maseko, ‘Nurse Refuses to Perform Abortion’, *The Sowetan*, February 13 1997

<sup>82</sup>The Sowetan, ‘SA Can’t Cope with Abortions’, *The Sowetan*, March 25 1997; an interesting perspective in this particular argument was the xenophobic sentiment that would later lead to extreme xenophobic violence. The “floodgate” to which the article refers includes nationals from outside SA who were travelling to the country because abortion was illegal in their states. The article goes on to suggest that these foreigners are less moral because “while citizens of neighboring countries may feel free to get abortions here”, the SA public were reluctant. of their willingness to make use of CTOP saying

Even those who supported the CTOP Bill and its expressive function drew on the “too many” discourse. Professor Helen Rees (who headed Planned Parenthood SA at the time) said at a conference in 1993 that the pro-choice and pro-life camps agreed on one thing: “it is desirable to reduce the number of unplanned pregnancies and abortions”.<sup>83</sup> Rees’s sentiment reinforced the anti-abortion idea that terminating a pregnancy—even if legally permissible—is not an unproblematic or legitimate choice.<sup>84</sup> For meaningful choice, abortion should be acknowledged as a legitimate choice “that pregnant women make routinely and unproblematically”.<sup>85</sup>

## Reproducing the Nation

CTOP was drafted at a time where SA was rebuilding its national identity. Millar and Baird argued that, in forging national identity, certain women were constructed as having too many abortions and so too few children which fails the project of reproducing the nation.<sup>86</sup>

In Meg Samuelson’s book *Remembering the Nation, Dismembering Women?*, she looked at how, in the period of SA’s transition from autocracy to democracy, “women bear the symbolic weight of nationalism”.<sup>87</sup> By this, she is referring to the way that women were framed in order to forge myths, symbols and political structures that constructed SA’s democracy.<sup>88</sup> She argues that in order to move away from the separatist image of an apartheid past, the priority of the new democracy was to position the ‘new’ SA as one of “homogenous unity” and that it promoted this image by making “national and ethnic claims to...women’s bodies”.<sup>89</sup> This image was one that “reflect[ed] the desired national body—usually that of Mother, or simply Womb”.<sup>90</sup>

This construction has its own history tied to the antiapartheid liberation movements. As Klausen highlights, popular protest chants denounced Black women who terminated their pregnancies.<sup>91</sup> One example of this is a chant in the mid-1980s:

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<sup>83</sup> Helen Rees, “Abortion and the Law in SA today”, *Conference in Pietermaritzburg*, 4-7 February 1993

<sup>84</sup> Millar, *Happy Abortions*, pg. 13

<sup>85</sup> Ibid

<sup>86</sup> Millar, *Happy Abortions*, pg. 221

<sup>87</sup> Meg Samuelson, *Remembering the Nation, Dismembering Women? Stories of the South African Transition*, (Durban: University of Kwa-Zulu Natal Press, 2007), pg. 2

<sup>88</sup> Ibid, pp. 1-2

<sup>89</sup> Ibid, pg. 2

<sup>90</sup> Ibid, pg. 2

<sup>91</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, pg. 196

Informers, we will destroy you...Witches we will burn you...Those who commit abortions, you will be destroyed...Mrs Botha is barren—she gives birth to rats...Mrs Mandela is fertile—she gives birth to comrades.<sup>92</sup>

Resistance to black women having control over their bodies “was a symptom of how *both* Afrikaner and black masculinities were vulnerable”, having children and black reproduction was “more than just a struggle for control of the state; it was also a battle between competing masculinities”.<sup>93</sup> Klausen argues that while there was intense white anxiety about a black population boom and a white population slump, the strategy of the state was contraception, not abortion.<sup>94</sup> Abortion was cloaked in immorality and, Klausen suggests, was too controversial and too expensive; it would have attracted the ire of both the international community and black men.<sup>95</sup> Because of this, Klausen suggests, the ideal aborting women was white and the 1975 law “was crafted with only white women in mind”.<sup>96</sup>

But SA is a country with two publics and though Black women were “failing the nation” for not producing enough “comrades”, they were also shamed by the white public for having “too many” children. This, as Baird shows, has to do with the fact that abortion is not only gendered and sexed but is also substantially racialised and classed.<sup>97</sup> By 1970s, as Susanne Klausen says “whites were losing the cradle race”.<sup>98</sup> In trying to reform abortion law from the 1970s, ARAG—though not expressly racist—were motivating for abortion because “too many” children were being born and that this would result in environmental disaster.<sup>99</sup>

In December 1978, Dr Marj Dryer, who was then the Chairwoman of ARAG suggested to the National Council of Women in South Africa that “four main lines of action should be taken”.<sup>100</sup> The actions suggested included increasing public awareness (“everyone in South Africa”) of the “environmental dangers and economic consequences of a continued high birth rate”.<sup>101</sup> Secondly, “the government should establish a full range of contraceptive, abortion and

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<sup>92</sup> Ibid, pg. 196

<sup>93</sup> Ibid, pg. 197

<sup>94</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, pg. 201

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Barbara Baird, “Maternity, Whiteness and National Identity: The Case of Abortion”. *Australian Feminist Studies* vol 21, no. 50, (July 2006), pg. 198

<sup>98</sup> Susanne Klausen, *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa*, pg. 187

<sup>99</sup> Ibid, pg.188

<sup>100</sup> Marj Dryer, *Letter to Bramwell*, 21 December 1978, ARAG papers

<sup>101</sup> Ibid

sterilization facilities, available on demand at no cost”.<sup>102</sup> ARAG also proposed incentives “to achieve reduction in the birth-rate (the reverse applies in South Africa at present”).<sup>103</sup> The last suggestion is the consideration of social changes such as “an increase in the female age at marriage”.<sup>104</sup> In the 1990s, this line of argument was still used by ARAG. Writing in the *Sunday Times*, Marj Dryer suggested that South Africa’s problem with squatters could only meaningfully be solved if abortion was available as a means of population control.

