Abortion law in Namibia and South Africa

A dissertation submitted in partial fulfilment of the requirements of the degree LLM/MPhil (Sexual and Reproductive Rights in Africa)

By

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PLAGIARISM DECLARATION

I, CHARLEMAINE WILDENE HUSSELMANN, declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

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DEDICATION

This work is dedicated to my best friend and husband Ashwynn Engelbrecht. You have been a source of great support and motivation in advancing my dreams. You have been a blessing in my life.

It is additionally dedicated to my parents, Ernst and Michelle Husselmann and my sister Desire Husselmann-Phillips for your continued love, support and commitment to our family and dreams.

A special dedication to all women, in particular, Namibian women in finding their voices and fighting for our rights in a world where women and girls are undervalued in everyday society.

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LIST OF ACRONYMS AND ABBREVIATIONS

Act 2 of 1975	Abortion and Sterilization Act 2 of 1975
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CTOP	Choice on Termination of Pregnancy Act 92 of 1996
D&E	Dilatation and Evacuation
FAR	Feminist Action Research
CESCR	International Convention on Economic, Social and Cultural Rights
LAM	Lactation Amenorrhea Method
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MDG	Millennium Development Goal
MMR	Maternal Mortality Rate
MoHSS	Ministry of Health and Social Services
NCFPP	National Contraception and Fertility Planning Policy
NGO	Non-Governmental Organisation
NHPF	National Health Policy Framework
SA	South Africa
SRHR 2011 – 2021	Sexual and Reproductive Health and Rights: Fulling our Commitments 2011 - 2021
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Program
US	United States
USD	United States Dollar
VA	Vacuum Aspiration
WHO	World Health Organisation

ABSTRACT

The analysis undertaken provides a comparison between the Namibian Abortion and Sterilization Act 2 of 1975 and the South African Choice on Termination of Pregnancy Act 92 of 1996. Given the unique history of both countries, it is of interest to note the legislation of both countries. South Africa since its independence in 1994 from apartheid rule has repealed and reformed several laws to promote human rights within its borders. This has not been the case for Namibia since achieving its independence from South African apartheid rule in 1990. Many laws still are existent on Namibia's legal system such as the Abortion and Sterilization Act that instead of promoting sexual and reproductive rights, restricts those rights. Through this comparative process, this research looked at the laws themselves, their impact and the societal perceptions that influence abortion practices within both countries. An analysis of the rights of the unborn versus the rights of the woman was done to understand the unique discourses which feeds into the abortion discussion and legislation.

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Chapter 1: Introduction

1.1. Background

In 1920 after World War I the mandate to administer South West Africa (as Namibia was known at the time) was given to South Africa. In December 1988 a Joint Commission supervised by the United Nations (UN) guided the implementation of UN Resolution 435 which led to the Independence of Namibia in 1990.[1] As a former province of South Africa, Namibia has in place many laws that were enacted during the apartheid regime, in particular, the Abortion and Sterilization Act 2 of 1975 (Act 2 of 1975). This piece of legislation was in force in both countries. However, South Africa replaced this with the Choice on Termination of Pregnancy Act 92 of 1996 (CTOP), while Namibia has kept the Act 2 of 1975 law in place even after independence from South Africa in 1990. It is understood that given the conservative traditional context of the African continent and both Namibia and South Africa, this has greatly influenced how abortion legislation was introduced in these two countries. It should be recognised the unique role colonialism has played within the adoption of the conservative social perceptions held within the continent and these two countries. Each of these respective pieces of legislation clearly outlined the conditions or limitations under which abortion can be accessed.

According to Act 2 of 1975, abortion can only be procured if the following provisions are met and the courts have granted the abortion:

- May be obtained by a medical physician only and this links to the rest of the provisions.
- Where the continuation of the pregnancy will endanger the life of the pregnant woman, which constitutes a grave threat to her physical health.
- Where the continued pregnancy constitutes a serious threat to the mental health and well-being of the pregnant woman involved.
- Where a perceived grave risk is found that the child born will suffer from severe physical or mental defect.

[1] South African History Online 'Towards a people's history' https://www.sahistory.org.za/place/namibia (accessed 14 April 2019).

- Where the foetus in question was conceived through an act of unlawful carnal intercourse (defined with the Act as rape, incest and unlawful carnal intercourse with a female idiot or imbecile which is in contravention of section 15 of the Immorality Act 23 of 1957).
- Finally, forming part of each of these provisions within the Act is the need for two medical physicians to corroborate in writing the justification to undergo an abortion.[2]

Through these provisions, access to abortion for woman in Namibia is highly restricted, often used as a basis in the debate to protect the woman's life and that of the foetus. These restrictions are further strengthened within a moral social space which condemns abortion at a societal level. South Africa realised the need for changing this law and thus advance women's rights and uphold the progressive constitution of the country. The new regime elected in 1994 made a commitment to women's health, which was highlighted by domestic policy documents such as the Reconstruction and Development Programme and the African National Congress' National Health Policy.[3] The progressive approach taken by South Africa was seen as advancing the rights of women within a feminist human rights framework.

According to the South African CTOP, these are the following conditions women and girls can access abortion:

- A pregnancy may be terminated when requested by a woman during the first 12 weeks of her pregnancy.[4]
- A pregnancy may be terminated from week 13 up until week 20 of the pregnancy if a medical practitioner after a consultation is of the opinion that the pregnancy if continued is a risk of injury to the woman's physical or mental health; or if it resulted from rape or incest; or the pregnancy can result in a significant effect on the economic or social life of the woman.
- A pregnancy may also be terminated after the week 20 if a medical practitioner, after a consultation with another medical practitioner or registered midwife is of

[2] Abortion and Sterilization Act 2 of 1975 sec 3(1)(a) – (d).
[3] SJ Varkey 'Abortion services in South Africa: available yet not accessible to all' (2000) 26 *International Family Planning Perspective* 87.
[4] Choice on Termination of Pregnancy Act 92 of 1996 sec 2(1)(a) – (c) & (2).

the opinion that the continued pregnancy would be dangerous to the life of the woman; would result in severe malformation of the foetus; or would be a risk of injury to the unborn foetus.

- Termination of pregnancy may only be carried out by a medical practitioner, or midwife who has completed the necessary prescribed training to do so.

The two acts are extremely different in their approach to addressing abortion. As a former province of South Africa, the expectation would have been for Namibia to replace Act 2 of 1975 once independence was achieved. With the achievement of independence, it was a goal to reform apartheid law within Namibia and repeal the majority of the laws.[5] However, this was not done until 2018 with Namibia still enforcing many of these acts even though some were repealed.

In the process of understanding abortion and accessing abortion, there are two types of procedures *medical abortion* and *surgical abortion* which can be performed to terminate a pregnancy. Women are not able to access these methods on-demand within Namibia as a legal process is needed to access an abortion. This is vastly different within South Africa where women can make the informed choice to access abortion on demand. *Medical methods of abortion (medical abortion)* is described as the use of pharmacological drugs (example pills) to end a pregnancy; sometimes it is also referred to as 'non-surgical abortion'.[6] In Namibia this method of abortion is easily available; the drug *Misoprostol* (used to treat ulcers known by the brand name Cytotec) is available to those who wish to procure an illegal/backstreet abortion.[7] It is reported that due to the fact that this is a controlled drug and should only be accessed with a prescription; pharmacists and doctors make it available on the streets and to their patients by selling it between 140 – 200 USD.[8] This can also pose a risk to medical

[5] The Repeal of Obsolete Laws Act 21 of 2018 was passed by Parliament to address and repeal legislation put in place by South Africa. The Schedule as outlined within the Act highlights the laws to be repealed by the Government of Namibia. Legislation repealed includes the Concessions from Natives Proclamation 8 of 1915, Venereal Disease Prevention Proclamation 5 of 1919, Vagrancy Proclamation 25 of 1920, and South West Africa Affairs Act 25 of 1969.
[6] World Health Organisation (WHO) *Safe abortion: technical and policy guidance for health systems: Second Edition* (2012) iv.
[7] P Nyangove 'Health-Namibia: Illegal abortions common despite risks' 7 October 2009 http://www.ipsnews.net/2009/10/health-namibia-illegal-abortions-common-despite-risks/ (accessed 21 April 2019).
[8] Ngyangove (n 7).

professionals who provide this to patients as they can be prosecuted. Under the Abortion and Sterilization Act section 10(1) it is an offence to access an abortion without the necessary certificates issued by two medical practitioners; and those who do so will be guilty of a punishable offence and liable for a fine not greater than five thousand dollar or alternative imprisonment for a time, not more than five years or both.[9] This puts those who access an abortion illegally at great risk for their health and face imprisonment if caught. The former Health Minister of Namibia Dr Bernard Haufiku reported that 7335 illegal cases of abortion were recorded at state health facilities in 2017 from women seeking post-abortion care.[10] The figure mentioned by the former Minister of Health for Namibia indicates the desperation many women feel who are unable to access abortion on demand.

In comparison, the South African CTOP makes provision for a trimester approach to terminating pregnancy during the first 12 weeks of pregnancy upon request from the woman.[11] In Namibia, the second method of abortion as discussed above is used and is chosen by the courts which is the *surgical method of abortion.* Surgical abortion is the utilisation of transcervical procedures to end a pregnancy; which includes vacuum aspiration, dilatation and evacuation.[12] Globally and in Namibia these are the options women have when they wish to terminate their pregnancies. By providing safe abortion in the first trimester, South Africa additionally provides safe abortion within the second trimester. 13 – 27 weeks is the most common period abortion takes place within South Africa. Evidence indicates that approximately 25% of abortions that take place in South Africa are performed after 12 weeks; whereas within most developed countries it stands at 10%.[13] In contrast, the current Act of Namibia makes no mention of the time frame of when an abortion can be performed. This leaves room for interpretation by the reader which is done on the premise of what is in the best interest of the patient. In relation to advancing the rights of women, Namibia and South Africa has ratified international treaties which are perceived as protecting the rights of all.

[9] Act 2 of 1975 (n 2) section 10 (1).
[10] 'Unsafe abortions reach 7000 mark' *The Namibian* 28 March 2017.
[11] C Albertyn 'Claiming and defending abortion rights in South Africa' (2015) 11 *Revista Direito GV* 435.
[12] World Health Organization (n 6).
[13] D Grossman *et al* 'Surgical and medical second trimester abortion in South Africa: a cross-sectional study' (2011) 11 *BMC Health Services Research* 2.

1.1.1. International Treaties and Sexual and Reproductive Rights

Despite these challenges, it must be highlighted within the analysis of international and regional human rights treaties both Namibia and South Africa ratified. One such treaty is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[14] With key emphasis on article 14 (2)(c) which highlights the protection of women's reproductive rights by the state by specifically authorizing medical abortions.[15] Namibia's law although restrictive meets most of its obligations under article 14 of the Maputo Protocol. While contrastingly South Africa has gone beyond the specific article in making abortion accessible to women and girls. What does benefit Namibia is that as a monist legal system by ratifying international treaties they automatically become part of Namibia's domestic laws. When Namibia and South Africa ratified the Maputo protocol in 2004 it pathed the way for the advancement of women and girls rights.[16] This provision for Namibia is found within the Constitution article 144 which stipulates that rules of public international law and international agreements are binding and form part Namibian law.[17]

Furthermore, interpretations of these treaties' further guides states into how to apply these instruments. General Comments No 2 on article 14 of the Maputo Protocol further strengthens the obligations states have under the protocol. General Comments 2 specifically states that women have the right to be free from discrimination; which carries that women must not be subjected to any form of criminal proceedings which include not incurring any legal sanctions for benefiting from health services which are specifically dedicated to them such as abortion and post-abortion care.[18] The interpretation of Article 14(2)(c) of the Maputo protocol further strengthens states' obligation to provide for safe abortion and post-abortion health services.

[14] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003). Herewith referred to as the Maputo Protocol.
[15] Maputo Protocol (n 14) article 14(2)(c).
[16] African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (2019).
[17] The Constitution of the Republic of Namibia: Annotated Edition (2018) article 144.
[18] African Commission on Human and Peoples' Rights of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, General Comments No. 2 on article 14.1 (a), (b), (c) and (f) and article 14.2 (a) and (c) para 32.

