

Is there room for religious ethics in South African abortion law?

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In light of the prominence and influence of secular bioethics, one could argue that religious ethics concerning weighty medical ethical issues such as abortion are often overlooked. South Africa (SA) is one of just five African countries which have legalised abortion without undue restriction, notwithstanding its gestational restrictions, placing it among the countries with the most liberal abortion laws in Africa.^[1] More than 94% of South Africans are religious, predominantly following Christianity, African Traditional Religion, Islam, Judaism and Hinduism.^[2] This raises the question of whether contemporary abortion law is inclusive of the religious ethical values that dictate the lives of the great majority of citizens. This article will explore religious ethics and secular morality in SA, followed by a discussion of the legal status of the fetus and contemporary abortion legislation. Subsequently, this article will determine whether the law is inclusive of religious ethical views on abortion, and if so, how.

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Approximately 90% of African women live in countries with overly restrictive abortion laws.^[1] While the vast majority of African countries strictly condemn abortion, proscription may be waived under certain conditions: to preserve life (out of necessity); for health preservation; if the pregnancy is a result of rape or incest; or if the fetus is impaired.^[1] However, the aforementioned grounds for abortion are not available to all women. For instance, Nigeria, Uganda and Somalia condone abortion solely out of necessity.^[1] Burundi and Cameroon extend the grounds to physical health, at the exclusion of mental health and fetal impairment, while Burkina Faso permits abortion on all three grounds, including cases of rape and incest.^[1] Ghana, Algeria and Namibia also make provision for all of the aforementioned grounds.^[1] Women are further required to seek parental or spousal consent to procure an abortion in Equatorial Guinea and Mauritius.^[1] Abortion is strictly prohibited, without any legal exceptions, in 11 African countries, including Angola, Congo-Kinshasa in the Democratic Republic of Congo, Congo-Brazzaville in the Republic of Congo and Senegal.^[1] Although these statistics are perturbing, as the majority of African women are being stripped of their human rights, they are to be expected, since Africa is the most religious continent in the world.^[3]

A recent world survey revealed that 'more than 8 out of 10' Africans identify as religious, actively participating in religious practices and traditions.^[3] Approximately 95% of South Africans are religious.^[2] Nevertheless, SA is one of only five African countries (along with Cape Verde, Mozambique, Tunisia and Zambia) that currently provide women with unrestrictive abortion services, within gestational limitations.^[1] SA's liberal abortion laws are to be expected since it is a secular state, established upon a Constitution^[4] that ensures that women are guaranteed rights conducive to their reproductive health, which is echoed in the country's laws governing abortion.^[5] Although reportedly half of all African countries are considered secular,^[6] most implement rigorous legal prohibitions on abortion that often coincide with religious ethical and moral views.

SA's Choice on Termination of Pregnancy Act (CTOPA) No. 92 of 1996^[7] is lauded as one of the most liberal abortion laws worldwide.^[8] It encapsulates and endorses several constitutional rights that women were denied during Apartheid,^[9] particularly the rights to reproductive health, bodily integrity, privacy and access to information. In light of the vast strides the CTOPA has contributed towards safeguarding and championing women's constitutional, sexual and reproductive rights, one might also ask whether SA's current abortion law is inclusive of religious ethics. This question entails an understanding of religious ethics, secular morality and SA abortion laws.

Religious ethics and secular morality in SA

'Religious ethics' refers to the moral principles that underpin religions and dictate the condemnation or condonance of believers' actions.^[10,11] Consequently, these provide a basis for moral deliberation on numerous issues, including abortion. Given SA's cultural, ethnic and racial diversity, it comes as no surprise that it is a bastion for religious pluralism. More than 94% of South Africans are affiliates of a myriad of religious denominations, predominantly Christianity (86%), ATR (5.4%), Islam (1.9%), Hinduism (0.9%) and Judaism (0.2%).^[2,11]

Judaism

Human life is immensely venerated in Judaism; while the fetus is deemed a potential life, it enjoys certain rights that cannot be infringed except in overwhelming circumstances.^[11-13] The Torah does not explicitly mention abortion; however, Jewish law expressly condemns it.^[11] The condemnation is predicated on Genesis 9:6, which states that: 'Whosoever sheddeth the blood of man in man, his blood shall be shed.' The verse is believed to be inclusive of the unborn child; consequently, the act of feticide can be equated to murder.^[11,13,14] Nevertheless, abortion is condoned if a continued pregnancy will jeopardise the woman's life, as normative religious rules may be overturned in life-threatening circumstances.^[11,16-18]