## Was the Ideal Aborting Woman Black?

During the drafting of ASA, black women were not a priority public.<sup>105</sup> In cosmetic consultations with non-white groups, the NP stressed that they had invited the input of coloured and Indian doctors but that they “intimated that they were satisfied with the proposed legislation as printed”.<sup>106</sup> In gauging the opinions of Black people, they contacted “Bantu medical practitioners” and “the homeland leaders”.<sup>107</sup> Black women were not consulted.<sup>108</sup> Ultimately, according to the NP, “all of them, without exception intimated that they were entirely satisfied with the moral code as well as the Bill”.<sup>109</sup>

By contrast, in the making of CTOP, lobbyists explicitly sought the input of black women. Aborting women have raced and classed faces in “public visibility and acceptance”.<sup>110</sup> This shift represents the argument that “not all personals become political, at the same time and place, with the same political effect”.<sup>111</sup> Black women and their abortions were thrust into the public sphere during the making of CTOP. This is significant in that politicising Black women in this way recognised that SA women experienced abortion along racial and economic as well

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<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Helen Bradford, “You Call that Democratic? Struggles over Abortion in South Africa Since the 1960s”, Presentation at the History Workshop held at the University of Witwatersrand (13-15 July 1994), pg. 4

<sup>106</sup> The Abortion and Sterilization Act No.2 of 1975, Section 3, *Government Gazette*, 478 (1975)

<sup>107</sup> RSA, 1975, *Parliamentary Debates*, Abortion and Sterilisation Act, col. 488

<sup>108</sup> Arguably, this lack of consultation with black women was in part symptomatic of ASA being more about the role of medical professionals in abortion than the women seeking them, the racist and sexist nature of the NP and apartheid regime that denied black women citizenary in the same way it did white women.

<sup>109</sup> RSA, 1975, *Parliamentary Debates*, Abortion and Sterilisation Act, col. 488

<sup>110</sup> Amanda Lock Swarr, *Sex in Transition: Remaking Gender and Race in South Africa*, (Albany: State University of New York Press, 2012), pg. 13

<sup>111</sup> Barbara Baird, “Maternity, Whiteness and National Identity: The Case of Abortion”. *Australian Feminist Studies* vol 21, no. 50, (July 2006)

as gender discrimination.<sup>112</sup> Black women's personal lives were in vogue in the making of CTOP. Importantly, however, these personal struggles were appropriated in specific ways.

For example, Black women were represented as having had tragic abortions. The pro-choice lobby invited "a 13-year-old from Soweto" to address the ad hoc Select Committee on Abortion as a part of the public hearings.<sup>113</sup> RRA spokesperson and ANC member, Loveday Penn-Kekana talked about the various arguments used to convince party members that the ANC should support CTOP. For Penn-Kekana, "I wouldn't say that the abstract bodily integrity rights stuff" was important.<sup>114</sup> Rather, Penn-Kekana pointed to "it was more a sort of political argument about Black people having the right to the same healthcare".<sup>115</sup> She went on to say that

You could see under [ASA] that white woman had been able to [procure abortions]. I think a...race and equality argument and a recognition of how difficult life was for lots of Black women.<sup>116</sup>

That pro-choice and abortion rights movements were dominated by principles of white feminism was true of the SA case. On the one hand, the idea that poor women were most disadvantaged under the previous law obscured some of the anti-abortion ideology that was at play. At the Malibongwe Conference, in considering issues affecting children, one of the assertions was that "children in South Africa start to suffer before they are even born. Their mothers do not have healthy food to eat. There is no proper health care for pregnant women. Children are then born into poverty".<sup>117</sup> While acknowledging that pregnant women are disadvantaged, this kind of language gave parental responsibility to the pregnant woman.<sup>118</sup> This in turn implies that, should she endanger her pregnancy, she is acting defiantly.<sup>119</sup>

Invoking economic circumstance has been a strategy on both sides of the debate. In the parliamentary debate, head of the ACDP Reverend Kevin Meshoe conjured a powerful image saying

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<sup>112</sup> Ibid

<sup>113</sup> The Sowetan, "In Brief: Abortion Discussion", *The Sowetan*, 11 October 1996

<sup>114</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Dot Cleminshaw Papers, University of Cape Town Special Collections Library, Cape Town, ZA UCT BC1051\_CC\_CC4, ZA UCT BC1051\_CC\_CC3

<sup>118</sup> Catriona Macleod, 'Developing Principles for Research around Young Women and Abortion: a Feminist Analysis of Difficulties in Current South African Studies', African Gender Institute UCT, (2008), pg. 61

<sup>119</sup> Ibid

I can only imagine what the backyard of an abortion clinic will look like at the every day, with hundreds of little bodies or pieces of bodies in buckets or waste bags. Abortion on demand will become a major health risk, especially in poorer communities, if these dead bodies are not taken care of properly.<sup>120</sup>

## Contraception and the Aborting Woman

Beyond the text of the law, the ideal aborting women was also constituted from the various arguments used to pass CTOP as well as the negotiations of different publics involved in the making of the law. The ideal aborting woman represents a problem for abortion access because it leans on rhetoric of empowerment that creates a phantom identity that is given sovereignty.<sup>121</sup>

This is an especially important construction given that CTOP was conceived within a particular ‘sexual moment’ in SA. The democratic regime replaced an explicitly moral regulation of sexuality with “the allocation of rights”.<sup>122</sup> Living in post-apartheid SA and the HIV/AIDS crisis meant a departure from the apartheid model of ‘sexual permissiveness’ as communist plot, to one where the permissiveness of sex is bound up more with health promotion models.<sup>123</sup> Crucially, sexual rights were imbued with heavier responsibilities especially in the case of sex without contraception.<sup>124</sup> A large part of this was because of the timing of the HIV/AIDS crisis and focus of public health officials on dissuading the public from ‘dangerous’ “unprotected” sex.<sup>125</sup>