Another instrument which is key in addressing the issue of abortion is the International Covenant on Economic, Social and Cultural Rights (CESCR) adopted by the UN. Ratified by both Namibia and South Africa the specific obligation under article 12 on the right to the highest attainable standard of health which is central within the structuring of all legislation pertaining to the provision of health services.[19] Article 12(1) states that states party to the Covenant must recognise the rights of individuals to enjoy the highest achievable standard of physical and mental health.[20] A key right provided in article 12 of the CESCR is the recognition of the obligations states must fulfil in providing quality and appropriate health services.

The CESCR Committee further released General Comments No. 14 which elaborates on the right to health by focusing on the issue of women's reproductive health. The realisation of women's right to health requires States to remove all obstacles which hinder the accessing of health services, education, information which must also include sexual and reproductive health.[21] This interpretation links with the WHO understanding of promoting safe abortions as highlighted in the guidelines of when to perform an abortion. The interpretation by the Committee on CESCR is clear in the obligation's states have towards women and girls to realise their full rights. Further elaboration to these obligations will be highlighted within preceding chapters in unpacking the key focus on promoting women's sexual and reproductive rights.

1.2. Problem Statement

Namibia known as South West Africa during South African rule; experienced South African apartheid laws being extended and enforced as Namibia was viewed as a part of South Africa.[22] However, several apartheid-era laws are still in force in the country after independence which raises the question; why does Namibia still keep some laws in place even though South Africa has repealed the same law? In reference to abortion legislation, South Africa has recognised the right of women to choose whether to

[19] Namibia has ratified the CESCR in 1994 and South Africa signed the CESCR in 1994 and only ratified in 2015. Source the UN Human Rights Office of the High Commissioner (accessed 19 September 2019) http://indicators.ohchr.org/.
[20] International Covenant on Economic, Social and Cultural Rights (1966) article 12.1. Herewith referred to as CESCR.
[21] International Covenant on Economic, Social and Cultural Rights, General Comments No. 14: The Right to the Highest Attainable Standard of Health (2000) article 12 para 21.
[22] South African History Online (n 1).

continue with a pregnancy or not has done much in advancing women's rights. In contrast, Namibia has clung to the apartheid law and enforced it strictly. I will strive to answer the question of whether Namibia is ready to repeal the Abortion and Sterilization Act after 29 years of independence by examining existing material on abortion within Namibia and South Africa.

Legal and human rights issues being addressed within this dissertation are those concerning women and girls right to access reproductive health services; specifically, the highest attainable standard of health pertaining to abortion. As Namibia and South Africa have both ratified several international and regional treaties it is important to examine the status of women's rights within the social context. In the current shifting environment of interpreting the international right to health the goal is to move towards a 'real-life' implementation for the benefit of individuals and communities; and thus, move between a short general abstract legal treaty provision to a more specific, practical human rights guidance.[23]

1.3. Significance of the Research

The proposed research will compare existing documents, statistics and analysis on the experiences of both South Africa and Namibia. Taking into consideration the unique historical relationship between the two countries. The role apartheid-era laws, specifically the Abortion and Sterilization Act 2 of 1975 has played within both countries. Based on this unique relationship the two countries still share today it begs the question of whether Namibia is ready to change its law and adopt a liberal approach to legislative development. It has been 29 years of independence for Namibia from South African rule and the legislation of the country has been progressing in advancing women's rights.[24] There is a need for further change to adapt to the reproductive and sexual health needs of women and girls.

[23] P Hunt 'Interpreting the international right to health in a human rights-based approach to health' (2016) 18 *Health and Human Rights Journal* 110.

[24] Progressive legislation such as the Combating of Domestic Violence Act 4 of 2003, Combating of Rape Act 8 of 2000 and the Married Persons Equality Act 1 of 1996 to name a few. The introduction of these Acts has shown Namibia's commitment to protecting and advancing women's rights within the country.

1.4. Objectives of Research

- To draw a comparative analysis between the Abortion and Sterilization Act 2 of 1975 and the Choice on Termination of Pregnancy Act 92 of 1996.
- To explore the discourses of abortion in Namibia and South Africa and the influence these perceptions has on abortion legislation.
- An analysis of how these two acts are different in terms of advancing women and girl's reproductive rights in both countries and the impacts of these laws.
- To what extent both countries are committed to their obligations under various international treaties in protecting, fulfilling, respecting and promoting women and girls reproductive and sexual rights.

1. 5. Research Questions

1. How has current and past discourse on abortion in Namibia and South Africa shaped the introduction and implementation of legislation in both countries?
    1.1. What is the historical evolution of abortion law in Namibia and South Africa?
    1.2. What are the consequences of restrictive abortion legislation?
    1.3. Do Namibia and South Africa meet their obligations under the international treaties which aims to advance reproductive rights of women specifically on abortion?

1.6. Methodology

The understanding of the two abortion laws requires an understanding of both the social and legal impacts of the acts. Exploring the historical development of the legislation in each country is vital to understanding the obligations Namibia and South Africa must meet under international treaties. To achieve this a socio-legal research approach was undertaken which is connected to understanding the social elements within the law. The incorporation of a sociological approach to researching law transcends the focus of the law and legal doctrine.[25] By focusing on elements of the existing legal system the goal is creating a theoretical understanding of the legal

[25] R Banakar & M Travers 'Theory and method in socio-legal research' (2005) xi.

system under study in terms of the wider social structures.[26] Through the application of socio-legal perspective within the research process, the aim is to understand the effects of the legal system within the social aspect of Namibia and South Africa particularly on the question of legislative reform within Namibia. Socio-legal studies is observed as an interdisciplinary perspective to challenging doctrinal studies of law[27] The understanding of how often decisions affect the application of law within the social context is key to understanding the social and legal needs of a society. Through the analysis of the legislation, I aimed to answer the specific research question by engaging with a feminist perspective of sexual and reproductive health and rights. An in-depth analysis of relevant text and information pertaining to both pieces of legislation assisted me in answering the research questions set forth.

By using the socio-legal research method I examined both the legal and social realities of abortion law in Namibia and South Africa. Understanding the unique female experience of abortion in the analysis of the various discourses in each country. I used a feminist paradigm to strengthen the socio-legal approach as a multi-approach to answer the research question and sub-questions. The engagement with feminist methodology, particularly Feminist Action Research (FAR), my goal was to generate a body of material that examined the unique experiences and discourses related to abortion through a feminist lens. By comparing the existence of two contrasting laws and their impact provided a view into how countries meet their obligations under international treaties. The resulting examination of these experiences would be used to relay the needs of women and girls and thus to act in achieving the needs of women and girls.

FAR is a methodological and conceptual research framework which is essentially focused on exploring and tracking opportunities for social justice and change in women's lived experiences.[28] As the research aimed to explore the historical progression of abortion discourse and law in Namibia and South Africa in the advancement of women's reproductive rights, the FAR approach galvanises the need

[26] Banakar (n 25) xi.
[27] Banakar (n 25) xii.
[28] C Reid 'Advancing women's social justice agendas: A feminist action research framework' (2004) 3 *International Journal of Qualitative Methods* 3.

to examine the specific vulnerabilities and needs of women and girls when accessing abortion. The process of discovering the marginalised knowledge of specific set of knowledge barriers and giving priority to this knowledge as well as enabling a joint development of action strategies is both theoretical and methodological.[29] It is this process that is the ultimate outcome of the research to ensure that the findings feed into a process of shifting discourse and law in Namibia on the topic of abortion. The characteristics of FAR is the notion of praxis – theory, methods, and practice of the research process that creates a dynamic interplay.[30] This is the goal achieved in using a multi-dimensional methodological approach by joining the socio-legal paradigm with the FAR paradigm of doing research.

1.6.1. Methods

The data collection and analysis process was done in a manner that will produce data that is in-depth and focused on the key research questions. Document review of relevant documents including the legislation governing abortion was conducted to gain an understanding of the governance of abortion in Namibia and South Africa. Furthermore, by examining the societal discourse of abortion in Namibia and South Africa it is key to understanding the legal aspects of abortion. Socio-legal studies as outlined employs sociology and other forms of social sciences as a tool of data collection to address aspects of legal research.[31] This process enabled a comprehensive approach to understand the social discourse and legal discourse on abortion within the two countries.

To grasp an understanding of the issue of abortion in Namibia, a review of existing documents was done. The document review process is often employed to conduct historical research of the topic under study examining data and information on past and present events.[32] There is a need to understand the historical progression of not only abortion in society but also legislation specifically in Namibia. This specific method afforded flexibility and was open because its goal was to understand how past events and present intentions relate to each other and what their meaning and value

[29] Reid (n 28) 8.
[30] Reid (n 28) 8.
[31] Banakar (n 25).
[32] L Letts *et al* 'Guideline for critical review form: Qualitative Studies (version 2.0)' (2007) 6.

is to the research process.[33] Through this process, I was able to examine secondary data for the purpose of understanding and investigating the research question and sub-questions.

1.7. Literature Review

1.7.1. Introduction

By gaining an understanding of the term 'abortion' one can better grasp the laws which govern abortion both internationally and nationally. By linking this definition, the key is to understand the laws that govern abortion in Namibia and South Africa. Several issues surround abortion were identified such as when does life start? What value does the embryo have? Whose rights are more important the pregnant woman or the unborn foetus? To answer these questions and link them to the research question and sub-questions an analysis of relevant literature was needed.

1.7.2. Understanding Abortion

Often the debate of whether a woman or a girl can access an abortion leads to a debate on the rights of the woman versus the rights of the unborn foetus. The issues raised in the 1973 American Supreme Court Judgement *Roe v Wade* has set the tone for how abortion will be addressed from all aspects. The court declared that the right to privacy within the American Constitution was broad enough to include a woman's decision if she wants to terminate a pregnancy or not.[34] In reaching this decision the court at the time reflected the changes within American society and the changes of time the country was experiencing. To reach its decision in *Roe,* the Supreme Court drew on decades of case law that established that the government cannot interfere with certain personal decisions about procreation, marriage, and other aspects of family life. In *Griswold v. Connecticut* (1865), an appeal of the criminal conviction of the executive director of the Planned Parenthood League of Connecticut for providing contraceptives to married couples, the Supreme Court found that a state making it a crime to use birth control violated married couples' right to privacy. Seven years later,

[33] Letts (n 32).
[34] Planned Parenthood Federation of America '*Roe v. Wade:* its history and impact' (2014) 1 para 1.

the justices found that this right also applied to single people (*Eisenstadt v. Baird,* 1972). Together these cases set the stage for *Roe v Wade.*[35]

The decision although within the American courts had a huge impact globally. This debate is often cited as the leading argument in the discourse of the rights of the woman versus the rights of the unborn and further elaboration to this point will be made in chapter 4. In tracking the history of abortion what is evident is that there is a trend of three main reasons given for why restrictions are placed on abortion. The first reason was a public intention to protect women from life-threatening abortions as so-called abortionists were killing women.[36] In following this logic the discussion on abortion law and policy came from the belief that women were being killed due to abortions. Through this logic, the states considered it their duty to protect women by making abortion illegal.

The second reason being from a more religious point viewed abortion as a sin or a form of transgression of morality.[37] It is vital to acknowledge that religion has played a key influencing part regarding how individuals perceive and feel about abortion. Religious doctrine across the world share a concern for the moral status of the foetus, the destruction of life and the societal norms that govern human behaviour[38].
This highlights the impact religion has in establishing what is morally acceptable and what is not. The third and final reason abortion was restricted was to protect the life of the foetus in some or all circumstances of the pregnancy.[39] These reasons are the main reasons cited for restricting or fighting against a woman's right to choose abortion. And it is this restriction that leads to unsafe abortions occurring overwhelmingly in developing region, in countries where abortion is highly restricted.[40] Women are often denied quality health services in these settings especially on the issue of access to safe sexual and reproductive health services.

[35] Planned Parenthood (n 34) para 3.
[36] M Berer 'Abortion law and policy around the world: In search of decriminalization' (2017) 19 *Health and Human Rights Journal* 14.
[37] Berer (n 36).
[38] M Stephens *et al* 'Religious perspectives on abortion and a secular response' (2009) 49 *Journal of Religion and Health* 529*.*
[39] Berer (n 36).
[40] S Singh *et al* 'Abortion worldwide 2017: Uneven progress and unequal access' (2017) 5.