Christianity

Catholicism states that life originates at conception; accordingly, abortion is almost entirely prohibited.^[11,19,20] Moreover, orthodox Catholics believe that even under the rare circumstances when abortion may be permissible, the fetus must not suffer any direct harm; this belief is founded on the principle of double effect, whereby an action is acceptable on condition that it produces more positive than negative consequences.^[11,21-23] Consequently, surgical abortion procedures that directly harm the fetus are strictly prohibited.^[11]

Protestant beliefs and views on abortion vary greatly. Conservative Protestants condemn abortion as it is believed that life engages at conception, while liberal Protestants believe that a woman's right to self-determination should be weighed against the fetal right to life, and others believe that the decision lies with the woman and her physician within the first trimester.^[11,24,25] Protestantism generally appears to underscore maternal interests, whereas Catholicism upholds fetal interests.^[26,27,11]

Islam

The preservation of Islam, life, knowledge, family and property are the principal objectives of Islamic law.^[11,28] Islam permits Muslims to act outside of normative religious rules and regulations if any of the aforementioned objectives are threatened.^[28,29] Therefore, if the life of a Muslim woman is jeopardised by her pregnancy, she is entitled to terminate it in order to prevent her death. The Prophet Muhammad stated that upon ensoulment, which occurs after 120 days of gestation, the fetus acquires personhood and the majority of the rights accompanying its new status.^[11,30,31] Consequently, abortion is condemned post-ensoulment except when it is used to preserve the life of the woman concerned, or in cases of fetal malformation.^[11,32-34] Pre-ensoulment, abortion is only permissible in cases of rape or incest.^[11,32-34]

Hinduism

Hindu scripture strictly forbids the procurement of abortion, as it completely disregards the Hindu concept of nonviolence, and fails to acknowledge fetal life.^[35] Abortion was so abhorred that ancient Vedic scripture enabled a man to divorce his wife if she procured an abortion; the punishment for procurement of abortion according to Dharma scriptures was the stripping of caste status, which could be particularly devastating for women occupying high positions in the caste system.^[11,36,37] Since personhood is believed to begin at conception, abortion disrupts the process of karma and rebirth, core elements of Hinduism.^[11,35,38,39] Abortion is therefore unacceptable except under life-threatening circumstances.^[11,40,41]

African Traditional Religion

Human life is held in the highest regard, as life and religion are not only interconnected; they are cornerstones of African Traditional Religion (ATR).^[11,42] Procreation, child care and child protection are prominent features of ATR; children are of significant importance to the community regardless of the circumstances surrounding their conception.^[11,43] Marriage provides a means for procreation^[11,44] and culture dictates that African children belong the community at large.^[11,45] African traditionalists hold the view that abortion is equivalent to murder, since personhood is originates at conception.^[11,46-50] Accordingly, abortion is condemned by African

traditionalists; however, ATR makes provision for abortion only in cases of rape and incest.^[11,50]

Secular morality

Secular morality reinforces the congruous coexistence of heterogeneous societies, regardless of religious differences.^[11,51] Secular morality is predicated upon logic and evidence, as opposed to religious morals and values; it places emphasis on the best interests of humanity as a whole rather than a notion of the divine.^[11,50-53] Thus secular morality is capable of substantiating women's autonomous right to abortion on several grounds correlating with her human and constitutional rights, including socioeconomic standing and career advancement,^[11,53] although this often goes against religious beliefs.^[11,54]

Secular morality dictates that legal personhood and its subsequent rights engage upon birth, and therefore abortion is not equivalent to murder, since a fetus is not a person.^[11,55]

The legal status of the fetus

In accordance with SA law, legal personhood, with all its accompanying rights, is assigned at birth.^[11,56] Birth itself does not guarantee legal subjectivity, as the latter is reliant on two common-law requirements collectively known as the 'born alive' rule, which requires the child to be separated from and exist freely apart from its mother.^[11,57-59] Legal subjectivity will be granted as long as the child fulfills the common-law requirements, even if it should pass away shortly after birth, as the duration of its life after birth does not negate legal subjectivity.^[11,59]