Abortion is “filled with the messy reasons why women have sex without contraception, even though they do not want to get pregnant”.<sup>126</sup> The ideal aborting woman inherited not only rights but also concomitant responsibilities in a context where sex without contraception was particularly dangerous.<sup>127</sup> While CTOP gave women a right to choose, it is the attached responsibilities that weigh on women’s experience of access. In my interviews with women

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<sup>120</sup>RSA, 1996, *Parliamentary Debate*, Choice on Termination of Pregnancy Bill

<sup>121</sup>Asha Nadkarni, *Eugenic Feminism: Reproductive Nationalism in the United States and India* (Minnesota: University of Minnesota Press, 2014)

<sup>122</sup> Deborah Posel, ‘Getting the Nation Talking About Sex’: Reflections on the Politics of Sexuality and Nation-Building in Post-apartheid South Africa’ in Sylvia Tamale (ed.), *African Sexualities: A Reader* (Cape Town: Pambazuka Press, 2011), pg. 113

<sup>123</sup>Tim Rhodes & Linda Cusick, “Accounting for Unprotected Sex: Stories of Agency and Acceptability”, *Social Science & Medicine*, vol. 55, (2002), pg. 212

<sup>124</sup>*Ibid*

<sup>125</sup>*Ibid*

<sup>126</sup> Michelle Oberman, *Her Body Our Laws: On the Front Lines of the Abortion War, From El Salvador to Oklahoma* (Boston: Beacon Press, 2018) pg. 3

<sup>127</sup> Tim Rhodes & Linda Cusick, “Accounting for Unprotected Sex: Stories of Agency and Acceptability”, *Social Science & Medicine*, vol. 55, (2002)

who had had abortions—whether legally, illegally or informally—a common thread was that they underscored their reasons for ‘choosing’ abortion with perceptions about “appropriate” and “transgressive” sex.

In the preamble to CTOP, there are many declarations of the relationship between legal abortion and democratic principles. CTOP’s preamble uses a human rights vocabulary, saying that the Act is a “recognition” by the state that people have the right to “make decisions concerning reproduction” because this protects their right to bodily autonomy, “recognition” of the right to access “safe, effective, affordable and acceptable methods of fertility regulation of their choice”, and “recognising that the decision to have children is fundamental to women’s physical, psychological and social health” and that access to ToPs is a fundamental and “acceptable” means of protecting this right.<sup>128</sup>

The use and repetition of the word “recognising” communicates that the state validates these rights and that CTOP is a means of doing so. However, interestingly, the preamble deviates from this in the last line; it goes from “recognising” to “believing that termination of pregnancy is not a form of contraception or population control”.<sup>129</sup>

The transition from the state’s acknowledgement to the state’s belief speaks to the desire to mediate between constructions of ToPs as a human rights issue but also one that carries with it the perception and potential to deviate from ‘appropriate’ sexual behaviours. However, what makes the wording interesting is that while the state ‘believes’ that ToPs are “not a form of contraception”, to “recognise” this would mean that the state would be compelled to interfere in the sexual lives of its citizens by imposing rules about unprotected sex.<sup>130</sup>

However, the state’s “beliefs” are not to be dismissed. The state’s constructions of appropriate sexual activity was influenced by and informed how abortion was constructed in public. “Believing” that ToPs should not be used as a contraceptive speaks to the construction of unprotected sex in particular circumstances to be “unacceptably risky or morally dubious”.<sup>131</sup>

The NP, in objecting to the CTOP Bill (and proposing an amendment) tried to capitalise on this relationship. In the parliamentary debate, the NP stated that “We believe the ulterior purpose of the ANC in pushing this Bill through is to use it for family planning, in spite of the fact that

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<sup>128</sup>RSA, 1997, *Choice on Termination of Pregnancy Act*

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Tim Rhodes & Linda Cusick, “Accounting for Unprotected Sex: Stories of Agency and Acceptability”, *Social Science & Medicine*, vol. 55, (2002), pg. 213

South Africa is party to an international agreement reached in Cairo two years ago which does not countenance abortion on demand for family planning purposes".<sup>132</sup> This line of argument is interesting by the NP who most certainly used the guise of 'family planning' to try control population dynamics.

The idea that abortion is not a method of family planning or fertility regulation is part of the packaging of abortion as an inherent ill or 'last resort'. In many of the stories of why women had abortions, contraceptive failure or not using "family planning" is chief among them. The shame here seems to be about not engaging in 'appropriate' family planning methods. Catriona Macleod advances a framework that problematises the "individualising approach" which makes individual women responsible to manage 'the risk' of 'unintended' pregnancy.<sup>133</sup>

For Lusanda "the general narrative...was being aware of it...and what the risks would be".<sup>134</sup> For her, condoms were part of the vocabulary of "sex and the, like, dangers of sex...because they are 90 whatever perfect effective".<sup>135</sup> For her, the condom narrative that dominated was "leaning more towards pregnancy than it was about disease".<sup>136</sup> For her, the danger of pregnancy was underpinned by her responsibilities as a reproductive being.

