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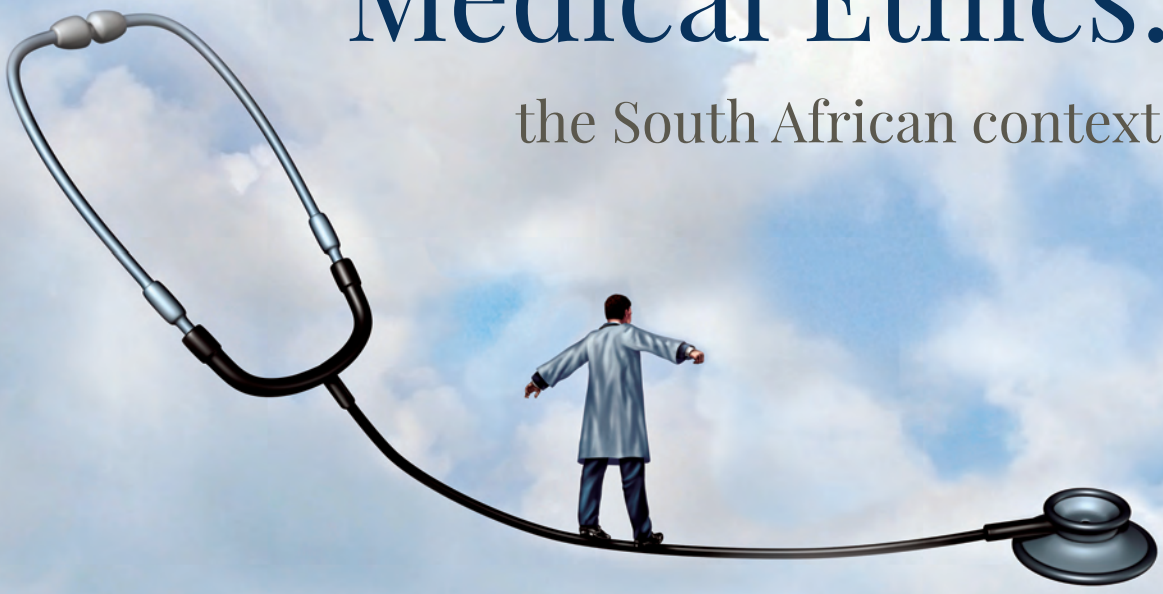

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3

Who Has the Right?

Reproductive health and the termination of pregnancy in contemporary South Africa

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Keywords: abortion; Choice on Termination of Pregnancy Act 92 of 1996; ethics; ethical challenges; ethical responsibility; reproductive health; reproductive rights; termination of pregnancy; women's rights

3.1 INTRODUCTION

Reproductive health in South Africa, like in any other country in the world, is by no means an easy topic to address, especially when it comes to the termination of pregnancy. While for some it is a complex ethical dilemma that leaves little or no room for the choice to terminate a pregnancy, for others it is about the right of a woman to choose what happens to her body. For many people, the question remains: who has the right to determine whether it is ethically justifiable to terminate a pregnancy? In contemporary South Africa, that question has a dual answer: on the one hand, the government made a decision, while on the other hand, the government's decision was that the final decision would rest upon the shoulders of a woman to choose whether or not to terminate a pregnancy. In this chapter, the aim is to provide information on reproductive health care in South Africa, more specifically, the termination of pregnancy in contemporary South Africa.

A brief overview of recent historical legislation regarding the termination of pregnancy in South Africa will be provided, focusing on the Abortion and Sterilization Act of 1975 and the Choice on Termination of Pregnancy Act 92 of 1996. This

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will be followed by a discussion of the reasons why the termination of pregnancy is regarded as an ethical dilemma in the 21st century. In this section, the argument will be made that some of the main reasons for the termination of pregnancy to be seen as an ethical dilemma include politics, technology, paternal rights, and religious conviction. The complexities and challenges of the termination of pregnancy will then be discussed to determine where the shortfalls are regarding the Choice on Termination of Pregnancy Act 92 of 1996. By determining the challenges with regard to the termination of pregnancy in contemporary South Africa, it will be argued that different role-players are key to accepting ethical responsibility when it comes to reproductive health in South Africa to ensure that policies, laws, and regulations are implemented practically. These include the acceptance of the ethical responsibility to ensure the implementation of the rights as set out by the laws of the country to secure the furtherance of gender equality, women's rights, and the right to reproductive health care.