A woman's right to abortion is often not accepted and promoted with many denying this right. This brings into question the development of the foetus and its viability outside of the body to be considered as a living human being encompassed with rights in relation to the woman's rights. The process of the pregnancy highlights the viability of the foetus to operate as a living person. The first trimester of pregnancy consists of the first 12 to 14 weeks of the pregnancy.[41] The *gestation age* within the WHO working guidelines is used to determine how far along the pregnant woman is in her pregnancy; which is calculated from the number of days or weeks since the first day of the woman's last menstrual period.[42] This calculation outlined within the WHO guidelines is cited as determining that life starts at the gestation period in arguing for the rights of the unborn. It should be noted that the timelines outlined above are recommended by medical professionals as the best period when to perform safe abortions. Between 12 and 14 weeks as stipulated within the WHO guidelines, it is advisable to use the Vacuum aspiration (VA) method and past 12 – 14 weeks it is advisable to use Dilatation and evacuation (D&E).[43] These methods identified above are recommended as having the least amount of risks attached to them in preserving the health of the woman. A woman's right to abortion is guided by the guides of methods availed to her within the time she wishes to access the service. "The medical care of women should never be based on any consideration other than ensuring her wellbeing and no woman should be compelled to have children".[44]

The statement above highlights the crucial need to observe access to abortion as a human right. Health services must enable women to exercise their right without exception to make choices and decisions in self-determining their lives; to exercise their right to facilities, services and environmental conditions which fully enables

[41] World Health Organisation (WHO) 'Clinical practice handbook for safe abortion' (2014) 3. This is considered by medical professionals the safest period to conduct an abortion without any potential risks to the health of the woman.
[42] WHO (n 41).
[43] WHO (n 41) 11. Within the definitions of this WHO guideline at page 12 to 13; Vacuum aspiration is observed to be a fast procedure with limited risk to uterine or cervical injury with the possibility of providing alternative contraceptive methods at the same time such as performing a sterilisation or placing an intrauterine device (IUD) with guidance and control by the woman. The second method which is observed as best after the 14-week mark is the Dilatation and evacuation (D&E) observed as also a fast method with additional requirements such as pre-preparation of the cervices with the timing of the procedure controlled by the facility and provider.
[44] Family Planning Association 'Abortion rights are human rights' (2009) 2.

women to make choices and decisions.[45] The recognition of these rights by health professionals and society at large is central to the advancement of the rights of women.

Within this debate there exist a pro-life and pro-abortion divide in addressing abortion. What the core essence of the pro-abortion movement recognises is the part society takes when a woman is faced with an unwanted pregnancy; accepting that for whatever reasons, and however the pregnancy came to be, women have a right to life and a right to a safe and legal abortion.[46] The circumstances surrounding a pregnancy does not take away from a women's right to self-determination and dignity when deciding what happens to her pregnancy. The consequences of restrictive abortion law challenges and suppresses a woman's right to self-determination. For abortion rights to be truly meaningful and effective to women, the state must facilitate and fulfil the duties under the constitution and international human rights treaties regardless of the moral controversy in society.[47] The state must, therefore, introduce legislation that aims to support women's access to safe abortion as is the case within South Africa. Further examination of women's rights in comparison to the rights of the unborn will be explored within chapter 4 to understand the need to value and promote women's rights.

1.7.3. Abortion in Namibia and South Africa

In Namibia and South Africa, the issue of abortion is often a contentious issue. Through the examination of the moral and ethical elements of abortion, it emerges that there is a struggle for women to access necessary services. It is estimated that about 93% of women in reproductive age in Africa reside in countries with restrictive abortion laws.[48] This restriction is observed as limiting women's and girls' reproductive rights. Available literature further highlights that abortion is not permitted under any circumstances in 10 out of 54 countries in Africa.[49] This can be concluded as a strong moral need to control women's fertility by enforcing legislation to this effect. Limiting

[45] Family Planning Association (n 44).
[46] M Berer 'Making abortion a women's right worldwide' (2002) 10 *Reproductive Health Matters* 4.
[47] C Ngwena 'Human rights and African abortion laws: a handbook for judges' (2014) 14.
[48] Guttmacher Institute 'Fact Sheet: Abortion in Africa' (2018).
[49] Guttmacher Institute (n 48).

women's and girls' reproductive rights is perceived as protecting the life of the unborn foetus.

A staggering 40 per cent of women in 14 developing countries who have undergone an abortion have developed complications which required medical attention.[50] This is the perceived case for many countries such as Namibia. Although not well known within Namibia; available data suggest that unsafe abortions contribute to maternal deaths within a range of 12 – 16 per cent.[51] The estimated statistics on unsafe abortion is very concerning although not confirmed as it indicates the high contribution that back street abortion has towards maternal mortality overall in Namibia. What is of note is that in Namibia women can readily access post-abortion care within state hospitals. However, there are very long waiting periods due to lack of equipment or qualified staff shortages to offer the care.[52] This is surprising considering the restrictive nature of the law and services. This research explored through the review of documents available how readily women are able to access post-abortion care.

1.8. Chapter Outline

The aim of this research is to compare the abortion laws of Namibia and South Africa and establish whether there is a need to reform Namibia's current abortion legislation. Chapter 1 the background of the legislation within Namibia and South Africa briefly elaborates the link to international treaties and guiding principles. The methodology, research question, significance of the study and the limitations experienced are also highlighted. Chapter 2 focuses on the differing impacts of existing legislation on abortion within Namibia and South Africa. Chapter 3 focuses on the societal, moral and ethical perceptions of abortion and how these influence abortion legislation within a human rights framework; linking to the understanding of legislation within South Africa and a need for change in Namibia. Chapter 4 provides a comparative analysis between the rights of the unborn and the rights of the woman in the promotion of rights in the legislative process. Chapter 5 concludes with a summary of the presenting findings and propose recommendations for both Namibia and South Africa in realising the sexual and reproductive rights of women.

[50] Singh (n 40).
[51] HEARD 'Unsafe abortion in Namibia: country factsheet' (2016) 2.
[52] HEARD (n 51).

Chapter 2: The Historical Road of Abortion Legislation and its Impact in Namibia and South Africa

2.1. Introduction

The achievement of independence for Namibia from South Africa ushered in a new era of self-determination in reforming apartheid laws which governed its citizens. Hope for the future for equality for all, especially women, was on the agenda for many within the country. The laws of the colonial government established by South Africa helped in prescribing the social norms which have persisted till today.[53] The South African colonial perception of what is considered right, and moral was engraved within the Namibian consciousness and enforced by retrogressive laws.

Following the dissolution of apartheid in South Africa in the early 1990s, the feminist movement was successful in advocating for a change in the abortion law, emphasising the law was part of a history of oppression within the country.[54] South Africa was progressive in repealing the law. In comparison, its neighbour Namibia took the opposite step with the new conservative Christian government determining the social norms of the country.[55] The persistence of a conservative social system in Namibia has limited attempts to highlight the need to amend the abortion law. The chapter will focus on the impact of the legislation in Namibia and South Africa taking into account the historical development of the laws. The positive and negative effects of the legislation in advancing sexual and reproductive rights.

2.2. Impact of the two differing laws

In exploring the impacts of the two abortion laws is key to understanding what worked and what needs to change. The controlling legal provision of abortion within Namibia is archaic and backwards stemming from the South African Apartheid era.[56] Recognising the retrogressive elements of the law and the history behind the law leads

[53] RL Brown 'In Namibia's abortion debate, echoes of a repressive history' 11 January 2018 https://www.csmonitor.com/World/Africa/2018/0111/In-Namibia-s-abortion-debate-echoes-of-a-repressive-history (accessed 27 June 2019).
[54] Brown (n 53).
[55] Brown (n 53).
[56] Intelligence Consultancy Namibia 'Legalising abortion' (2017) https://intelliconn.wordpress.com/2017/03/29/legalising-abortion/ (accessed 30 June 2019).

to the understanding of how society played a role in determining the social landscape of abortion services. The prohibition of access to abortion on demand does not cause instances of lowering the demand for it. This only causes a situation where women and girls seek out the procedure within illegal and unsafe settings.[57] When women and girls are faced with a difficult and unwanted or unplanned pregnancy; the current legislation limits the options available and this can lead people to illegal and unsafe activities (such as baby dumping and illegally obtaining abortion medication).[58] Foremost in understanding abortion individuals must view it as a health care provision in deciding upon the best course of action when addressing a pregnancy.

The contrasting reform of South Africa's abortion law was done to improve the health situation of women and to prevent maternal deaths due to unsafe abortions.[59] The protection of women's reproductive health and rights was essential at the time the law was proposed and brought into effect. It must be acknowledged that the history of women is undeniably linked to the history of oppression within society, women not being allowed to make decisions for themselves which included decisions about reproductive health.[60] It is this control that was dismantled with the new act brought in South Africa in the 1990s. The impact of the International Conference of Population and Development (ICPD) which took place in Cairo in 1994 and the Fourth World Conference on Women held in Beijing 1995 cannot be denied in defining how we understand sexual and reproductive rights.[61] The Cairo Declaration defined reproductive health as a 'state of complete physical, mental and social well-being and not merely the absence of infirmity, in all matters relating to the reproductive system and to its functions and processes.'[62]

[57] Intelligence Consultancy Namibia (n 56).
[58] Intelligence Consultancy Namibia (n 56).
[59] RE Mhlanga 'Abortion: Developments and impact in South Africa' (2003) 67 *British Medical Bulletin* 115.
[60] Mhlanga (n 59) 116 para 2.
[61] C Ngwena 'An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective' (2004) 32 *Journal of Law, Medicine & Ethics* 708. Referencing the 'Summary Report: The Beijing Declaration and Platform for Action turns 20' report of 2015, the number of unsafe abortions are still high despite the efforts to advance women's sexual and reproductive health and rights in many countries. With many women still dying from unsafe abortions this number will still increase without adequate access to safe abortions and contraceptives, pages 16 & 17.
[62] Ngwena (n 61) para 2.

The holistic approach of this definition encompasses a complete understanding of the health needs of women. An approach that was taken up in the South African abortion law. With the changing of the law, South Africa has not only decriminalized abortion but has also de-stigmatised abortion within the country.[63] The dual effect of the law has created a safe space for women to claim and exercise their right to decide what to do regarding their pregnancies. This has led to a genuine commitment of resources by the government to provide early, safe and legal access to abortion services for every woman.[64] The progress achieved by the reform of the law in South Africa indicates a strong commitment to the realisation of the Cairo conference in aligning with the definition of sexual and reproductive rights. However, within this space there exist realities of challenges and barriers experienced by some women.

2.3. Barriers, Restrictions and Consequences in relation to the Laws

Access to abortion within a liberal or restricted setting has consequences to the health and freedoms of women and girls. In a restrictive legal framework such as Namibia, the trend has seen women turn to alternative illegal means to remove an unwanted pregnancy which puts their lives at risk. In such a restrictive environment the Namibian Women's Health Network report that women turn to methods such as drinking mixtures which contain ink, petrol and boiled newspaper, and sometimes also make use of instruments such as sticks and metal clothes hangers to end the pregnancy.[65] Contrasting to Namibia, within a liberal space such as South Africa where abortion is easily accessible there still exist barriers despite governments efforts to legalise, destigmatise and resource safe legal abortion. These barriers identified include health provider opposition, stigma, insufficient knowledge of the law, lack of adequate training of providers to perform abortions and facilities to provide services, especially in the rural areas.[66] These barriers found within South Africa are not uncommon within liberal legal frameworks as it brings to light the moral and ethical barriers.

[63] Ngwena (n 61) 715 para 3.
[64] Ngwena (n 61) 715 para 3.
[65] C Devine 'The path towards abortion legalization' (2018), unpublished write up prepared for Chairperson of the Law Reform and Development Commission Y Dausab 16 para 32.
[66] J Harries *et al* 'An exploratory study of what happens to women who are denied abortion in Cape Town, South Africa' (2015) 12 *Reproductive Health* 1 – 2.