There was a lot of...uh, slut shaming rhetoric around it, so, um, I remember...that example of this girl who was gang raped and she was young and she...was described with the analogy of um, chewing gum.<sup>137</sup>

For Lusanda, who described herself as being in a sexually 'safe' relationship before her pregnancy and abortion, "there was this feeling of being immune...being in a so-called 'educated space' where we should know to protect ourselves and we should know the risks of unprotected sex and we should know to have safer behaviours".<sup>138</sup>

To try divorce abortion from methods of family planning was part of the broader patriarchal project that women's sexuality is chiefly reproductive. Single mothers represent a particular threat to the reproductive model and shaming is used to indicate that it is these women who

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<sup>132</sup>RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col. 4856

<sup>133</sup> C Macleod & T Feltham-King, "Young Pregnant Women and Public Health: Introducing a Critical Reparative Justice/Care Approach Using South African Case Studies. *Critical Public Health*, vol. 30 (2019), <https://doi.org/10.1080/09581596.2019.1573313>, pg. 47

<sup>134</sup> Interview with Lusanda (woman who had an abortion in the early days of CTOP), Observatory, Interviewed by Ronel Koekemoer, 25 June 2019

<sup>135</sup> Ibid

<sup>136</sup> Ibid

<sup>137</sup> Ibid

<sup>138</sup> Interview with Lusanda (woman who had an abortion in the early days of CTOP), Observatory, Interviewed by Ronel Koekemoer, 25 June 2019

should have abortions. As Jacqueline Rose highlights, there is a “common assumption that a single mother is a woman who puts her sexual life ahead of her social responsibility. She therefore has only herself, or rather her voracious sexual appetites are to blame”.<sup>139</sup>

To put Rose’s suggestion about the over-sexed single mother in conversation with the SA context reveals a similar trend: having many children to reproduce the nation becomes important but only in the context of male partnership. While the mother of the nation must be reproductive, her sexual self must be invisible.<sup>140</sup> For the pro-life camp, the idea that women could access abortion under CTOP meant an encouragement of an excessive sexuality in women who were meant to be mothers. It also encouraged sex for women who should rather not populate the republic. Dr Newbury, in his objection to contraception spoke about the trouble with what he calls “the contraceptive mentality” which allows sex (even when “between husband and wife”) to “only be used as a pleasurable thing—which obviously it is pleasurable as God has intended it—but its essence is reproductive”.<sup>141</sup> For Newbury, the contraceptive mentality allows for “pleasure without reproduction” which is not what sex should be about.<sup>142</sup> The real danger in this is that this “possibility of pleasure” means that “if and when reproduction does occur”, women turn to abortion.<sup>143</sup>

While the ideal aborting woman might be unwed, however, this did not advocate for abortion as a solution to sexual activity. This was done by emphasising responsibility. During the parliamentary debate, while the IFP largely supported greater access to abortion, they emphasised that “abortion is not only about women’s rights. It is also about responsibility, morality, safety and health”.<sup>144</sup> Their major objection to the CTOP Bill, despite being pro-choice, was their stance that it did not do enough to “encourage [women] to be responsible”.<sup>145</sup> Their critique was that CTOP did not package abortion as a considered choice. They argued for a mandatory waiting period before having the procedure saying that “the argument that any pause placed on a woman who requests an abortion is a denial of her right is one we reject. Requiring a woman’s decision about her present and her future to be

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<sup>139</sup> Jacqueline Rose, *Mothers: an Essay in Love and Cruelty*, (London: Faber & Faber Ltd., 2018), pg. 36

<sup>140</sup> Ibid

<sup>141</sup> Interview with Dr Claude Newbury (founder of Pro-Life SA and medical doctor), interview with Ronel Koekemoer over phone call, 13 April 2020

<sup>142</sup> Ibid

<sup>143</sup> Ibid

<sup>144</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol. 10

<sup>145</sup> Ibid

responsible and not casual is not obstructing her freedom to choose”.<sup>146</sup> The IFP were clear about their belief that this was the place of the state to ensure that the abortion choice was a considered and responsible one:

It is the government’s responsibility...to encourage people to understand the intrinsic value of life, to help a woman understand that she is responsible for making the decision to abort reflectively, not out of immediate convenience but out of examined conviction.<sup>147</sup>

The arguments that liberal abortion laws encourage abortion are decidedly anti-abortion. These arguments invoke the aborting woman as overly sexual or not sexual in the correct way. Single or unmarried women pose a particular challenge because while abortion is not desirable, their being mothers is not ideal either. This idea that women could ask for abortions and not have to motivate why or meet criteria was routed in ideas about abortion not being a legitimate choice or option for pregnant women.<sup>148</sup> The idea that women are always desperate when seeking abortion, implies that there are no women who do not want to be pregnant.<sup>149</sup>

For Margaret, she positioned her ‘abortion story’ within having premarital sex. While morally wrong in the view of her Catholic beliefs, she rejected this, saying: “there was sex before marriage, that’s just the way it is. I think it’s the most normal thing in the world”.<sup>150</sup> For her, having premarital sex was not the transgression. Rather, her abortion is a direct result of her being “actually quite stupid. It was stupid, to think you can go and have sex with a guy and not fall pregnant. You know, the thought didn’t enter my head”.<sup>151</sup> Sex is not transgressive in her narrative (“I can’t even remember, that’s how unimportant it was”).<sup>152</sup> Instead, it is her inability to use contraception. Another participant who had an illegal abortion during apartheid shared the same conviction. She spoke to the disconnect between what was being espoused by the state and the “community”—as she calls it—“and then there was reality”.<sup>153</sup>

In my interviews with women who had had abortions, almost all of them spoke about how relationship difficulties contributed to their decision to abort. For one interviewee who had an

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<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Millar, *Happy Abortions*, 117

<sup>149</sup> Millar, *Happy Abortions*, 117

<sup>150</sup> Interview with Angel (woman who had illegal abortion under ASA). Interviewed by Ronel Koekemoer, Edgemoed, 20 January 2020

<sup>151</sup> Ibid

<sup>152</sup> Interview with Angel (woman who had illegal abortion under ASA). Interviewed by Ronel Koekemoer, Edgemoed, 20 January 2020