The importance of the right to reproductive health care, the right to education, and the right to freedom can never be overestimated. It is crucial that these rights are not merely accepted as theories but lived experiences that allow women to live their lives according to their rights and not according to what society expects of them. To ensure that this happens, it is critical that ethical responsibility is accepted regarding reproductive health. In the absence of the practical implementation of these basic human rights, it will be argued that these human rights fail to be rights at all.

3.2 AN OVERVIEW OF THE TERMINATION OF PREGNANCY LAW IN SOUTH AFRICA

After the dawn of democracy in South Africa and the implementation of our new constitution, a new law on the termination of pregnancy was enacted in 1996. Not only was this a big step towards the rights of women in the country, but also meant that South Africa was committed to ensure that reproductive rights and reproductive health of women would align. In November of 1996, South Africa introduced the Choice on Termination of Pregnancy Act 92 of 1996 as a replacement for the outdated Abortion and Sterilization Act of 1975 which gave women an option for abortion, but not without the consent of at least two health care providers, among other rules that had to be adhered to.

The Abortion and Sterilization Act of 1975 made some advancements in terms of reproductive health, but still lacked the importance of the complete freedom of a woman's right to choose whether to terminate a pregnancy and it could easily be disallowed if consent was not obtained. This often led to self-induced abortion or illegal 'backstreet' abortion, leading to numerous cases of serious

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illness or even death among women. The Choice on Termination of Pregnancy Act 92 of 1996 that was implemented as part of the law of South Africa sets out specific conditions for the termination of a pregnancy as published in the *Government Gazette* of South Africa during November 1996. These conditions specify the three main categories for the termination of a pregnancy as follows:

> 2. (1) A pregnancy may be terminated–
>
> (a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
>
> (b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that–
>
> (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
>
> (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
>
> (iii) the pregnancy resulted from rape or incest; or
>
> (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
>
> (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy–
>
> (i) would endanger the woman's life;
>
> (ii) would result in a severe malformation of the fetus; or
>
> (iii) would pose a risk of injury to the fetus. (RSA, 1996)

Between 1997 and 2002, after the implementation of the Choice on Termination of Pregnancy Act 92 of 1996, the mortality and morbidity cases found in post-abortion cases among women declined by 91% (Kaswa & Yogeswaran, 2020:1). According to Kaswa and Yogeswaran (2020:1) further amendments were made in 2004 and 2008 which led to an even greater decline in maternal mortality and morbidity during or after the process of the termination of pregnancy. The changes in law brought about by the government regarding the termination of pregnancy has had a big influence on the access to reproductive health care and rights of women in South Africa. As can be seen by the act, the Choice on Termination of Pregnancy Act 92 of 1996 allows a woman the right to choose whether to terminate a pregnancy up to the 12th week. During this time, the procedure can be done by either a trained nurse, a registered medical doctor, or a midwife, while only a registered medical doctor is allowed to perform a termination of pregnancy after the 12th week of a pregnancy (Kaswa & Yogeswaran, 2020:2). This period can be extended up to the 20th week of a pregnancy after the pregnant woman

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and a medical practitioner have had a consultation and have concluded that there may be mitigating factors to terminate the pregnancy (RSA, 2022). After the 20th week of pregnancy, a termination of pregnancy will only be conducted if the life of the mother or the life of the foetus is in danger or if there is a cause for serious concern regarding birth abnormalities (RSA, 2022).

Before and after the procedure, a woman has certain reproductive rights when it comes to the termination of a pregnancy, including the right to any information regarding the procedure, the right to choose as an individual whether to terminate the pregnancy, counselling, the various procedural options, and alternative options when women fall outside the window for a legal right to abortion (Kaswa & Yogeswaran, 2020:2). Mavuso and Macleod (2020:7-8) reiterate the importance of various forms of counselling that should be provided to ensure that women are exposed to the best possible information regarding reproductive health services and termination of pregnancy. They suggest that the following counselling options should be made available to assist women before and/or after a procedure: "decision-making counselling (for those who have not yet decided and would like assistance in talking through their options such as they may be), procedural counselling (where clients can elect to hear more details about the procedure), and pre- and post-procedural counselling (where clients may get emotional support prior to or after their procedure)" (Mavuso & Macleod, 2020:7-8).