2.3.1 Conscientious objection

The issue of conscientious objection is cited in Namibia and South Africa by health professionals in denying abortion services.[67] Within the existing legislation, it must be noted that it provides for conscientious objection within limitations as not to infringe upon the rights of the woman. The CTOP Act provides that the right to deny the provision of abortion services only applies to the actual abortion procedure.[68] The protection of health service providers rights to freedom of religious and moral consciousness has seen many women unable to freely exercise their rights. The only responsibility upon health service providers is to inform women of their rights under the new abortion law in South Africa.[69] This provision removes the obligation to provide mandated services resulting in putting women under pressure to continue with an unwanted pregnancy. To continue providing access to safe abortion services for women, measures must be introduced to address challenges of conscientious objection and to provide support to those who provide the services.[70]

The issue of conscientious objection to abortion must be observed within the framework of human rights. It must be understood and conceptualised in terms of the right to freedom of conscience which has a universal appeal to humans.[71] As much as there is emphasis on a woman's right to decide if she wishes to access an abortion, emphasis should also be put on the protection of the rights of health care providers to exercise their freedom of conscience. Freedom of conscience is recognised and accepted as a fundamental right and is well entrenched within various international human rights instruments which many countries including Namibia and South Africa have adopted.[72] The protection of this right is in line with recognising the unique difference between human beings in subscribing to their beliefs. The right to freedom of conscience is an assertion of the moral and ethical diversity of society; It accepts

[67] 'The right to conscientiously object to providing health services means that health care professionals may legitimately be able to refuse to provide certain services because they are contrary to their personal convictions'. Center for Reproductive (2013) 1.
[68] J Harries *et al* 'Conscientious objection and its impact on abortion service provision in South Africa: a qualitative study' (2014) 11 *Reproductive Health* 2.
[69] S Guttmacher, F Kapadia, J Te Water Naude & H de Pinho 'Abortion reform in South Africa: a case study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24 *International Family Planning Perspective* 193.
[70] Harries *et al* (n 68) 6.
[71] C Ngwena 'Conscientious objection and legal abortion in South Africa: delineating the parameters' (2003) 28 *Journal for Juridical Science* 5.
[72] Ngwena (n 71).

that individuals do not hold the same belief systems or outlooks on life.[73] This is certainly true on the issue of abortion and women's right to decide over their bodies.

In Namibia, the question of conscientious objection is not prevalent as not much information in the form of formal data is available, however, poor implementation is existent in the country. Through many engagements with government to implement abortion-related-health guidelines; the process of implementation has not taken place.[74] The lack of support from the government to implement the existing law can be traced back to the past conservative and religious dynamics adopted by the government at the time of independence. It can be surmised that a form of state conscientious objection bars women from making use of the current act in Namibia. This perception has created a barrier to women wishing to access abortion within the limits of the law. This perception is further emphasised and brought to the front by the mere fact that government speak about abortion as if it is illegal; the government makes no concerted effort in providing women with information about the legal parameters of abortion.[75] The lack of support from the government in providing legal and health care support to women who wish to access abortion through legal channels only puts a strain upon the women. This stance taken by government based on an analysis of the above; has fed into the understanding that many health care providers do not observe it as their duty to provide the service.

2.3.2. Baby dumping and illegal backstreet abortions

As much as women resort to homemade mixtures to induce an abortion there are other methods some choose to employ in getting rid of an unwanted baby. The issue of baby dumping is prevalent within Namibia as there are often reports of new-born babies who have been dumped. Resorting to baby dumping is often a woman's response to continues strains placed on her due to deprivations, vulnerabilities and often a desire for differing forms of survival.[76] Making abortions illegal in Namibia do not stop women from accessing them; it only makes the termination of the unwanted pregnancy unsafe

[73] Ngwena (n 71).
[74] United Nations Human Rights Council 'Universal Period Review – Namibia' (2010) 3.
[75] United Nations (n 74).
[76] S Ndempavali 'A psychosocial educational programme to facilitate the reintegration of incarcerated women who had dumped babies and/or committed infanticide in Namibia' unpublished PhD thesis, University of Namibia, 2015 16.

for women and leads to death for many of them.[77] As some women might not be able to access abortion they often turn to other means such as baby dumping and infanticide as an alternative to safe and legal abortion.[78] The radical means many pregnant Namibian women turn to due to the restrictions placed on safe legal abortions has put women's lives in danger both physically and criminally.

Former Namibian Minister of Health and Social Services Dr Bernard Haufiku stated that in 2016 within their system they reported 7 335 women and girls had accessed health services with abortion-related injuries.[79] However, Dr Haufiku estimated that the number was closer to 10 000 as many cases are not reported.[80] The incidence of backstreet abortions is alarming considering the lack of legally sanctioned services. Many women only access health services after engaging within the procedure that endangers their lives. In providing his analysis Dr Haufiku stated that the addition of women and girls who can afford a safe abortion are either prepared to take the risk within Namibia or travel to South Africa for an abortion at a Marie Stopes clinic.[81] Dr Haufiku further elaborates that the estimated number is even bigger when adding women and girls who buy pills that are promoted on Facebook and succeed in their endeavours; and then adding on the number of women and girls who dump their babies.[82] The figures described by Dr Haufiku is alarming and indicates a need to provide services that speak to the needs of women and girls. The fact that some women and girls who are financially able to procure an abortion in Namibia or travel to South Africa highlights the lack of appropriate health services in Namibia.

Adding to this discussion is the notion that abortion is viewed as a private matter for women and girls who choose to access it. There exists an element of privacy in the risk women take to have a private abortion, a need to control their bodies and privacy. The need for privacy is preferred by women as indicated by a 50% prevalence rate and can be assumed to be linked to stigmatisation experienced by women within their

[77] 'Abortion is a women's right' *The Namibian* 7 May 2019.
[78] The Namibian (n 77).
[79] Sister Namibia 'We need to talk about abortion' 19 October 2018 https://sisternamibia.com/2018/10/19/we-need-to-talk-about-abortion/ (accessed 7 July 2019).
[80] Sister Namibia (n 79).
[81] Sister Namibia (n 79).
[82] Sister Namibia (n 79).

communities should it be known they went to a facility.[83] A study conducted by WHO in 2010 found that 30% of women within South Africa still believe abortion is illegal and it is this perception that adds to the engagement with unsafe abortion methods.[84] The lack of awareness around legislation and policy can be assumed as a contributing factor in South Africa as women are often not aware of services available to them.

2.3.3. Maternal mortality

The maternal mortality rate is a key indicator of the prevalence of unsafe abortions as they are a key contributor to the high maternal mortality rate of a country. In any country, the issue of maternal mortality is one that affects health provision to women and girls especially in reproductive and sexual health services. As discussed by Dr Haufiku in Namibia many women and girls are being treated for abortion-related injuries within medical institutions. This is alarming considering the legal status of abortion in the country. This high figure points to a concerning conclusion on the maternal mortality rate of the country. As defined by the World Health Organisation (WHO) maternal death is:

> The death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes.[85]

The WHO definition provides a comprehensive understanding of maternal mortality and its relation to abortion. The alarming rates of unsafe abortions in countries can only be assumed as increasing maternal deaths. In Namibia the maternal mortality rate has been on the rise since the beginning of the 1990s; with the ratio almost doubling between 1992 and 2006/7 from 225 to 449 per 100 000 live births; which translates to an estimated 350 mothers dying from pregnancy-related complications each year.[86] However, later statistics from the World Bank has indicated a change over the years in the maternal mortality rate standing at 195 deaths per 100,000 live

[83] R Jacobs, N Hornsby & S Marais 'Unwanted pregnancies in Gauteng and Mpumalanga provinces, South Africa: examining mortality data on dumped aborted foetuses and babies' (2014) 104 *South African Medical Journal* 865 para 4.
[84] Jacobs *et al* (n 83) para 5.
[85] J Nakuta (ed) '2013 Baseline study report on human rights in Namibia' (2013) 50.
[86] Nakuta (n 85).

births in 2017.[87] Although there was a drop in the number of deaths there still exists a dire situation in the country and there is a need to examine the causes of these deaths. As discussed by medical professionals' direct causes of maternal deaths in Namibia are eclampsia, obstructed birth, haemorrhage and complications from abortion.[88] The causes highlighted in Namibia are far more common than one would expect within the country as many Namibian women and girls do not have access to quality health care services in the regions of the country. Globally research indicates that abortion-related complications are a key and preventable cause of maternal death which can be assumed as 8 – 9% of all maternal deaths with an estimated 42 – 63 women dying from 100 000 abortions globally.[89]

In South Africa, the situation is no different as they also experience their own incidences of back street abortions and baby dumping. In a state where abortion is legal, the presumption would be that all women and girls are able to access the service. However, this is not always the case. It is estimated that 50% of abortions take place outside of an identified health facility in South Africa.[90] Despite advancements in policy and legislation in South Africa women are still accessing abortions outside designated facilities even within areas where formal services are present.[91] The expectation that formal services will be accessed when provided is not often met within informal settings.

What is of note is that since the passing of the 1996 Choice Act in South Africa abortion-related mortality significantly dropped by 91% between 1994 and 1998 – 2001.[92] The impact of the legalisation upon women's health and survival by legalising abortion is significant which indicating the benefits of legal progressive legislation. The World Bank estimated maternal mortality per 100 000 live births declined from 138 deaths in 2015 to 119 in 2017 in South Africa.[93] The change in figures indicate there has been a significant drop in the maternal mortality in the past few years. However,

[87] The World Bank 'Maternal mortality ration (modeled estimate, per 100,000 live births) 2019 (accessed 22 September 2019) https://data.worldbank.org/indicator/sh.sta.mmrt.
[88] World Health Organisation 'Maternal and child health in Namibia: second edition' (2009) 9.
[89] M Temmerman 'Missed opportunities in women's health: post abortion care' (2018) para 1.
[90] HEARD 'Unsafe abortion in South Africa: country factsheet' (2016) 2.
[91] Jacobs *et al* (n 83) 865 para 4.
[92] HEARD (n 90).
[93] The World Bank 'Maternal mortality ration' (modeled estimate, per 100,000 live births) 2019 https://data.worldbank.org/indicator/sh.sta.mmrt (accessed 22 September 2019).

there are women who have been observed to prefer a fast and private response to their problem and prefer seeking help from doctors, nurses, pharmacists and traditional healers, or in some cases engage in self-inducing methods such as making use of laxatives, medicines, household products or oral contraceptives.[94] The dangers for South African women engaging within these processes are many, as this is similar to the approach of many women in Namibia who do not have access to safe legal abortion services. It is estimated that within the period 2008 – 2010 the maternal mortality death rate in South Africa was 4967 deaths recorded, of this number 186 women died from septic miscarriages in public healthcare facilities, and 23% of these were a result of an unsafe abortion.[95] The phenomenon of unsafe abortions in South Africa is one which is similar to that of Namibia despite the differences in legislation.

Further research from the United States indicates that women report multiple barriers in accessing safe abortion care; which includes increased travel time to health facilities, longer waiting times for appointments and increased costs for the procedure.[96] These barriers and obstacles described is believed to be experienced in many countries where abortion is restricted. It can be inferred that these restrictions also add on to the reasons many women choose to abort on their own and not within formal institutions. Limited formal data on the issue is available as statistics were only taken from public health facilities, and it is believed that the number of deaths due to unsafe abortions is much higher in South Africa.[97] Some of the reasons woman choose to access unsafe abortion services range from medical service providers reluctant to be involved within the provision of abortion, not knowing where services are located, facing stigmatisation from their communities as well as fear of confidentiality and financial implications.[98]

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[94] Jacobs *et al* (n 83).
[95] S Osman & A Thompson 'Unsafe abortion in South Africa: a preventable pandemic' (2012) http://www.ngopulse.org/blogs/unsafe-abortion-south-africa-preventable-pandemic (accessed 8 July 2019).
[96] Bixby Center for Global Reproductive Health 'Abortion restrictions put women's health, safety and well-being at risk'. Research conducted by MA Biggs, B Rowland, CE McCulloch and DG Foster have found through a 4 year longitudinal study that women do not general surfer negative consequences by accessing an abortion. Briggs *et al* 'Does abortion increase women's risk for post-traumatic stress? Findings from a prospective longitudinal cohort study' (2016) *BMJ Open Access* 10.
[97] Osman & Thompson (n 95). National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD) only focused their attentions on formal institutions. It is unknown the number of unsafe abortions given the 50% prevalence of women who do not choose formal institutions as discussed previously.
[98] Osman & Thompson (n 95).