<sup>153</sup> Ibid

illegal abortion during apartheid, while it was acknowledged that abortion was morally wrong and premarital sex was wrong, she said that “Girls. Do. Fall. Pregnant...they are not married, and they are young and they get into situations and that’s true”.<sup>154</sup>

Relationship status was also a significant abortion narrative. In the case of Margaret, part of her motivation for the abortion was that she did not want to have to marry (and so be bound to) the man. This was important for Margaret’s mother who asked “Do you love this guy?” before supporting her through the termination.<sup>155</sup> For Rita, there was a similar refrain. She described how, part of not wanting to have the child was because “we weren’t married—the father of the child and myself—we weren’t married at that stage to one another”.<sup>156</sup> For her, she felt that she would ‘one day’ be punished for “killing another human being” but the shame rested in “being in this shameful situation of not being married and being pregnant”.<sup>157</sup> For Michelle, the relationship to the man was also part of her reason for having abortion; while she was happy to marry him, he told her that he would not continue a relationship if she carried the pregnancy to term.

Pregnancies coming out of premarital sex carried specific social meaning during the apartheid years and persisted into the new South Africa. In one opinion piece in support of CTOP, Bhan Mahabir wrote that his support for abortion rights was because it is “highly irresponsible to bring an unwanted child into the world. For one thing, the stamp of ‘illegitimacy’ is a life-long stigma that must adversely affect the personality of any individual”.<sup>158</sup>

For women seeking abortion because of premarital sex, the shame is concentrated on the sex. For married women seeking abortion, the shame is concentrated on not wanting a child. In both iterations, the relationship dynamics of women seeking abortion was not emphasised. For all the aborting women I interviewed, the textures of their relationship were a deciding factor—whether in or out of marriage. In some cases, women abort because they do not want to stay with their partner, or it is their male partner wanting the abortion. While the male partner consideration was quite limited, arguably one of the more impassioned members debating the Bill was member of the New National Party, Desmond Padiachey. For him, amongst other

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<sup>154</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>155</sup> Interview with Angel (woman who had illegal abortion under ASA). Interviewed by Ronel Koekemoer, Edgemoed, 20 January 2020

<sup>156</sup> Interview with Rita (A woman who had an illegal backstreet abortion under ASA. Her name has been changed) Interview conducted by Ronel Koekemoer, Kalk Bay, 2 May 2020

<sup>157</sup> Ibid

<sup>158</sup> ‘Dear Editor’, *The Sowetan*, 17 October 1996

things (“life and murder”) the CTOP Bill was “about men’s rights being taken away...a man involved in the conception of a child has a right to that child”.<sup>159</sup> Padiachey felt that dismayed that “the men in the ANC are now listening to the women”.<sup>160</sup>

## Aborting Teenagers

In newspaper coverage, pregnant teenagers and their newfound access to abortion received a lot of attention. Teenagers were especially vulnerable to the dangers of backstreet abortions: “most women who find themselves compelled to go to a backstreet abortionist or concoct their own mixture are teenagers”.<sup>161</sup> After CTOP was enacted, there was widespread coverage of the number of teenagers accessing terminations. In the *Sowetan*, one article said that “the majority of...patients at the Chris Hani Baragwanath Hospital’s gynecology department are teenagers, ranging in age from 12 to 18 who have come to terminate pregnancies”.<sup>162</sup>

The focus on teenagers was part of an ongoing moral panic. Rebecca Hodes traced how anxiety around teenage pregnancy emerged in the late 1990s. Hodes attributed this to ideas that democracy signaled an abandonment of so-called traditional values.<sup>163</sup> The concern that came with the rights discourse was that it would erode the authority of traditional values over morality.<sup>164</sup>

One of the aborting women I spoke to, Eva, spoke of the connection between abortion and the apartheid context saying: “I went to school in the 80s—in [19]85, the school, the highschool was shut. And there was a spike in teenage pregnancies of course”.<sup>165</sup> When I asked her why she saw such an obvious connection between the school being closed and the increase in teenage pregnancies she said: “Our parents worked or were in the struggle...so [with school closed] what the hell were we supposed to do now? Learn biology [laughs]”.<sup>166</sup> This is significant because it shows that abortion education was introduced as part of the discussion of

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<sup>159</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col.4835

<sup>160</sup> *Ibid*, col. 4834

<sup>161</sup> ‘Abortion Bill not the Answer’, *The Sowetan*, 13 November 1996

<sup>162</sup> ‘Steady flow of abortions’ *The Sowetan*, 5 September 1997

<sup>163</sup> Rebecca Hodes, “The Medical History of Abortion in South Africa, c.1970-2000”. *Journal of southern African studies* 39, no. 3 (2013): pp. 527-542. <http://www.jstor.org/stable/42001354>.

<sup>164</sup> *Ibid*

<sup>165</sup> Interview with Eva (woman who had one abortion before CTOP and one after the law was passed), interviewed by Ronel Koekemoer via phone, June 2020

<sup>166</sup> *Ibid*

teenage pregnancy. Being young is constructed as a legitimate—if tragic—reason for abortion. One of the ways we see this legitimacy being established within the public sphere is the hypervisibility of teenage pregnancy.