Even though there have been great changes regarding the termination of pregnancy and women's rights in South Africa, there are still people who strongly oppose the right of a woman to choose to terminate a pregnancy.

3.3 WHY IS TERMINATION OF PREGNANCY STILL OFTEN CONSIDERED TO BE AN ETHICAL DILEMMA?

While this chapter is being written on termination of pregnancy in contemporary South Africa, the media is buzzing with the news from the United States of America (May 2022) on the very same topic. This is the result of a recent leak of official documentation from the Supreme Court of the United States wherein judges seem to have drafted a bill to overturn the notorious *Roe v Wade* decision of the Supreme Court that allows a woman to choose whether to terminate a pregnancy without legal interference from the government. This sparked anew an international debate on women's rights in general and a woman's right to specifically choose what happens to her body. Why is it then that in the 21st century, abortion is still considered to be such a controversial topic of discussion? Why is it still considered to be an ethical dilemma to so many

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people? Even more so in a country like the United States of America which is often regarded as the leader of the free world.

There are many reasons why people still object to the termination of pregnancy which make it such an ethical conundrum for people all over the world, including South Africa. From a moral and quite often a religious point of view, it is found that the exact moment of when life begins raises a lot of questions regarding the justification of the termination of a pregnancy. Some argue that life begins at the moment of conception, others argue that life begins the moment that there is a heartbeat, or that life only begins when a foetus is able to survive on its own outside a woman's protective uterus and is no longer dependent on the woman for its survival. There is still not consensus among individuals on when exactly life begins, and while this is the case, abortion will always be considered an ethical dilemma. Other influential ethical stances on the termination of pregnancy are often based on political and technological considerations, the rights of the father (Jones & Chaloner, 2007:46), or in some cases, religious reasons.

Politically, the most popular distinction in thinking regarding the termination of pregnancy is known as the pro-life and the pro-choice approaches. Scott Silk (1997:29) explains that these two perspectives are often viewed as the two main approaches to the termination of pregnancy. She calls pro-life an extreme approach that does not allow for any reason to terminate a pregnancy, even though there are very rare occasions that a termination of a pregnancy is allowed (Scott Silk, 1997:29). However, a basic or simplified understanding of the pro-choice approach allows a woman alone the right to choose whether to terminate a pregnancy or not as the law in South Africa currently stands (Scott Silk, 1997:29), even though the right of the woman to choose becomes a bit more complex after the 12th week of pregnancy since there has to be mitigating factors and medical practitioners involved to terminate a pregnancy after this period of time. People who relate more to the pro-life approach tend to believe that abortion is the equivalent of murder and therefore it should not be allowed, whereas people who relate more to the pro-choice approach tend to believe that only the person who is pregnant should have the right to decide whether to terminate the pregnancy or not, thereby allowing for the freedom and right of choice, up to at least 12 weeks of pregnancy without influence from unwanted external factors.

Technologically, there has also been some pushback on the termination of pregnancy due to "increased technological advances" (Jones & Chaloner, 2007:46) and what some label as unethical practices whereby tissue from aborted foetuses is used for "beneficent or therapeutic purposes" (Jones & Chaloner, 2007:46). Jones and Chaloner (2007:46) explain that this becomes an issue when considering

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the moral status of the foetus as a human life. This is further complicated by the conversation regarding embryonic stem cell research, gender selection, gene manipulation, and assisted reproductive technology. Ethical policies and laws are therefore crucial when it comes to technological advances and the challenges faced regarding the termination of pregnancy.

Another factor contributing to the ethical dilemma are the rights of the father of the foetus. There has been an increasing public outcry that the biological father of the unborn foetus should also have a say in the decision to terminate a pregnancy or not (Jones & Chaloner, 2007:46). It is especially the view of pro-life advocates that the biological father, as a contributor to the pregnancy, should have a right to have a say in the final decision. It is, however, mostly overruled in countries where a woman alone has the right to choose because she alone hosts the foetus.