This view was reiterated in *Christian Lawyers Association of SA and Others v Minister of Health and Others*.^[60] where the court held that the Constitution did not include any provisions granting fetal personhood.^[11,60] If the drafters of the Constitution had any intention of recognising and safeguarding fetal interests, the drafters would have included a provision pertaining to the fetus under section 28, which deals specifically with children, defined as persons aged 18 years and younger.^[11,60] However, since age commences at birth and a fetus is by definition unborn, Section 28 does not apply to the fetus.^[11,60] Furthermore, if fetal interests were acknowledged under Section 28, those interests would apply throughout the Constitution, and consequently the term 'everyone' would be inclusive of the fetus, which would then acquire the same constitutional rights as the woman.^[11,60] If both woman and fetus hold the right to life, abortion would be rendered unconstitutional. This argument is untenable, hence fetal personhood is not recognised in SA.^[11,60]

Although fetal personhood is unrecognised in SA law, both the common law and statutory law acknowledge fetal interests. For instance, not only does the common law take cognisance of fetal interests, it safeguards them by way of the nasciturus fiction.^[9] The nasciturus fiction states that when a benefit accrues to an unborn child, the unborn child will be treated as if it has been born alive, until its actual birth.^[9,54] Subsequently, the child will be entitled to the benefit.^[11,56] The nasciturus fiction is only permissible if the unborn child is the subject of the accrued benefit, or if the benefit is jointly accrued to the unborn child and a third party, provided the third party does not benefit to the exclusion of the unborn child.^[11,56,59] Lastly, the unborn child has to be born alive in order to qualify for the accrued benefit.^[11,56]

In addition to the common law, the National Health Act proscribes experimentation in embryos that are older than 14 days, unless written

permission has been obtained from the Minister of Health.^[61] The Birth and Deaths Registration Act obliges physicians to register the death of stillborn children of gestational age 26 weeks and over,^[62] thereafter, a burial order is authorised for the deceased.^[11,63] The aforementioned gestational age corresponds with fetal viability, which occurs around 24 weeks.^[11,64] Accordingly, fetal viability ultimately determines the requirements for the registration and burial of a stillborn child. Hence, recognition is given to the interests of the fetus.^[11]

The Choice on Termination of Pregnancy Act^[7]

CTOPA ushered in a new era for women's reproductive health rights. The Act ensures a number of constitutional rights that were previously denied to women in pre-democratic SA.^[9] CTOPA makes provision for safe and legal termination of pregnancy services to all women without an age limitation^[65] or additional consent requirements; CTOPA explicitly states that in order to procure termination of pregnancy, only the informed consent of the woman concerned is compulsory.^[11,66] Consequently, CTOPA encompasses the constitutional right to bodily integrity, which promotes women's autonomous reproductive health decisions, and the constitutional right to reproductive healthcare.^[67]

According to CTOPA, a woman can procure an abortion under the following conditions:

(i) Within the first 12 weeks of gestation, a woman may terminate her pregnancy on demand.^[11,68] She does not have to fulfil any additional requirements to terminate her pregnancy, nor does she have to provide any reason as to why she wishes to terminate it.

(ii) Between 13 and 20 weeks' gestation, a woman may terminate her pregnancy if her medical practitioner, after having consulted with the patient, determines that her pregnancy will threaten her mental or physical health; the fetus may be subjected to acute physical or mental disability; pregnancy arose out of rape or incest; or her pregnancy will detrimentally affect her socioeconomic standing.^[11,69-72]

(iii) After 20 weeks' gestation, a woman may only terminate her pregnancy if her medical practitioner, after consulting with another medical practitioner or registered midwife, determines that the patient's life is in jeopardy; there is acute malformation of the fetus; or the fetus could be significantly injured during delivery.^[11,73-76]

Moreover, a woman seeking to procure an abortion is entitled to counselling from the state before and after the procedure, as long as she consents to these services.^[11,77] If the woman concerned happens to be a minor, a healthcare professional is expected to encourage the patient to seek the counsel of those closest to her before she decides to go ahead with the procedure.^[79] Regardless of whether or not she heeds the advice, abortion will always be available to the patient.^[11,79] Additionally, women are entitled to be informed of their rights under the Act.^[11,80] While CTOPA does not include a conscientious clause, medical practitioners may conscientiously object to performing an abortion via the constitutional right to freedom of conscience, religion belief, thought and opinion.^[81,82] Medical practitioners may conscientiously object free of any unfair discrimination from colleagues or employers,^[81,82] provided another medical practitioner is willing to perform the procedure and there is no constitutional and ethical obligation to provide medical assistance to the patient, such as in an emergency context.^[83] The Health Professions Council of SA (HPCSA) reiterates the constitutional and ethical duty to provide emergency medical assistance to preserve