In her oral submission to the Select Committee on Abortion in May 1995, Dr Marj Dryer (on behalf of ARAG) spoke about “the specific advantages in making legal abortion available in cases of teenage pregnancy”.<sup>167</sup> It was framed as a way to prevent “a recurrence of the problem in the teenage years” in that it would allow girls to complete their education, “leads to the first introduction to effective contraception” and, reduces the number of babies who are “illegitimate” and so “are often disadvantaged from the start”.<sup>168</sup>

While there was certainly a fear that teenagers would see the CTOP law and the consent clause as an invitation to promiscuity and recklessness, Penn-Kekana mentioned that there was concurrently an idea that,

I remember the person who was in charge of maternal health saying, ‘actually do you want to force young girls who are so unincontrol of their lives that they keep having abortions to have a child?’.<sup>169</sup>

This sentiment came through multiple times: the continued emphasis on preventing teenage pregnancy or using abortion to introduce pregnant teenagers to “responsible” sexual behaviours “are premised on the assumption that pregnant teenagers are failures regardless of whether they have abortions or become mothers”.<sup>170</sup>

The idea that being a teenager is an acceptable reason to have an abortion is supported by the notion that having an abortion is less shameful than carrying a pregnancy to term. This idea is interesting because, in many of the reasons given for abortion, women would explain that—within the parameters of choice—abortion was the better choice in the face of the alternative. But in the case of teenage pregnancy, abortion does not carry the same veneer of shame that we see in older women.

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<sup>167</sup> Abortion Reform Action Group (ARAG) Records, Killie Campbell Africana Library, University of Kwa-Zulu Natal, Durban

<sup>168</sup> *Ibid*

<sup>169</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

<sup>170</sup> Millar, *Happy Abortions*

Michelle described one of her defining encounters with abortion as

An experience in my family with somebody falling pregnant...and she was 15 so she had the baby like at 16 and...she obviously didn't have an abortion. She had this baby and this baby was then raised by its grandparents...<sup>171</sup>

Her 'choice' not to have an abortion was a product of the shame of abortion, but Michelle's memory does not end there. She goes on: "but there was always talk...about how Sharon was such a bright girl and she was so capable and she was the cleverest of the bunch and she fucked up her life" by not terminating her pregnancy.<sup>172</sup>

When Michelle turned 17, she became pregnant and expressed that those around her positioned abortion as the less shameful choice: "my mom and my step-dad made these offers and they kept saying "it's so soon, nobody knows...I was 6 weeks pregnant and my step-dad and mom said "we'll put you on the plane tomorrow and go. Go to London, we'll pay'."

Michelle did not go to London and carried the pregnancy to term.

I couldn't do it. I knew that meant that I couldn't go to university, I knew that it meant that—I wasn't in love with the person so—I knew that I was going to have to end up with him or end up with my parents. I knew the choices were not good choices. Perhaps the choice of going and having the abortion would be the good one.<sup>173</sup>

For another woman I interviewed who had a legal abortion on mental health grounds under apartheid, her age was important in legitimising her choice. At 19, she "had just started working...and my mom and dad just said 'you've got your whole career ahead of you, you've just matriculated from a very good school'".<sup>174</sup> While abortion was no doubt shameful, in the case of teenage pregnancy, much is done to imply that abortion was the less shameful choice.<sup>175</sup> In the law, this is done through the clause that stipulated that a minor does not have to seek the consent of her caregiver when seeking an abortion.

When then-health minister Dr Nkosazana Dlamini-Zuma opened the parliamentary debate on the CTOP bill, she justified different aspects of the Bill by conjuring ideal aborting women.<sup>176</sup>

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<sup>171</sup> Interview with Michelle Berg (woman who had abortions in the 90s before CTOP). Interviewed by Ronel Koekemoer, Claremont, 9 January 2019

<sup>172</sup> Interview with Michelle Berg (woman who had abortions in the 90s before CTOP). Interviewed by Ronel Koekemoer, Claremont, 9 January 2019

<sup>173</sup> Interview with Michelle Berg (woman who had abortions in the 90s before CTOP). Interviewed by Ronel Koekemoer, Claremont, 9 January 2019

<sup>174</sup> Interview with Angel (woman who had illegal abortion under ASA). Interviewed by Ronel Koekemoer, Edgemoor, 20 January 2020

<sup>175</sup> Millar, *Happy Abortions*, pg. 213

<sup>176</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10

One of the first of these were teenagers: “one out of every four mothers who give birth in South Africa is under 20 years old”.<sup>177</sup> She goes on to introduce the consent clause saying:

What this Bill says is that if that young woman [a school-going girl] is terrified even of telling her parents about the pregnancy, she will be equally terrified if she has decided to terminate that pregnancy. Therefore, if she is forced to get consent from her parents, she will still have a backstreet abortion, and she will still die. If one was a parent, would one rather one’s child died because she did not get consent from one, or would rather she was saved even if one did not know about the pregnancy?<sup>178</sup>

Dr Dlamini-Zuma responded to interjections saying that the CTOP Bill “says that the life of that young girl is paramount. We have to save her life even if it means not getting parental consent”.<sup>179</sup> The idea was that, while “minors are expected to consult their parents”, the law would not deny minors the “right to abort” without parental consent.<sup>180</sup>

Even though teenagers accessing or needing abortion were highly visible in the public debate, teenagers were not the main demographic terminating pregnancies. Penn-Kekana spoke about the initial days of implementing CTOP and said “I remember myself going to the clinics and looking through and actually it wasn’t really teenagers” who were seeking abortions.<sup>181</sup> According to another abortion provider working in the private sector:

**RK:** *Is it mainly teenagers? Young girls?*

**MS:** *I don’t know why people always ask that. I don’t see children.*

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<sup>177</sup>Ibid, col. 4760

<sup>178</sup> Ibid

<sup>179</sup> RSA, NA Deb (*Choice on Termination of Pregnancy Bill*) 29 October 1996, vol 10, col. 4761-4762

<sup>180</sup> Ibid

<sup>181</sup> Interview with Loveday Penn-Kekana (spokesperson of the RRA and member of the ANC portfolio on health). Interviewed by Ronel Koekemoer via Zoom, Mowbray

## Conclusion

The rhetoric that produced the ideal aborting woman was imbued with judgments about what the law should do about abortion. In contexts of nation-building, she reflected the imagined relationships between law, nationhood, and citizenship. Even in the context of a liberal law, abortion can be *for* one demographic but not another. This obscured and delegitimised the complex (and not so complex) reasons why women end pregnancies.