Interestingly to note is that research conducted in 2015 in the United States has produced evidence that abortion generally does not negatively impact a woman's well-being. This is contrary to some beliefs that abortion puts women at risk of post-traumatic stress disorder, depression, low self-esteem, anxiety, and it does not increase the use of drugs, tobacco and alcohol by women. [99] These findings reinforce the need for women to take charge of their bodies and make decisions based on what is best for them. Although the findings are generalised there is need to acknowledge that abortions are individual experiences and have individual impacts. Findings further states that 95% of women did indicate that abortion was the right decision for them.[100] Although the findings discussed are from the United States the figures reinforce the benefits of allowing progressive abortion legislation. The decisions taken by women to access an abortion when they need to will greatly bring down maternal mortality numbers in countries. Moving from the research in the United States, the situation in South Africa, although provides for legislative and health service support, does not often trickle down to grassroots communities. The laws surrounding abortion in both countries is vast and contrasting yet the consequences and realities of abortion services in Namibia and South Africa are similar. The politics surrounding legislation is vital to understand how the legalisation of abortion on demand versus the restriction of abortion plays out within society.

2.4. Conclusion

To conclude the laws in Namibia and South Africa although vastly different, are both aimed to provide abortion services at various degrees. Namibia within a restrictive legislative space enforced by historical colonial rule provides services that raises questions on whether it promotes, fulfils and protects women's rights. South Africa, on the other hand, embraces the need to promote, protect and fulfil women's right to abortion by choosing to replace the 1975 Act with legislation that recognises the sexual and reproductive rights of women. The unique historical influence South Africa had on Namibia is indicative of the social and cultural space the country operates in 29 years after independence. The existence of apartheid-era laws highlights the strict control Namibian's still sees as needed to protect the moral fabric of Namibian society. Often

[99] Bixby Center for Global Reproductive Health (n 96).
[100] Bixby Center for Global Reproductive Health (n 96).

described by politicians as a conservative nation; the moral and ethical discourse of abortion rights in Namibia are viewed differently than in South Africa.

Chapter 3: The political discourse of abortion: the moral and religious influences within society

3.1. Introduction

The political and moral discourses surrounding abortion is often a barrier to women being able to fully access abortion services. The stigma attached to abortion has ostracised many women and girls who go through the procedure from their communities and their families. The isolation experienced by many women leaves them traumatised and unable to cope. It is the aim of this chapter to explore the unique discourse found within Namibian and South African society which drives the politics of abortion legislation. Where do we draw the line between protecting the rights of women and letting the moral code of society determine women's choices in life?

3.2. Societal perceptions of abortion

The question of morality is always a contentious one especially as it is set within society and determined by what is right and what is wrong. It is often linked to the expectations of the roles men and women must fulfil such as parenthood. *Benevolent Sexism (BS)* an ideology which perceives women who conform to traditional gender norms as highly revered – understanding that women who fulfil these norms are held in high regard which in itself is restrictive for women.[101] This is but one theory in many which determines the roles and expectations set forth for women in society. The social construction of women's gender identity and roles has placed a burden upon women to fulfil the role of motherhood, as becoming a mother is considered the highest calling that "completes" women.[102] It is evident from the discussion in previous chapters that should a woman fail to meet this expectation she is often ostracised by her community. In Namibia, this perception of motherhood is revered and promoted reinforcing societal stereotypes. The value placed on children highlights the strong indignation many feel in advocating for the protection of the unborn foetus. This proposes, that part of the debate of the rights of women and the rights of the unborn, is the issue of what is

[101] Y Huang *et al* 'Benevolent sexism, attitudes toward motherhood, and reproductive rights: a multi-study longitudinal examination of abortion attitudes' (2016) 42 *Personality and Social Psychology Bulletin* 1.
[102] Huang *et al* (n 101).

observed as appropriate roles for women for the general public.[103] This focus on traditional gender roles for women only serves as a restriction of women's reproductive choices and limits their ability to fully exercise and claim their rights.[104] The focus on traditional gender norms often hinders women's full enjoyment of their sexual and reproductive rights.

This restrictive perception of women and motherhood has resulted in women being focused on accessing contraceptives and abortion services should the need arise. In countries where abortion is restricted or prohibited by law, it has deadly consequences for women who choose other non-medical means to remove an unwanted pregnancy. Abortion is one of the leading causes of death among women and prevalent in countries such as Namibia, additional to this is the issue of "baby dumping" which is part of the phenomena in Namibia when addressing unwanted pregnancies.[105] Laws against abortion do not deter abortions, they do, however, discriminate against poor women whose only option is 'backstreet abortions' while women with money have the options to access safe abortions.[106] Linking to this and playing into the differing socio-economic challenges most women face is the issue of religion.

Different religions have different beliefs and theories about when life begins; this also includes different views and attitudes regarding contraceptives.[107] This is the trend with many religions across the world. Attempts made to disentangle the various issues in the abortion debate must start with distinguishing the legal debate from the ethical debate and recognising how these two debates are related.[108] In the ethical debate, the focus is largely turned on discussing the question of when or whether the foetus is considered a living human being with rights – specifically the "right to life" – as any other recognised human being.[109] It is surmised that the debate around the right to life is a key focal point in the abortion debate with various stances taken within the Christian camp and the liberal camp.

[103] Huang *et al* (n 101).
[104] Huang *et al* (n 101).
[105] D Hubbard 'Morality and the law: The abortion question" (1997) 1.
[106] Hubbard (n 105) 2.
[107] Hubbard (n 105) 2.
[108] PC Bube 'Abortion: Law, religion, and society' (1993) 1. Article update February 2017.
[109] Bube (n 108) 2.

> The common assumption among anti-abortion legal theorists is that it can be demonstrated that there is no fundamental constitutional grounding for a right to privacy, and thus each state legislature is free to regulate access to abortion as long as other constitutional rights are not violated. The common assumption among anti-abortion ethicists is that it can be demonstrated that the foetus is a person with a right to life, and thus our legal system must respect that right by restricting abortion.[110]

As can be read within the text there are strong positions in defending what is perceived to be the rights of the pregnant woman versus the rights of the foetus. In the Christian and ethicists positions, a focus needs to be drawn to the challenges in deciding whether abortion must be restricted or allow for women's access to abortion without restrictions.

Research conducted in Namibia indicated that young people's attitudes towards abortion is mainly against the accessing of abortion. Research indicates that 27% of total respondents (target population being young people) who took part disagreed that a woman/girl has the right to decide if she wants to have a baby or not (the figure has a sex segregation of 52% males and 48% females).[111] The high number of respondents within this research demonstrates the conservative views held in the country. A mere 15% of the sample believed that a woman has a right to decide with 9% who strongly agreed. 50% of men and 64% of women who took part believed that those who have had abortions are "bad people".[112] The social expectation within Namibia for women to fulfil the role of motherhood clearly comes out in these findings as the role of motherhood is revered in the Namibian society. The remaining respondents indicated that 47% believed women did not have the right to decide with 10% remaining neutral and 19% did not know.[113]

The gendered aspect in these responses' feeds into the figures of unsafe abortions highlighted within chapter 2. Surprisingly the findings of the above-discussed study, demonstrate that 59% of the respondents agreed that the restriction on abortion does

[110] Bube (n 108) 2 para 1.
[111] S Mwatilifange & L Edwards-Jauch 'Reproductive justice in the face of conservatism: youth attitudes towards abortion on demand' (2017) 6 *Journal for Studies in Humanities and Social Sciences* 239.
[112] Mwatilifange *et al* (n 111) 240.
[113] Mwatilifange *et al* (n 111) 239.

not stop women from terminating their pregnancies; with only 21% who consider the legislation effective.[114] There is a recognition that the legislation in place does little in curbing backstreet abortions and the dangers women put themselves in to terminate pregnancy. In the question of women having access to safe and healthy abortion services as forming part of a woman's reproductive right, the findings indicated that 23% of respondents disagreed where sex-segregated breakdown indicates 78% were male and 22% were females.[115] The lack of understanding around access to safe and healthy abortions as part of a woman's reproductive right indicates a need to inform the Namibian citizen about their rights. Although Namibia has a comprehensive approach to sexual and reproductive health in the National Health Policy Framework 2010 – 2020 (NHPF) it lacks discussion on the issue of abortion due to the global gag rule and the moral stance taken by government.

The NHPF focuses on the promotion of maternal health and child health with a focus on providing quality services to reduce the Maternal Mortality Rate (MMR).[116] Figures indicate within the discussion on maternal mortality highlights a change. Figures between 2008 where the MMR was 180, in 2010 the MMR was 200 and 2015 the MMR stood at 265 deaths per 100,000 live births indicates this change.[117] This increase over the years indicates that there was significant risk to women's health during this period when pregnant. It is this increase that the NHPF aims to reduce which was achieved in 2017 with a drop to 195 deaths per 100,000 live births as was discussed previously.

The focus on adolescent sexual and reproductive health in the Ministry of Health and Social Services (MoHSS) framework highlights the dangers of baby dumping and unsafe abortion. The NHPF policy highlights that 19% of all pregnancies in Namibia are teen pregnancies.[118] The notable high number of teenage pregnancies can lead to unsafe abortions as teenage pregnancy are unwanted and risk the lives of young

[114] Mwatilifange *et al* (n 111) 240.
[115] Mwatilifange *et al* (n 111) 241.
[116] Ministry of Health and Social Services 'National Health Policy Framework 2010 – 2020' (2010) 7. Herewith referred to as NHPF.
[117] Index Mundi 'Historical Data Graphs' 30 June 2015 (accessed 23 September 2019) https://www.indexmundi.com/g/g.aspx?c=wa&v=2223.
[118] NHPF (n 116) 9.

girls.[119] What is of note is in 2008 the then President of the Republic of Namibia His Excellency Hifikepunye Pohamba released a draft National Reproductive and Child Health Policy addressing reproductive health at national level. Part of its objectives was to increase the number of women who access health services for post-abortion care and to also make voluntary choice of family planning service by 2013.[120] The draft policy, although never finalised is a document which can guide engagement on reform of the legislation within Namibia. The Child Health Policy was aimed at guiding the reproductive health services which included family planning within Namibia, beyond this the policy is also aimed at promoting access to reproductive health for every Namibian who needed it.[121] Although the health framework and Child Health policy both aim to promote reproductive health, there was a disconnect between the two policies and there is a need to create uniformity in addressing reproductive health and rights in Namibia.

In South Africa, the influence of religion has played a key role in society. Considered as a secular country the majority of the population is religious, yet liberal laws are in place to advance sexual and reproductive rights.[122] However, the progressive liberal approach to women's sexual and reproductive rights has raised questions around the involvement of the church. Statistics in South Africa highlight that approximately 95% of the population identify as belonging to a religious domination.[123] Despite the prevailing self-recognition of South Africans belonging to a religious group, the country has made strides in progressive human rights-based legislation. South Africa is one of five African countries that has made provision for women to access abortion services unrestrictedly within the prescribed time frames set out in the legislation.[124] The current Choice of Termination of Pregnancy Act No. 92 of 1996 is hailed as one of the progressive liberal abortion laws worldwide, recognising the constitutional rights that women were denied during Apartheid.[125] As can be inferred by the analysis of the various documents there is a vast difference in approach to abortion within Namibia

[119] NHPF (n 116) 9.
[120] Republic of Namibia 'Draft of the consolidated national reproductive and child health policy' (2008) 27. Herewith referred to as the Child Health Policy.
[121] Child Health Policy (n 120) 11.
[122] F Jogee 'Is there room for religious ethics in South African abortion law? (2018) 11 *South African Journal of Bioethics and Law* 46 para 2.
[123] F Jogee (n 122) 49.
[124] F Jogee (n 122) 46 para 2.
[125] Jogee (n 122) para 3.

and South Africa. While both recognise the role, religion plays in the state, both claims to be secular states. In the discussions above it is clear that in Namibia the church has strong influences in determining legislative approval in the country. However, South Africa is not constrained by the impacts of the church recognising the constitutional protection of women's rights.