the health and/or life of a patient requiring an abortion.^[11,84] According to the HPCSA, medical practitioners may conscientiously object to performing an abortion in non-emergency contexts, provided he or she refers to the patient to a colleague who is prepared to perform the procedure.^[11,84] The HPCSA expressly condemns the practice of medical practitioners imposing subjective cultural and religious opinions regarding abortion onto patients; medical practitioners are obligated to objectively counsel patients seeking to procure an abortion.^[11,84] Failure to perform an abortion in an emergency context will give rise to legal repercussions.^[85] Should the right to conscientious objection be invoked, CTOPA requires the medical practitioner concerned to inform the patient of her rights under CTOPA, thereby ensuring that she is capable of procuring a safe and legal abortion elsewhere.^[11,85] Should the medical practitioner refuse to inform the patient, he or she will be guilty of an offence and subject to either a fine or imprisonment up to 10 years.^[86] Furthermore, the identity of women who have terminated their pregnancies cannot be made public unless the woman concerned sanctions disclosure,^[11,87] which safeguards women's constitutional rights to access to information and privacy.^[88,89]

Although it appears that CTOPA caters exclusively to maternal interests, the drafters of the legislation evidently made significant efforts to counterpoise fetal and maternal interests by introducing a gestational limitation framework into the law.^[11] It is apparent that during the first trimester, the law has a vested interest in maternal interests, as abortion is available on demand to women until the conclusion of the first trimester.^[67] However, as pregnancy progresses, the law gradually centres its attention on maintaining a balance between the interests of both parties. For the duration of the second trimester, the grounds for abortion are limited, albeit moderately, as the decision to terminate a pregnancy warrants the opinion of a medical practitioner in consultation with the patient concerned, and the latter can no longer procure the procedure on demand.^[68-72] This limitation is predicated on the interests of the nascent fetus, and as it approaches viability, the grounds for abortion are progressively limited.^[11]

Once gestation approaches the third trimester, abortion is restricted to rare circumstances, in order to serve the interest of the viable fetus. The decision to terminate a pregnancy no longer lies with the patient; it is made by her medical practitioner, who is required to consult with another medical practitioner or registered midwife.^[73-76] Nevertheless, the gestational limitations do not unduly limit women's constitutional or statutory rights, as the principal objective of the law is to provide safe and legal abortions for women while upholding their constitutional rights to bodily integrity, including the right to make autonomous reproductive health decisions, and reproductive healthcare. Therefore, maternal interests take precedent over fetal interests. However, even though CTOPA ultimately serves women's interests, it does take into account the interest of the fetus.

CTOPA and religious ethics

We now know that CTOPA attempts to counterbalance maternal and fetal interests by upholding and championing women's constitutional and reproductive rights, while progressively restricting the grounds for abortion as pregnancy progresses, particularly towards fetal viability. In doing so, CTOPA simultaneously integrates secular and religious ethics, thereby creating an equilibrium between secularism and religion in the context of abortion.

Section 2(a) of CTOPA makes provision for abortion on demand within the first 12 weeks of gestation.^[6] Drawing on our discussion on Christian ethics, liberal Protestant groups believe that abortion is permissible at the discretion of the woman and her physician within the first trimester. Hence, not only does CTOPA uphold women's right to autonomy regarding reproductive healthcare, it is also inclusive of liberal Protestant ethical views on abortion. This makes sense in a context where the majority of SA Christians are Protestant,^[90] with a significant number belonging to liberal denominations, including the Lutheran, Methodist and Presbyterian Churches that are known to hold pro-choice views.^[91] Additionally, there is evidence of Islamic jurisprudential precedent sanctioning abortion in times of adversity, exclusive of any grounds affecting the health of the woman, such as in cases of a minor falling pregnant, rape or incest, provided termination occurs pre-ensoulment.^[92] Thus, should a Muslim minor fall pregnant and wish to terminate her pregnancy during her first trimester, she could do so within the confines of liberal Islamic ethics. This is reassuring considering the growing number of Muslims in SA, coupled with the fact that it is the most prevalent religion practised in the country after Christianity and ATR.^[2] In this sense, CTOPA is representative of Islamic and Protestant ethics, secular morality and the constitutional rights to bodily integrity and reproductive healthcare, by granting women the ability to terminate their pregnancies on demand within the first trimester.