The ideal aborting woman was a product of the public life of abortion, the result of contestations and compromises between interest groups, public imagination, and political ideals. The result was a view of womanhood forged in such a way that “naturalis[ed] a historically and contextually specific view of pregnancy”.<sup>182</sup> This affixed the ideal aborting woman with a timelessness that those who would seek abortion access through CTOP could emulate. Unjustifiable and legitimate abortions were informed by moralities founded from SA’s past racist, patriarchal, and ableist ideologies.<sup>183</sup>

Textually, the law’s ideal aborting woman was one empowered by choice. However, public preoccupation with the reasons women should or should not have abortion access suggested that women needed to meet a variety of criteria for this choice to be legitimate. In this way, the ideal aborting woman, even if she makes abortion more accessible for certain people, is also an iteration of Bradford’s lament about the silencing of women on the abortionist’s table and elsewhere.

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<sup>182</sup>Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd., 2017), pg. 22

<sup>183</sup> Susanne Klausen’s book *Abortion Under Apartheid* makes this argument and outlines the historical forces that created the discriminatory ASA. With CTOP, while textually the law adheres to tenants of liberal democracy and non-sexism, the law is imbued with social meaning about abortion that Klausen first outlined in her work.

## Final Conclusion

I introduced this study with Helen Bradford's sentiment that put forward a particular image of an aborting woman. Bradford's description represented what women seeking abortions under apartheid had to navigate: stigma, criminalisation, and potentially imperilling and painful procedures. If not for the historical work done by the likes of Klausen, Bradford, and Hodes, these histories of women seeking to end pregnancies could have been stifled.

The process of repealing ASA with CTOP has been examined in this thesis. CTOP was a triumph for reproductive rights in South Africa. The law drastically reduced the rate of maternal morbidity associated with the backstreet abortion industry that ASA implicitly strengthened. These discourses come from a wider context in which the sexual and reproductive aspects of people's lives were being formulated within a human rights paradigm.<sup>1</sup> The idea that sexual and reproductive health rights should be protected and enshrined by liberal democratic states was internationally and regionally recognised and developed in the 1990s.<sup>2</sup>

However, like her apartheid predecessor, the contemporary aborting woman must still navigate her share of shame, vilification, and limited options. Despite the enabling legislation and efforts to improve CTOP's implementation, abortion remains inaccessible and highly stigmatised. CTOP has not significantly changed abortion culture in South Africa, and the women seeking termination services are bearing the brunt of this. Resting on our laurels about CTOP's progressiveness and ignoring its implications for abortion access is another form of silencing. By pretending that liberal and progressive laws are enough to ensure women's lives can be well lived is a dangerous oversimplification.

Perhaps most promising in remedying this, is the move from a reproductive *rights* to a reproductive *justice* framework. I wrote this thesis in the thick of the Covid-19 pandemic, and during this time, access to abortion services in South Africa was further limited. Amidst this, the possibilities of allowing South African women to manage their own abortions went from being a feminist fantasy to a practice.

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<sup>1</sup> Lucía Berro Pizzarossa & Ebenezer Durojaye, "International Human Rights Norms and the South African Choice on Termination of Pregnancy Act: an Argument for Vigilance and Modernisation", *South African Journal on Human Rights*, 35:1(2019), pp. 50-51

<sup>2</sup>ibid

Dr Melusi Dlamini (an abortion provider for Marie Stopes) recalled that “it was April [2020] when we received our first call”.<sup>3</sup> Marie Stopes started couriering abortion pills to women and providing remote consultations on how women could self-manage their abortions.<sup>4</sup> This service is limited to people who can afford to have private sector abortions. CTOP does not make provision for self-managed abortions even though research into self-managed abortions has been available in South Africa since 2012.<sup>5</sup> The amendments to telemedicine guidelines to accommodate the unique needs of the nationwide lockdown did not address abortion access. While self-managed abortions are not a “solve-all”, Dhlamini maintained that “the advantages of self-managed abortions outweigh the disadvantages”.<sup>6</sup>

In a submission to Dr Tlaleng Mofokeng (the UN Special Rapporteur on the Right to Health), the Gender, Health and Justice Research Unit advocated for self-managed abortions to become “a key and sustained part of abortion service provision in South Africa”.<sup>7</sup> In their report, the GHJRU said that the lockdown’s demand for self-managed abortions would be an important part of “improving access to abortion services”.<sup>8</sup> They called self-managed abortions “a cost effective, non-judgemental, and private experience” that the South African government had “chosen” not to support thereby “foregoing the opportunity to improve access”.<sup>9</sup>

In many ways, self-managed abortions provide a solution to many of the issues with access I highlight throughout my thesis. To be fair, these self-managed abortions are not unproblematic. In a context where girls and women do not have reproductive literacy, the knowledge required to manage one’s own abortion cannot be assumed. Similarly, self-managed abortions still require someone to provide the relevant medication and information. This is already being done by informal and illegal providers whose medication is not verified or regulated. These issues and the politics surrounding self-managed abortions is a site for future research.

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<sup>3</sup>Melusi Dhlamini, “Pills and Phone Calls: How COVID Restrictions Forced us to Conduct Abortions Telephonically”, *Bhekisisa Centre for Health Journalism*, 29 September 2020, <https://bhekisisa.org/article/2020-09-29-pills-and-phone-calls-how-covid-restrictions-forced-us-to-conduct-abortions-telephonically/>

<sup>4</sup> Ibid

<sup>5</sup> Melusi Dhlamini, “Pills and Phone Calls: How COVID Restrictions Forced us to Conduct Abortions Telephonically”, *Bhekisisa Centre for Health Journalism*, 29 September 2020, <https://bhekisisa.org/article/2020-09-29-pills-and-phone-calls-how-covid-restrictions-forced-us-to-conduct-abortions-telephonically/>

<sup>6</sup> Ibid

<sup>7</sup> Nasreen Solomons, & Harsha Gihwala, “The Right to Sexual and Reproductive Health: Challenges and Possibilities During Covid-19”, *The Gender, Health and Justice Research Unit submission to Dr Tlaleng Mofokeng*, (June 2021), <https://www.ohchr.org/Documents/Issues/Health/sexual-reproductive-health-covid/CSOs/ngo.ghjru.pdf>, pp. 1-14

<sup>8</sup> Ibid

<sup>9</sup> Ibid.