Within the context of South Africa, findings from a 2013 social attitudes survey highlights the attitudes held by South Africans towards the issue of abortion. Abortion stigma[126] is a complex phenomenon that is played out through micro and macro levels; with negative individualistic attitudes which can be theorised as potential indicators of stigmatisation and which can lead to unsafe abortions.[127] The impacts of these attitudes has seen many women not being able to access abortion services in a country such as South Africa where abortion on demand is legal and available. Results from the research indicated that approximately half of the respondents felt abortion was always wrong even in incidences of foetal abnormality and poor economic status.[128] As has been outlined throughout this analysis South Africa is a country revered for its progressive legislation. The fact that there are people within the country that believe that abortion is wrong is indicative of the impact of religion and ethical cultural norms.

Findings also indicate that respondents with secondary or tertiary education were significantly less likely to indicate negative attitudes toward abortion; which supports global research that demonstrates increasingly positive attitudes about abortion with higher levels of education.[129] The provision of education and information as indicated by the findings is central to the understanding and acceptance of abortion as a right of women. A report done on South Africa's achievement of Millennial Development Goal (MDG) 5 indicated that gaps still exist in the implementation and service delivery of progressive sexual and reproductive health policies and legislation.[130] The report

[126] Stigma is defined as "a strong lack of respect for a person or a group of people or a bad opinion of them because they have done something society does not approve of" Cambridge Dictionary (accessed 24 September 2019), https://dictionary.cambridge.org/dictionary/english/stigma.
[127] EA Mosley *et al* 'Abortion attitudes among South Africans: finding from the 2013 social attitudes survey' (2017) 19 *Culture Health & Sexuality* 13.
[128] Mosley *et al* (n 127) 4.
[129] Mosley *et al* (n 127) 7.
[130] United Nations Development Program (UNDP) 'Millennium development goals: goal 5 improve maternal health' (2010) 19.

outlined that the policies and legislation do not reflect within the delivery of adequate services on the ground.[131] Where services are available they are not integrated and inequalities exist which benefit urban areas.[132] The lack of integrated services outlined by the report indicates that inequalities are key to women not being able to access services. Societal perceptions galvanises the creation of an environment that is not conducive to women accessing quality services specifically within rural areas. Many South African women like in Namibia often are unable to access services due to the circumstances they find themselves in.

In combating this perception, it is vital for countries such as Namibia and South Africa to have comprehensive family planning programmes. A programme that focuses on the provision of contraceptive services and information but also one which includes abortion and post-abortion care services.

3.3. Abortion services and a Comprehensive Family Planning Programme

Family planning programmes are put in place for individuals to determine if, how and when they have children. WHO provides a definition that aims to encompass the components of what family planning is within the context of health:

> Family planning allows individuals and couples to anticipate and attain their desired number of children and the spacing and timing of their births. It is achieved through the use of contraceptive methods and the treatment of involuntary infertility. A woman's ability to space and limit her pregnancies has a direct impact on her health and well-being as well as on the outcome of each pregnancy.[133]

This definition although comprehensive makes no reference to abortion forming part of a comprehensive family planning programme. The understanding from the definition being that contraceptive methods (or birth control) are essential to controlling fertility. Family planning is crucial to the protection of women's health as one-third of pregnancy-related deaths are preventable, as well as 44% of neonatal deaths; and this is due to timing and spacing of pregnancies (advisable two years between births)

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[131] UNDP (n 130).
[132] UNDP (n 130).
[133] D Shaw 'The ABC's of family planning' 22 March 2010 https://www.who.int/pmnch/media/news/2010/20100322_d_shaw_oped/en/ (accessed 17 August 2019.

which is needed to prevent adverse pregnancy outcomes.[134] What is outlined by WHO is that abortion should not be promoted as a family planning method.[135] However, prevention of unsafe abortion should be a priority for public health within a family planning programme.[136] The need to ensure a comprehensive family planning programme to prevent unwanted pregnancies and unsafe abortions is important to breaking down barriers for women.

In Namibia and South Africa, as outlined above, policies are in place to fulfil the demand of individuals to access contraceptive services and information. In Namibia family planning methods are divided into *Traditional (Natural)* and *Modern (Artificial Methods).*[137] Traditional methods include withdrawal, Lactation Amenorrhea Method (LAM) to name two; and modern methods include but not limited to oral contraceptives, implants, injectable contraceptives etc.[138] These methods are subject to an individual choosing a method that most suits them. Within the draft Child Health Policy strategies are present to promote family planning services such as advocacy and awareness activities on family planning; for health facilities to offer non-judgmental counselling and services and so forth.[139] The efforts the Namibian health system has engaged in as outlined in the draft policy shows a commitment to women's sexual and reproductive health. As elaborated above although the Child Health Policy is in draft the National Health Policy puts mechanisms in place to ensure a comprehensive family planning programme is available.

As previously discussed, provision is made for post-abortion care which is central to the WHO's outline of not promoting abortion as a family planning method but ensuring services that aims to protect the woman's health. Research done indicates that the use of modern contraceptive methods amongst young Namibian women stands at 52%, lower than the Southern African region prevalence at 60%.[140] Although

[134] Shaw (n 133).
[135] Shaw (n 133).
[136] Shaw (n 133).
[137] Child Health Policy (n 120) 14.
[138] Child Health Policy (n 120) 14.
[139] Child Health Policy (n 120) 28.
[140] N Indongo & K Naidoo 'Family planning dialogue: identifying the key determinants of young women's use and selection of contraception in Namibia' (2008) 12 *African Sociological Review* 104. Although data collected in 2008 it can be surmised as presenting a picture of a situation that young women are able to access contraceptives as needed.

contraceptive use is high there are still challenges women experience when accessing contraceptives. Findings further indicate young women expressed that they experience discomfort when negotiating contraceptive methods in public spaces of sexual and reproductive health facilities; especially unmarried young women additionally childless unmarried women perceived themselves as being judged by older health service providers.[141] This discomfort described is similar to the prejudice women and girls experience in society when accessing abortion. What can be inferred from this is that contraception is a contentious moral issue when it comes to young people.

What is observed with the South African experience with contraceptive methods in their family planning policy is that it is similar to many countries promoting easy access. Within the South African health policy, clear guidelines are discussed for health service providers in providing women with contraceptive health services within Chapter 8 of the policy.[142] One key approach that needs to be highlighted is that the guidelines specifically makes mention of resource challenges where there exists a high demand for contraception.[143] Limited resources can result in an unwanted pregnancy which can lead to an abortion whether safe or unsafe depending on the circumstance. Pre-contraceptive general examination and screening should not be a deterrent from initiating contraceptive use.[144] The goal of this policy is that service provision must not be denied no matter the circumstances. A statement within the policy reiterates South Africa's commitment by aligning the policy and guidelines with the country's laws, principles and values guided by UN and African treaties and agreements which South Africa is signatory to.[145] Aligning with the UN and African treaties such as the CESCR and the Maputo Protocol, South Africa has demonstrated its commitment to promoting sexual and reproductive health within a human rights and social justice framework. The Department of Health released a document where they define and adopt sexual and reproductive health services as:

[141] Indongo & Naidoo (n 140) 110.
[142] Department of Health, Republic of South Africa 'National contraception and fertility planning policy and service delivery guidelines: a companion to the national contraception clinical guidelines' (2012) Chapter 8, 59. Herewith referred to as NCFPP.
[143] NCFPP (n 142), Note Box 59.
[144] NCFPP (n 142), Note Box 59.
[145] NCFPP (n 142) 14.

> Comprehensive sexual and reproductive health and rights services as including all aspects of promoting a culture of sexual and reproductive rights, and all aspects of prevention, diagnosis, treatment and care in relation to sexual and reproductive health.[146]

The rights-based approach is central to providing a comprehensive service inclusive of abortion and post-abortion care. The aim of this document is to move away from the societal perception of treating sexual and reproductive issues as taboo. In looking back at the apartheid era, South Africa family planning services were only introduced in 1970, where the national government at the time offered free contraception and family planning counselling to white citizens.[147] What was the trend during this period was the public provision of family planning services at the time was openly political, focused on controlling the fertility rate of the mainly black population.[148] The politics as described indicates the focus was more on control over the population then ensuring full realisation of women's and girls' sexual and reproductive rights. Despite how family planning was used within the apartheid era it has now become a key service needed to realise sexual and reproductive health and rights.

Notably, both Namibia and South Africa has put in place measures and policies to provide a comprehensive service delivery of contraceptive services within their family planning programmes. In both Namibia and South Africa provision of abortion is not part of family planning and is separate from it. Based on the analysis of these two countries what is evident is that there is a need for Namibia to move towards progressive legislation based on the analysis of existing data.

3.4. Namibia's 1996 Draft Abortion and Sterilisation Bill

In 1996 the Namibian government released a draft Abortion and Sterilisation Bill for discussion. The bill which took a strong liberal and pro-choice stance similar to the CTOP act was met with strong opposition from across denominational and confessional lines.[149] This opposition was observed by *The Namibian* newspaper and

[146] Department of Health, Republic of South Africa 'Sexual and reproductive health and rights: fulfilling our commitments 2011 – 2021 and beyond final draft' (2011) iii. Herewith referred to as SRHR 2011 - 2021
[147] J Norling 'Family planning and fertility in South Africa under apartheid' (2015) 1.
[148] Norling (n 147).
[149] N Horn 'Religion and human rights in Namibia' (2008) 8 *African Human Rights Law Journal* 419 para 2.

explained that the majority of the population opposed the passing of the Bill, but blamed this on the influence of middle-aged male church leaders for leading the populist campaign against the legislation proposed.[150] This highlights the perception of the anti-abortion ethicists and the indication that the church plays a strong role within the abortion debate in Namibia. Despite the opposition of the church, the introduction of this strong liberal bill showed the interest of Namibia to pave a way forward to fully realise women's sexual and reproductive health and rights. Due to the backlash from the church however, the draft bill was dropped in April 1999 by the then Health Ministry.[151] Despite this backlash, progress has been made over the years where there has in recent years been a call from civil society organisations and others to again have a debate on law reform.[152] There is a belief from the youth of Namibia that there needs to be open discussions on issues surrounding access to contraceptives, unwanted pregnancies and unsafe abortion.[153] This call from various spaces in Namibian society indicates a change in attitudes from the youth as there is a more willingness to engage on issues they perceive as affecting them despite research findings discussed above indicating there are still youth opposed to abortion.[154]

Although the Bill was proposed in 1996 and shot down in 1999 the country has since then not introduced another such bill. One contentious issue that could influence this delay in introducing another such bill is the current socio-political debates at the global level with the introduction of the Global Gag rule by the United States of America. The global gag rule is also known as the *Mexico City Policy*, was first introduced by US President Reagan in 1984, however, was rescinded by US president Obama in 2009, and again reinstated by current US President Trump in 2017.[155] The essence of the rule requires Non-Governmental Organisations (NGOs) who benefit from US health assistance to not use their non-US funds to provide abortion-related services to their beneficiaries as well as advocating for the liberalisation of abortion laws.[156] This is alarming to many African countries as a lot of US funds are funnelled to Africa; the

[150] Horn (n 149) at 419 para 4.
[151] N Horn 'An introduction to the Namibian Constitution' 17.
[152] M de Bruyn (ed) *"I was afraid that people might read it from my face": information and women's testimonies about abortion in Namibia* Namibia Women's Health Network (2011) 11.
[153] De Bruyn (n 152).
[154] Mwatilifange *et al* (n 111).
[155] New York City Bar 'The global gag rule and what it means for Africa' (2017).
[156] New York City Bar (n 155).

2017 rule expanded and covers all global health institutions who benefit from the US.[157] The limits put onto countries due to the gag rule has seen a limiting of women's and girls' access to sexual and reproductive health services.