Section 2(b) provides for abortion between 13 and 20 weeks of gestation in cases of rape, incest, and/or physical and mental health preservation, as determined by the medical practitioner upon consultation with the patient.^[68-72] Collectively, all five aforementioned religions, except for liberal protestant denominations, generally prohibit abortion except on the specific grounds that happen to be listed in Section 2(b) of CTOPA. Specifically, Christian, Jewish and Hindu ethics dictate that abortion is permissible when the health of the woman is at stake, while ATR and Islamic ethics extend those grounds to cases of rape and incest. Accordingly Section 2(b) of CTOPA is inclusive of Christian, Jewish, Hindu, Islamic and ATR ethics. Section 2(b) furthermore makes provision for abortion on socioeconomic grounds, thus taking into account the socioeconomic standing of the woman and its effect on sexual and reproductive healthcare decisions. Additionally, liberal Islamic scholars state that abortion can be considered in times of socioeconomic hardship, albeit in rare instances.^[93] Hence it may be permissible for Muslim women to terminate their pregnancies on socioeconomic grounds without breaching Islamic ethical views on abortion, in some instances. It is worth noting that in these instances it is likely that a Muslim woman will have to terminate her pregnancy within 17 weeks of gestation (119 days), as abortion post-fetal ensoulment is only permissible in cases of necessity or fetal malformation. Thus Section 2(b) balances religious ethics and secular morality by providing abortion on socioeconomic grounds.

Nevertheless, one could still argue that Section 2(b) does not fully comply with the health exception outlined by Christian, Jewish and Hindu religious ethics, since the general normative Christian, Jewish and Hindu prohibitions on abortion can only be overturned to prevent death. While Section 2(b) does not explicitly address abortion in life-threatening circumstances, Section 2(c) unambiguously regulates abortion on the grounds of necessity, and so it is trite to state that this ground would also apply to Section 2(b)(i). According to Section

2(c), after 20 weeks of gestation, abortion is only permissible on the grounds of necessity, severe fetal malformation, or fetal endangerment, as determined by the medical practitioner upon consultation with another medical practitioner or registered midwife.^[74-77] It is clear that while Jewish, conservative Christian, Islamic, Hindu and ATR ethics generally proscribe abortion, the significant exception for four of the five is for life preservation, principally with respect to late termination of pregnancy (LTOP). As previously mentioned, Islam extends the grounds for LTOP to severe fetal malformation. Thus, the inclusion of Section 2(c) of CTOPA takes cognisance of religious ethics in the context of LTOP and upholds the right to bodily integrity and healthcare, while simultaneously protecting the interests of the fetus, as LTOP is restricted, except in rare circumstances, on the basis of fetal viability.

Conclusion

The prominence and influence that secular bioethical principles and theories have had on medical ethical issues such as abortion could lead to the presumption that religious ethics hold no weight in medical ethics, healthcare and law. Although SA is considered a secular country, the majority of its population is religious, and its abortion legislation is among the most liberal the world over.

SA's current abortion legislation attempts to create a balance between maternal and fetal interests. CTOPA promotes and upholds women's legal and constitutional rights with respect to bodily integrity, autonomy and reproductive healthcare, while taking cognisance of the nascent fetus and its accompanying interests by limiting the grounds for abortion as pregnancy progresses. Similarly, CTOPA has attempted to counterbalance secular morality, which correlates with the legal and constitutional rights of women and their interests, with religious ethics, which largely advocates a pro-life stance on abortion. This attempt is evident in the provisions of CTOPA that address the circumstances under which abortion is permissible in SA.

Section 2 of CTOPA encompasses conservative and liberal religious ethical grounds as well as secular grounds for abortion. The religions predominantly practised in the country collectively permit abortion for reasons relating to the preservation of life and health, severe fetal impairment, and cases of rape and incest. Some liberal denominations grant abortions to minors and on socioeconomic grounds, as well as permit abortion on demand during the first trimester. These views coincide with the secular ethical approach to abortion, which advocates maternal rights and interests over fetal interests.

Thus, CTOPA is unique in the sense that it belongs to one of only five African countries that provide abortion without restriction, notwithstanding its gestational limitation framework, yet encompasses the religious ethical views of every major religious group practising in the country; it balances religious and secular ethical views, while upholding and endorsing women's constitutional rights as well as fetal interests.

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