As far as religion goes, termination of pregnancy has always been a contentious issue. Scott Silk (1997:36) notes that it is interesting that in ancient times a woman was given a set amount of time after conception to decide whether she wanted to continue with the pregnancy. She continues by claiming that most ancient cultures determined the timeframe for this decision to be made between conception and the first movement of the foetus (Scott Silk, 1997:36). The Stoics believed that life began at conception, but the soul of the foetus only came into existence at birth; Thomas Aquinas believed that a male foetus would receive its soul at 40 days and a female foetus at 80 days; and St Augustine believed that the soul was received at the first movement of the foetus (Scott Silk, 1997:36). According to Scott Silk (1997:37-40) religious beliefs regarding termination of pregnancy varies from very rigid points of view found among the Greek-Orthodox Church, the Roman Catholic Church, and Hinduism, to a slightly more refined view from Protestant and Muslim understandings. With most South Africans ascribing to some form of religious foundation, whether through upbringing or active religious affiliation, it would suffice to say that their stance on the termination of pregnancy may have been, or is still being, influenced by some form of religious conviction.

If politics, technology, the rights of the biological father, and religious conviction were all to be taken out of the equation and the only remaining factor determining the right of the woman to terminate a pregnancy was the law, then surely abortion should not face too many challenges in contemporary South Africa, one would think. This, however, is not the case.

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3.4 UNDERSTANDING SOME OF THE CHALLENGES SURROUNDING TERMINATION OF PREGNANCY IN SOUTH AFRICA

Pickles (2017:496-497) acknowledges that South Africa has made great progress in valuing the rights of women in South Africa with the Termination of Pregnancy Act 92 of 1996, but also notes that the implementation of the act still faces some challenges in contemporary South Africa, especially regarding the lack of facilities with the necessary resources, the stigma that still clings to those who undergo the procedure, and abusive behaviour towards the person who opted for a termination of pregnancy. Overall, there is a generalised shame when it comes to sexual practices and reproductive health that may easily lead to ignorance or misinformation. This means that there are often situations where women are forced into a situation of self-inflicting a miscarriage or seeking illegal means to perform harmful and dangerous procedures that lead to increasing maternal morbidities and mortalities.

One of the ways to address these issues would be through education. This education should form part of primary school curriculums, at an age when children start to enter puberty. It is of the utmost importance that children be informed about the changes that occur in their bodies and how to be responsible and informed when it comes to issues of reproductive health. The stigma and shame surrounding sexual development, reproductive health, and sexual responsibility should never be a once-off conversation only but should rather become part of a responsibility-orientated approach whereby children are taught about the sexual changes and realities that they are facing throughout their developmental stages. This should not be seen as a means to encourage young girls to get abortions but should rather be seen as an opportunity to engage children in an open and honest conversation about reproductive health, sexual development, sexual responsibility, access to information, and an awareness of human rights. Of grave concern is the fact that information regarding reproductive health is either not being spread efficiently, or that the information made available is not received as it is aimed to. One example of this is that women reported that people are willing and open to discuss or even disclose their HIV status but are unwilling to do discuss termination of pregnancy (Orner, De Bruyn & Cooper, 2011:790).

Orner et al. (2011:781) stress the importance of investigation of the decisions and experiences of pregnant women who are HIV+ when it comes to sexual and reproductive health in South Africa. In a study conducted among women living with HIV in Cape Town, they found an extreme sense of judgement, social and economic difficulties, and a lack of information regarding reproductive health and more

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specifically South Africa's law on the termination of pregnancy up to 20 weeks of gestation (Orner et al., 2011:781-782). This means that women who are living with HIV who inadvertently become pregnant may seek illegal abortion options due to fear, shame, and being ill-informed about their reproductive rights. Where termination of pregnancy was sought, women often reported that they have experienced a feeling of being judged by their health care providers for being pregnant while living with HIV (Orner et al., 2011:782). Apart from feeling judged, these women also mention a lack of support within communities when a person living with HIV/AIDS fell pregnant and reached out to members of the community for assistance in deciding whether or not to terminate the pregnancy, they would not be supported (Orner et al., 2011:785).