Research indicates that across 26 sub-Saharan Africa countries including Namibia has found that a substantial increase in abortions by women who have been affected by the US Mexico Policy (Gag Rule).[158] The restriction of the rule indicates an increase in unsafe abortions that can only be concluded by the nature of the policy. The findings further indicate that the increase in abortion mirrors a corresponding decrease in the use of modern contraception's with an increase in pregnancies under the policy.[159] What can be inferred from these findings is that the gag rule has negative effects on the sexual and reproductive rights of women and girls. In examining the consequences of the policy, it further includes additional potential harms to maternal health.[160] The negative effects of the policy in sub-Saharan countries like Namibia limits the country's advancement of its own agenda on promoting sexual and reproductive health and rights.

3.5. Conclusion

The impact of social forces such as religion has detrimental effects on the advancement of abortion services and the rights of women. This can be further impact by a weak family planning policy resulting in women being unable to prevent unwanted pregnancies. Policies such as the Global Gag rule have detrimental effects on the lives of women. There is a need for countries such as Namibia to stand up and fight for women's sexual and reproductive rights. A comprehensive family planning programme is key to the advancement of rights which includes the prevention of unwanted pregnancies. Recognising the rights of the youth to access services. These issues are linked to questions on who's rights are more important the woman or the unborn foetus. The next chapter will focus on linking with discussions from this chapter in dissecting the rights debate.

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[157] New York City Bar (n 155).
[158] N Brooks *et al* 'USA aid policy and induced abortion in sub-Saharan Africa: an analysis of the Mexico City policy' (2019) 7 *Lancet Global Health* e1052.
[159] Brooks *et al* (n 158).
[160] Brooks *et al* (n 158).

Chapter 4: Rights of the Pregnant Woman versus The Right to Life of the Unborn

4.1. Introduction

The advancement of the pro-abortion movement aimed at advancing women's rights clashes with the pro-life movement which advocates for the rights of the unborn. Within a social justice framework, the rights of the woman versus the rights of the unborn are central to deciding legislation and health policy. Women are often dismissed when it comes to fully and realising their sexual and reproductive rights and priority is often given to an unborn foetus within conservative societal frameworks. Where do we draw the line in defining the rights of the unborn? Many laws within Africa are similar to the one in Namibia restricting women's access to abortion, while others completely block it by criminalising abortion. Within this chapter, a comparison of the rights of the woman versus the rights of the unborn will be discussed to link with the societal perception which feeds into the legal framework.

4.2. Morality within a Human Rights Framework

The moral and human rights dilemmas within the abortion debate are highlighted by moralists and religious proponents who support the rights of the unborn, versus those of the pro-choice movement advocating for the rights of the woman. The Universal Declaration of Human Rights (UDHR) highlights the key fundamental rights from which all international laws are built upon. Article 1 of the UDHR within its first sentence states that all human beings are free and equal upon birth in dignity and rights.[161] The presumption and understanding from article 1 of the UDHR is the emphasis that human beings claim their rights upon birth and that it is inherited within them. Article 3 of the UDHR emphasises that everyone has the right to life, liberty and security as a human being.[162] Within this analysis, it can be determined that the acknowledgement of being a legally recognised person is key to claiming rights.

This notion of being a recognised person within the politics around the abortion debate is at the centre of the pro-life and pro-choice debate. Whose life do we prioritise the life of the pregnant woman or the life of the unborn foetus? And does the foetus

[161] Universal Declaration of Human Rights (1948), Article 1. Herewith referred to as the UDHR.
[162] UDHR (n 161) article 3.

possess the potential to have life as an unborn entity with rights? The key questions within this debate has divided many.

4.3. The Constitutional Question of Right to Life

Article 6 of the Namibian Constitution focuses on the protection of life: 'The right to life shall be respected and protected'.[163] The Namibian Constitution makes no distinction as to when life starts, only the fundamental right to life is protected by the supreme law of the country. In the South African Constitution, the right to life is protected as follows: 'Everyone has the right to life'.[164] Like Namibia, no distinction is being made as to when life starts.

The overall protection of the right to life by both countries highlights the inherent right for all to be protected and guaranteed. The understanding and basis of the UDHR is that human rights are inherited and must be protected. However, there is a key interest in the unborn foetus and the protection of the foetus by States. There are those who argue that the legalisation of abortion presents a bleak picture of society not being interested in supporting the pregnant woman and removing injustices she faces such as poverty, and further argue that by legalising abortion it exposes her to more harm.[165] This leads to a perception of abortion as a violation of the rights of women and the unborn. This argument is further elaborated on in legalising abortion, religious and cultural values are destabilised and that biblical scripts promote the value of life.[166] It can be surmised that this perception pertaining to the right to life has great impacts when discussing the right to bodily autonomy and a woman's right to life.

In assessing when life begins there is, unfortunately, no clear indication or agreement between medicine, philosophy or theology when determining at which point of the foetus development can be determined as gaining the right to life.[167] The notion that there is a clear moment when a foetus obtains the right to life, is often observed as

[163] The Constitution of the Republic of Namibia (Annotated Edition) (2018) article 6.
[164] The Constitution of the Republic of South Africa (1996) sec 10.
[165] I Gilbert 'Narratives on abortion: psychosocial, ethical and religious considerations' PhD thesis, University of KwaZulu-Natal, 2013 64 (on file with author).
[166] Gilbert (n 165).
[167] BBC 'When is the foetus alive' 2014 http://www.bbc.co.uk/ethics/abortion/child/alive_1.shtml (accessed 16 July 2019).

undeterminable by all camps within the debate.[168] The lack of definitive proof of the commencement of when a foetus is considered alive and thus obtains the right to life, leaves a gap in terms of scientific corroboration; and due to this lack of scientific determination it is often left to the discretion of legislators to determine the viability of a foetus or when one obtains the right to life.[169] As a matter of practicality in addressing reproductive rights, many abortion laws provide a guideline in terms of which stage of the pregnancy a foetus is considered viable and when an abortion can be performed.[170] Determining the right to life, the understanding is the state has an interest in protecting life. Through the criminalisation of abortion, many countries have sought to protect the health rights of the unborn foetus.[171] In Namibia, due to the strict regulations, this has led many pregnant women to put their lives at risk by engaging in backstreet abortion and baby dumping. The interlinkages between right to life, dignity and health are essential within analysing both the legislation of Namibia and South Africa.

Although the goal is to provide adequate health services to women and girls societal perceptions and expectations about women's roles often impact how they access health services and their rights. The social disapproval of abortion is linked to the expectation of women's roles in society.[172] The perceived expectation that motherhood should be women's principal role and that women who choose not to have children as deviant.[173] This expected and assigned role greatly affects how much value is put upon the rights of the unborn and the rights of the woman.

4.4. The Unborn's Right to Life

The right to life of the foetus is questionable at best as was observed within the analysis of when the viability of the foetus can be determined. Without a clear scientific determinant as to when life begins how do we protect the life of the unborn or is there

[168] BBC (n 167).
[169] BBC (n 167)
[170] BBC (n 167).
[171] MS Motoki, FR Cabar & RP Francisco 'Mother's freedom of choice and the rights of an unborn child: a comparison between the views of freshmen and senior medical school students' (2016) 71 *CLINICS* 570 para 2.
[172] A Guillamume & C Rossier 'Abortion around the world an overview of legislation, measures, trends, and consequences' (2018) 72 *Population-E* 218 para 3.
[173] Guillamune & Rossier (n 172).

need to allow for the protection of the unborn? Do we then justify putting the unborn's right to life above the rights of the pregnant woman?

The emphasis put on the right to life of the unborn is highlighted within one key example taken from Ireland when in 1983 a referendum by the people added within their constitution the protection of *foetal rights*.[174] This key event by Ireland is significant in understanding the value placed upon the interest in preserving the right to life of the unborn. The addition of the protection of the *right to life of the unborn* was viewed as being equal to the *right to life of the mother*; since this major change within the abortion debate protecting foetal rights has become a key element within anti-abortion campaigns globally.[175] It can be inferred from this example, that in Namibia and South Africa the apartheid era law served its purpose in attempting to protect the life of the foetus by ensuring restrictive access to abortion. Despite the fact that protection of foetal life is not specifically made mention of within the two countries constitutions. This debate is often not highlighted as an issue, that a foetus is not considered to possess' legal personhood until the time of their birth'.[176] An example of this is found in the European Court of Human rights, *VO v France* found that a foetus cannot be considered a "human person".[177] This further strengthens the argument for the non-recognition of a foetus as a legal person.

In South Africa, the question of foetal rights was raised in the case of the *Christian Lawyers Association of SA and others v Minister of Health and others* in 1998. The judgment of the court was that the foetus in terms of section 11 of the constitution is not a legal person and therefore not a rights bearer.[178] As is discussed previously the South African constitution recognises the protection of life within the bill of rights. However, no provision of protecting the unborn is made within the constitution. As noted by Pickles:

> At common law, legal subjectivity starts at birth and requires that the child must be separated from the mother's body and must survive independently of the mother after separation. Without

[174] F de Londras 'Constitutionalising fetal rights: a salutary tale from Ireland' (2015) 22 *Michigan Journal of Gender and Law* 244.
[175] De Londras (n 174).
[176] De Londras (n 174) 246.
[177] *VO v France* (2004) ECHR53924/00 para 80.
[178] *Christian Lawyers Association of SA and others v Minister of Health and others* 1998 (11) BCLR 1432 (T) 4.

> any evidence of live birth, constitutional rights will not vest in the foetus. Accordingly, a tension arises between foetal interests in continued existence (as a non-legal subject) on the one hand, and women as legal subjects) exercising their rights to autonomy by accessing termination-of-pregnancy services on the other.[179]

Based on the understanding of the various interpretation from case law and readings it is clear that the unborn cannot claim rights as not being a legally recognised person. This is, however, different for a woman who has claimed her legal personhood and is a barrier of rights.

4.5. The Rights of the Woman

As a human being born with inherent rights, the predominant status of the pregnant woman's rights is central in providing and protecting her reproductive rights. The Beijing Declaration and its Platform for Action (1995) strengthened the recognition of the human rights of women as central to their well-being and health by stating:

> The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual; respect, consent and shared responsibility for sexual behaviour and its consequences.[180]

The UN statement encompasses the essence of what women's sexual and reproductive rights are and the importance of promoting them within all aspects of a women's life. The statement further supports article 16 of CEDAW that women have the right to determine the number and spacing of their children and are entitled to have access to information, education and means to ensure they are able to exercise this rightfully.[181] The importance of this provision ensures that women are able to take the necessary steps and access the necessary services.

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[179] C Pickles 'Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: the *Choice on Termination of Pregnancy Act* 92 of 1996' (2012) 15 *Potchefstroom Electronic Law Journal* at 403. Pickles introduces the concept of *foetal interest* within the discussion of rights within abortion. As a non-human entity not existing on its own interest is shown in observing the foetus survive and obtain the rights beholden onto the pregnant woman.
[180] Women's Rights Foundation 'Women's sexual & reproductive health & rights: position paper' (2018) 6. Statement by the United Nations at the Fourth World Conference on Women Beijing 1995.
[181] Women's Rights Foundation (n 204). Referencing the UN Convention on the Elimination of all forms of Discrimination Against Women article 16.

Forcing a woman to carry an unwanted pregnancy until the end imposes irreparable circumstances that can change her relationship with her body, sexuality, self-worth, friends, family, lovers, work, financial status, mental and physical well-being and interfere with her life goals.[182] The consequences are often not elaborated on when conversations are had around protecting the interest of the unborn. As discussed above the notion and view that motherhood is the most fulfilling role for a woman creates the expectation that she should carry the pregnancy to term no matter the consequences to herself. What is mentioned within this discussion by the others is that abortion is not the opposite to contraception; the two are complementary to each other where abortion may not be the ideal method of contraception, however, there are unintended accidents where no contraception is 100% effective.[183]

In countries like Namibia and South Africa, the incidences of not being able to always have access to contraceptives has dire consequences for women. This is similar to a situation where access to abortion services are denied, "women become prisoners of their reproductive systems", and are trapped in the stereotypes and cultures which promote motherhood as the vital role for women.[184] It should be noted that many women and feminists are not "anti-motherhood" as many women who are mothers take part in pro-abortion campaigns; as the fundamental goal is to reiterate and support the right of a woman to basic self-determination over her body, life and her right to decide.[185] This links to the right to life and the right to health, as restrictive laws which restrict access to reproductive health services, will interfere with the human dignity of women; which is key to the freedom of individuals to make personal decisions without interference from their state; especially in a private and intimate area such as sexual and reproductive health.[186] In discussing the restrictive nature of laws the denial of abortion on demand within a country such as Namibia does not allow for women to be self-determining in their choices.