On the plus side, self-managed abortions can drastically reduce the gatekeeping of medical expertise and infrastructure. It can be done without being confronted by the reductionist war between pro-choice or pro-life. Self-managed abortions reduce encounters with (and falling short of) the ideal aborting woman. One answer is to amend CTOP and the protocols with this in mind. But mention of CTOP by those in power remain few and far between. Just like the politicians of the apartheid regime, as we face upcoming elections, even the most pro-choice candidates often remain silent on abortion when seeking political office.

Alternatively, could the future see abortions happening without the limitations of a law—no matter how progressive? In August 2020, long-time reproductive justice advocate Marion Stevens penned an opinion piece titled “*Do we Need the Law to Provide for a Regular Clinical Medical Procedure such as Abortion?*”.<sup>10</sup> In it, Stevens outlined how lobby groups have tried to amend certain regulations of CTOP. These amendments were designed to broaden abortion access by updating the law to allow for self-managed abortions, as well as hastening the process of approving the registration of generic abortion drugs to lower the cost.<sup>11</sup> She ends her piece saying “this brings into question whether abortion law has any relevance given current practices. Perhaps it is obsolete”.<sup>12</sup> While this may be an exciting prospect, there are ways that laws matter beyond allowing or restricting certain types of abortion. As this thesis has shown, abortion laws do matter. Even if not in the ways that Stevens is saying. They make moral declarations and generate specific limitations in the ways a person can access abortion. These legal contexts operate within a social context as well.

Importantly, putting abortion back into the private sphere (what’s more private than swallowing a pill?), is not an uncomplicated ideal. The private/public divide and its gendered dimensions are not neutral spaces. The private lives of women have been constructed as idyllic escapes from a public sphere brutalised by masculine contest. The reality is that both private and public spaces are subject to similar subjectivities and conflicts. For example, in South Africa, most women experience violence in these ‘private’ spaces, in their homes and by their loved ones.

In terms of the historical work, a thorough and critical lens on CTOP was due. Even with its own history, reproductive justice is a useful lens because it offers insight into how abortion

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<sup>10</sup> Maron Stevens, “Abortion is a Regular Medical Procedure, So Why Do We Need a Law for It?”, *Daily Maverick*, 14 August 2020, <https://www.dailymaverick.co.za/article/2020-08-14-abortion-is-a-regular-medical-procedure-so-why-do-we-need-a-law-for-it/>

<sup>11</sup> Ibid

<sup>12</sup> Ibid

laws can recognise that abortion access is based on much more than whether the law gives women particular rights. CTOP has not benefitted from such popularisation and festers in the mindset of the past rather than being a proud child of the democratic present. The progressiveness of CTOP occluded the ways in which the law-making process relied on representations of aborting women which maintained that abortion could “only be imagined in negative terms”.<sup>13</sup> Historians of abortion have proven that abortion was practiced despite legislative limitations. These histories also show that women seek to terminate pregnancies in all contexts.<sup>14</sup>

While ubiquitous, abortion is by no means normative—even in the context of liberal laws.<sup>15</sup> From the early 2000s, research into abortion in SA and CTOP focussed on highlighting and examining various barriers to access. Stigma and prejudice, shortage of relevant resources such as lack of staff, infrastructure, training and equipment, normative ignorance and misunderstanding of the law, and the abuse of so-called ‘conscientious objection’ have all been identified as obstructing the implementation of CTOP.

The idea that abortion primarily describes a way of ending a pregnancy is a reproductive justice fantasy. Abortion has been used as a descriptive of various dimensions of societies. Abortion has been about murdering babies, killing women with knitting needles, rejecting motherhood, responsible parenting, population control, gender equality and the fantasy of choice.<sup>16</sup> Other than terminating pregnancy, abortion has also been a litmus test for religious, state, parental and male authority. Abortion concerns beliefs about women and their sexuality, and cosmologies of origins and existence.<sup>17</sup> If there is one thing these histories teach us, is that no matter the context, women still seek ways to end their pregnancies. During dictatorships and democracies, pandemics or prosperity, women will use abortion to control their fertility. At different historical moments and contexts, abortion has had various meanings and manifestations. What unites these, as historian Helen Bradford argues, is that “the issue was and is not abortion”.<sup>18</sup>

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<sup>13</sup> Erica Millar, *Happy Abortions: Our Bodies in the Era of Choice* (London: Zed Books Ltd, 2017)

<sup>14</sup> Helen Bradford, “‘You call that democratic?’: Struggles Over Abortion in South Africa since the 1960s”, *History Workshop*, (Johannesburg: University of the Witwatersrand Press, 1994)

<sup>15</sup> Millar, *Happy Abortions*, pg.13

<sup>16</sup> Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011), pg. 7

<sup>17</sup> L.L Wynn & Angel M. Foster, *Abortion Pills, Test Tube Babies, and Sex Toys: Emerging Sexual and Reproductive Technologies in the Middle East and North Africa* (New York: Vanderbilt University Press, 2016)

<sup>18</sup> Helen Bradford, “‘You call that democratic?’: Struggles Over Abortion in South Africa since the 1960s”, *History Workshop*, (Johannesburg: University of the Witwatersrand Press, 1994), pg. 4

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