Another complication with the termination of pregnancy concerns women seeking termination during the second trimester of their pregnancy. Harries, Orner, Gabriel and Mitchell (2007:2) state that an estimated 20% of the total number of termination procedures are conducted during the second trimester of a pregnancy. The chances of medical complications or maternal morbidity and mortality increase after the first trimester and is therefore considered to be of greater risk than first trimester terminations (Harries et al., 2007:2). While it may be a greater risk, it is still legal to undergo a termination procedure during the second trimester due to factors including socio-economic hardship, danger to the life of the mother (physical or mental), rape, or incest. However, during the second trimester any termination procedures must be conducted by a registered medical practitioner. Seeking reasons why women waited until their second trimester to opt for a termination of pregnancy, Harries et al. (2007:3) discovered that women often reported having a history of irregular menstrual periods and did not have any typical signs of being pregnant, and thereby realised only at a very late stage that they were pregnant. Most women are also not using any form of contraceptive medication to prevent them from falling pregnant, while those who did make use of a contraceptive pill, report that they did not use it consistently or as advised (Harries et al., 2007:3). Another reason that women sought a second trimester termination is because of the failure of an attempted, self-inflicted termination, after which they then approach legal facilities (Harries et al., 2015:2).

Adding to the challenges women face in seeking termination of a pregnancy, they reported receiving negative judgement or discouragement in certain cases by health care providers (Harries, Gerdts, Momberg & Foster, 2015:1). Women also reported the often very negative attitude of health care providers in their search for legal and safe options to terminate a pregnancy (Harries et al., 2015:1). Harries et al. (2015:2) add that legal and safe abortions are often lacking due to

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a shortage of trained staff and a shortage of legal facilities to accommodate these procedures. This not only hampers women's right to safe and legal abortion but can also lead to women seeking illegal options for the termination of a pregnancy or attempt to self-inflict termination which could have dire consequences for them. Unfortunately, this often seems to be the case in rural areas (Harries et al., 2015:2). This is worsened by the identification of an ever-growing network of termination of pregnancy providers who are not registered medical practitioners or legally trained to provide the service (Harries et al., 2015:2).

More recently, a study on the termination of pregnancy and refugees in South Africa concluded that refugees often face serious challenges in seeking legal and safe termination services. Munyaneza and Mhlongo (2019:1) say refugees are more likely to be on the receiving end of basic human rights violations than citizens in South Africa. Reports received from refugees suggest that they often experience "medical xenophobia and discrimination" (Munyaneza & Mhlongo, 2019:4) when they seek termination of pregnancy services. This was further complicated by the struggle to communicate properly due to language barriers between the refugees and the local service providers (Munyaneza & Mhlongo, 2019:4). Refugees often found legal termination services and service providers to be unprofessional because of a lack of health care information and sufficient care for the patient (Munyaneza & Mhlongo, 2019:4), while others mentioned that due to financial constraints as refugees, they were unable to afford private health care and struggled to access overcrowded public reproductive health care services where they felt like they were being judged for their decision to terminate a pregnancy (Munyaneza & Mhlongo, 2019:5). Taking the experience of refugees into account, it becomes crucial to address the issue of proper education and training in reproductive health care in South Africa. Refugees should not feel unsafe, unwelcome, or judged by health care providers in the same way that South Africans ought not feel unsafe, unwelcome, or judged for their reproductive health care decisions.

As a consequence of some of the challenges surrounding the termination of pregnancy, it becomes clear that more needs to be done to address these challenges. It has been 26 years since the Choice on Termination of Pregnancy Act 92 of 1996 has been enacted. It should not be regarded as a theoretical law but should rather be implemented responsibly and in the best interest of the patient in need of reproductive health care. This calls not only for an ethical awareness, but also for ethical responsibility and accountability when it comes to the furtherance of reproductive health care in South Africa.

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3.5 ETHICAL RESPONSIBILITY AND REPRODUCTIVE HEALTH CARE IN SOUTH AFRICA

As seen by some of the challenges surrounding the termination of pregnancy in contemporary South Africa, the need for ethical responsibility and accountability regarding reproductive health care can no longer be evaded. As citizens, women, policymakers, academics, and politicians, we can no longer turn a blind eye to the desperate need for ethical responsibility in the reproductive health care sector. It is time for the Department of Health to look at the implication of the challenges faced surrounding the termination of pregnancy and to put policies and laws in place which seek to protect and advance the sexual reproductive health care rights of women – not only in theory or on paper, but by taking responsibility for the implementation of these policies and laws to create a safer and more just society wherein women are not shamed, judged, overlooked, frightened, or denied the right to reproductive health care. Macleod (2019:58) echoes the outcry for the practical implementation of reproductive health laws in stating that "there are a number of injustices that continue at both a micro- and macro-level, thereby hindering women's access to non-judgemental abortion services and, in some cases, jeopardising their health" (Macleod, 2019:58). Everyone, women and men alike, should have the right to feel safe, educated, and empowered by their right to reproductive health care. This should include the right to counselling and education to address "the dangers of clandestine abortions and the option of safe and legal abortion" (Orner et al., 2011:792).