[182] P Hinman & C Holt *Abortion: a woman's right to choose – the case for law repeal* (1998) 5.
[183] Hinman & Holt (n 182) 5 - 6.
[184] Hinman & Holt (n 182) 6.
[185] Hinman & Holt (n 182) 6.
[186] J McRenolds-Perez 'Abortion as empowerment: reproductive rights activism in a legally restricted context' (2017) 17 *BMC Pregnancy and Childbirth* 97.

Research has indicated that there exists a direct relationship between legal restrictions on abortion and the high level of unsafe abortions.[187] The trend to increase the discriminatory implementation of abortion criminal law by those who enforce public security and judicial state authority has seen detrimental effects on women's full enjoyment of her right to privacy, liberty and security of her person, equality, and the freedom from discrimination within the health system.[188] The impacts of the criminalisation of abortion law is clear and it reflects the state's interest to protect the life of the unborn over the life of the pregnant woman.

This links to the example of the American Case *Roe v Wade* which touches on the right to privacy when it comes to abortion. The United States Supreme Court in 1973 struck down the laws which criminalise abortion in the State of Texas, contending that the right to decide whether to have a child is a fundamental right protected under the American constitution.[189] The decision of the court not only took abortion out of the backstreets of society it also helped define the right to privacy; which protects individuals from interference from the State in private affairs.[190] The build-up to this decision came after much change within the socio-political and legal space of the United States. It is essential to recognise that other cases laid the foundation for *Roe v Wade. Griswald v Connecticut (1965)* involved the Executive Director of Planned Parenthood League of Connecticut providing information, instructions and other medical advice to married couples wishing to access birth control.[191] The decision of the court laid the groundwork for the right to privacy with the decision of the court ruling that the right to privacy in marital relations is protected and that the Connecticut Statute at the time conflicted with this right and is therefore null and void.[192] The strong decision of the courts extended the right to privacy within the American Constitution recognising its presence within marital relations. However, although a progressive decision at the time the current situation within the United States is moving in the opposite direction of this decision.

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[187] B Galli 'Negative impacts of abortion criminalization in Brazil: systemic denial of women's reproductive autonomy and human rights (2011) 65 *University of Miami Law Review* 969.
[188] Galli (n 187).
[189] Center for Reproductive Rights '*Roe v. Wade* and the right to privacy: third edition' (2003) 5.
[190] Center for Reproductive Rights (n 189).
[191] *Griswald v Connecticut* (1965) 381 U.S. CT 479. A short summary of the case outlines the key issues within the case.
[192] *Griswald v Connecticut* (n 191).

4.6. Abortion Rights within a Social Justice Framework

The discussion highlights the need to advance women's health needs within a social justice framework that recognises the changing social and political context of countries. Social justice is based on compassion for individuals and can be defined as the goal of all persons to be able to access equitable opportunities and services in society.[193] The understanding of this being that legislation and policy in place must ensure an equitable environment for individuals to fully claim their rights. It is about ensuring that individuals within society feel physically and psychologically secure and are thus able to be both self-determining in the decisions they make and interdependent in their reliance on members in society for support.[194] And it is this understanding of social justice that legislation on abortion must fulfil. International treaties such as the CESCR protects the right to the highest attainable standard of health in article 12. The interpretation of this by the UN Committee on CESCR includes the protection of sexual and reproductive rights within a social justice framework building on the General comments 14 of 2000.

Furthermore, General comments 22 of CESCR provides interpretation to the right to sexual and reproductive health which encompasses a set of freedoms and entitlements.[195] It further outlines that these freedoms include the right for individuals to make free and responsible decisions, free of violence, coercion and discrimination, regarding matters which concern an individual's body and sexual and reproductive health.[196] It allows states to provide policy and legislation that will enable them to meet their obligations under treaties they have ratified; specifically within a gendered context of policy and legislative implementation. Namibia and South Africa as signatories has taken steps to meet these obligations through the introduction of specific sexual and reproductive health services. However, gaps are still present as is evident by MMR and policies not being properly implemented. Gender equality requires that the health needs of women, which are significantly different from men, be considered and that

[193] J Shaw 'Abortion as a social justice issue in contemporary Canada' (2013) 14 *Critical Social Work* 3.
[194] Shaw (n 193).
[195] UN Committee CESCR General Comments 22 'The right to sexual and reproductive health (article 12) (2016) 2 para 5.
[196] General Comments 22 (n 195).

States provide appropriate services for women in line with their life cycle and needs.[197] In South Africa, this need is fulfilled in terms of appropriate legislation and policy. However, within Namibia legislation is restrictive and thus limits the full implementation of appropriate policies and services. Apart from international treaties to guide the global community African treaties exist that highlights the specific experience of the African people.

The Maputo Protocol is one such instrument which was put in place to guide African states in safeguarding women's rights. Article 14 of the Maputo Protocol as discussed above focus specifically on the sexual and reproductive rights of women and is the only instrument which speaks about abortion. General comments 2 on article 14 of the Maputo Protocol is focused on a woman's right to control her fertility, contraception, family planning, information and abortion.[198] Instead of creating new human rights standards General comments 2 of the Maputo protocol rather draws explicitly and implicitly from existing UN human rights law and authoritative guidance.[199] The comments reinforce the long-standing recognition of international law that sexual and reproductive rights are not just an essential part of the overall right to health, but it is fundamentally connected to the full enjoyment of many other rights such as the right to work, education, equality, life and privacy.[200] These interpretations are what must guide states in providing for the protection for the rights of women.

A right to reproductive health means little should a woman with an unwanted pregnancy be compelled to either become a mother; or to alternatively seek out an unsafe abortion due to the criminalisation of abortion or the inaccessibility of safe abortion services.[201] Legislation and policy within Namibia and South Africa must be responsive to this predicament when a woman is faced with an unwanted pregnancy. Inclusive sexual and reproductive health and rights services are inclusive of promoting a culture of rights, and all aspects of prevention, diagnosis, treatment and care of

[197] General Comments 22 (n 195) 7 para 25.
[198] UN Office of the High Commission on Human Rights (OHCHR) 'Your health, your choice, your rights: international and regional obligations on sexual and reproductive health and rights (2018) 4.
[199] OHCHR (n 198) 5.
[200] OHCHR (n 198) 5.
[201] C Ngwena & E Durojaye 'Strengthening the protection of sexual and reproductive health through human rights in the African region: an introduction' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 5.

sexual and reproductive health issues.[202] South Africa's sexual and reproductive health services shall be evidence-based and be in line with national policies, protocols and clinical guidelines as stipulated by the department of health.[203] This commitment by South Africa can only strengthen the implementation of their existing health policies and the Choice of Termination Act.

Contrastingly efforts done with the introduction of the Namibian National Human Rights Action Plan (NRAP) in 2015 aims to put the focus of the State on achieving the countries obligations under the various treaties it has ratified.[204] The goal to achieve for Namibia is that every citizen will be able to enjoy access to quality, affordable and accessible health care that aims to attain the highest standard of physical and mental health.[205] The NHRP aims to achieve this by implementing a responsive legal and regulatory framework for the health sector of the country.[206] Although the plan for the country speaks about health, in general, it makes no mention of sexual and reproductive health specifically. It brings up the question of what Namibia will do to provide sexual and reproductive health services to its citizens.

4.7 Conclusion

The examination of the right of the unborn versus the rights of the woman has highlighted the contrasting debates when it comes to the issue of abortion. What is evident is that there is an interest from the state to protect the foetus and its potential for life. The contrasting views on when life begins only feeds into the societal debates around the moral issue of life. With many in society, particularly from the religious sector, believing that life starts at conception only denies the inherent rights of women. Contrasting to this issue policies and health care systems put in place such as family planning services aims to ensure that women have a multitude of services and avenues available to them. What was found is that restrictions on abortion such as the Global Gag rule has an adverse effect on the health and well-being of the woman. It is the responsibility of the state to respond to the needs of women.

[202] SRHR 2011 - 2021 (n 146) 10.
[203] SRHR 2011 - 2021 (n 146) 10.
[204] Republic of Namibia 'National human rights action plan 2015 – 2019' (2015). Herewith referred to as NHRAP.
[205] NHRAP (n 204) 8.
[206] NHRAP (n 204) 12.

Chapter 5: Conclusion and Recommendations

5.1. Conclusion

The rights to health, life, dignity and autonomy is central to the self-determination of women in claiming their sexual and reproductive rights inclusive of the right to access abortion. Health service provisions within States should be done within a human rights context which reflects this claim women have to their rights. Feminist have argued that patriarchy is the key barrier to many women and girls claiming their rights as men continuously feel the need to control women's sexuality and fertility. It is this ideology of patriarchy which plays out within the religious and moral spaces of society. This analysis has surmised that the unique religious and historical experience of both Namibia and South Africa influenced the discourse on abortion legislation. It is this discourse which has seen many denied their rights which has also impacted access to family planning services. The impact of patriarchal views has seen the provision of services such as contraceptive access being impaired which leads to many unwanted pregnancies. The consequences of this have seen those who access abortion due to lack of family planning services being ostracised as the ideal role for women is motherhood. Women who choose to not fulfil this role are viewed as moving out of their expected gender roles and going against what society deems as proper.

The issue of the right to life has played a central role in the advancement of rights. This has opened the avenue for much of the philosophical discourse on whose rights the state should protect. Although the state has a vested interest in protecting the unborn, the question must always be, does the unborn meet the requirement to claim personhood and thus claim the human rights we all claim at birth? South Africa has taken steps through legislation and court decision to recognise and priorities the rights of the woman despite societal perceptions on the moral and religious issue of abortion. Namibia in contrast through the retention of the Abortion and Sterilization Act 2 of 1975 which emphasises rather the need to protect the moral fabric of Namibian society has made their stance clear in protecting the right of the unborn. Based on the high numbers of unsafe abortions and baby dumping presented within this analysis there is definitely a need to revive the 1996 public discussions on legalising abortion. It is evident that legislation which allows for abortion on demand has seen a decline in

unsafe abortions in those countries and a rise in contraceptive use. However, the existing challenge of unsafe abortions will forever be a concern due to multiple barriers such as poor service delivery and distances to services.

The comparative analysis of these two pieces of legislation has indicated that Namibia much like its neighbour in South Africa has a duty to protect, promote and fulfil women's sexual and reproductive rights especially on the access of abortion. Namibia as a country can learn much from its neighbour in terms of what to do and what not to do in legalising abortion on demand. There is a need to move towards a society which embraces the equality of women in claiming their rights and becoming self-determining.

5.2. Recommendations

It is recommended that based on the analysis of various instruments Namibia has ratified that parliament amends the existing legislation that governs abortion. Recognising the full protection of women's sexual and reproductive rights in all aspects of their health. The grounds for legal abortion within the African region should be broadened in general thus reducing the consequences of unsafe abortions.

It is further recommended that both South Africa and Namibia set forth to follow the WHO guidelines for health workers: *Health worker roles in providing safe abortion care and post-abortion contraception* (2015). This should be extended to improvements in post-abortion care in promoting health and thus reducing illness and death from unsafe abortions. This will strengthen the commitment to international health standards.

The improved implementation of programmes and policies that improve women's and men's knowledge of, access to and use of contraceptive methods thus reducing the need for abortions. This is extended to the fact that liberal abortion laws alone cannot ensure safe abortions, but comprehensive health services do which include a comprehensive family planning programme.

Although the *Namibian Human Rights Action Plan 2015 – 2019* was put in place for the country to meet the needs of its citizens in realising their human rights there is a

need for this document to be expanded and include specific the sexual and reproductive health and rights of its citizens which is lacking.

It is also recommended that both Namibia and South Africa expand on their definitions on the right to life within their Constitutions. As it currently stands in both constitutions there is a general right to life for all. The expansion of this right will align with international understandings of this right in terms of interpretations on the right to the highest attainable standard of health. General comment 14 on the right to health in CESCR and General comment 2 of the Maputo protocol can be used as guiding interpretations within this process.

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