Orner et al. (2011:781) reiterate the fact that the decision-making component when it comes to reproductive health in women who are living with HIV in South Africa are in a particularly troubled situation. The challenges regarding sexual reproductive health and women's rights are not only complex, but also severely neglected. South Africa has one of the highest HIV infection rates in the world and women are more often affected by this than men (Orner et al., 2011:781). Orner et al. (2011:781) ascribe this to the fact that contemporary South Africa is still very much an unequal society in terms of gender and socioeconomic rights. For women living with HIV, decision-making regarding pregnancy is extremely difficult, since they may likely not only be experiencing judgement about their HIV status, but also because they have fallen pregnant while living with HIV (Orner et al., 2011:781-782).

De Bruyn (2004:93) notes that there exists an unnoticed form of discrimination regarding living with HIV and access to information regarding reproductive health care in South Africa. Women's restricted access to responsible education

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and their inability to acquire the contraceptives of their choice further complicates the right to reproductive health care (De Bruyn, 2004:93). It is therefore critical to implement ethically sound policies that ensure women have access to proper education, reproductive health care resources, and safe services. The ethical importance of access to information regarding sexual reproductive health, the termination of pregnancy, and the laws surrounding it, cannot be stressed enough. This will not only lead to the furtherance of the practical implementation of women's rights, but also to safer and healthier reproductive health care services. If responsibility is not accepted for the implementation of basic human rights, there is no use for the existence of the human right concerned. Therefore, it can be said that a human right like access to reproductive health care is not a human right if the policies and laws do not ensure its practical implementation in the lives of citizens.

De Bruyn (2004:95) explains that, in the past, changes in terms of policies and laws that lead to the protection of women in society have come about through rigorous "lobbying by NGOs, researchers and members of the healthcare sector". It is the ethical duty of the same people who were lobbying for a change in policies, laws, and regulations to take responsibility along with the Department of Health in South Africa to make sure that these policies, laws, and regulations are thoroughly implemented. Where there is a lack of responsibility with regard to the practical implementation of the law, it can be stated that the "state should be held to account for its failure to respect, protect and promote women's rights in the context of abortion services" (Pickles, 2017:505). It is noteworthy that this effort to implement policies where needed never happens in isolation, but demands the involvement of different sectors of society. Bolarinwa and Boikhutso (2021:8) echo the "call for the attention of key stakeholders towards policy formation and development of behaviour and social intervention".

3.6 CONCLUSION

The termination of a pregnancy and the right to choose to terminate a pregnancy is without a doubt a difficult topic to discuss. It is however crucial to discuss this topic within the framework of reproductive health and reproductive health care services.

In this chapter on reproductive health, a brief overview is given on the most recent history of the laws regarding the termination of pregnancy in South Africa. This is done by briefly discussing the content of the Abortion and Sterilization Act of 1975 and the Choice on Termination of Pregnancy Act 92 of 1996. It is

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argued that the act of 1996 furthered the rights of women by allowing them the right to choose whether they want to terminate a pregnancy or not. This decision is left entirely in the hands of the women. It is then argued that although women have the legal right to choose whether to terminate a pregnancy or not, it never comes without challenges, whether it be political, technological, paternal rights, or religious conviction. The identification of some of the challenges leads to the demand that ethical responsibilities should be addressed. It is argued that women's rights, the right to reproductive health care, and the right to freedom cannot not be realised rights if they are not practically implemented. For this to happen, ethical responsibility for issues like education, access to information, and access to reproductive health care needs to be accepted.

Finally, although a woman has the legal right to decide whether or not to terminate a pregnancy, the practical implementation of the law falls somewhat short of securing women sole jurisdiction of their life choices.

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