

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 23/96

Ex parte: THE CONSTITUTIONAL ASSEMBLY

In re: THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

SUBMISSION OF THE REPRODUCTIVE RIGHTS ALLIANCE

IN RE: SECTIONS 12 (2)(a) and (b) and 27 (1)(a)

SUBMISSION TO THE CONSTITUTION COURT ON BEHALF OF THE REPRODUCTIVE RIGHTS ALLIANCE

1. This submission is a response to a number of religious organisations who filed submissions with the Constitutional Court arguing that the guarantee of reproductive health and the right to make decisions concerning reproduction violate Constitutional Principles I, II and III[#1].

[#1] See submissions of Pro Life, South Africa, Christians for Truth, The Dutch Reformed Church, People for Life, Human Life International, United Christian Action, Victims Choice, Africa Christian Action and World Federation of Doctors Who Respect Human Life.

Interpreting the Constitutional Principles and Reproductive Rights

2. It is submitted that the Constitutional Principles provide a framework for the drafting of the new Constitution which is before Court. The Principles stand as markers designating the boundaries within which the Constitutional Assembly could exercise a broad range of choice in drafting the Constitutional text. The process of certification is to ensure that the text of the new Constitution adheres to the foundational structure outlined by the Constitutional Principles. The Certification is a judicial process and is not a venue for interest groups to lobby for amendments.

3. In response to the objections to sections 12(2)(a), 12(2)(b) and 27(1)(a) of the new Constitution, it is submitted that the question before the Court is not whether a particular right which could have been included in the Constitution has been left out or whether particular objectors agree with the wording or inclusion of a right in the Constitution. The test is only whether the inclusion of the rights in question are, on their face, provided by the Constitutional Principles. The task of the Court is only to determine whether the protection of reproductive decision-making and access to reproductive health care services in the new Constitution conflicts with the Constitutional Principles.

4. In addition, the question before the Court is not whether an unlimited right to abortion conflicts with the Constitutional Principles but whether the broader protection of reproductive rights and reproductive health do. The submissions of the objectors seem to conflate the issue abortion with the broader protection afforded under sections 12(2)(a), (b) and 27(1)(a).
5. It is submitted that the right of access to reproductive health care and the right to freedom and security of the person which includes the right to make decisions concerning reproduction are in a way prohibited by the Constitutional Principles. Moreover, as will be submitted below, the protection of these rights in the new Constitution accords with commitment to equality, democracy and fundamental rights set out in the Constitutional Principles.

The Objection to Certification

6. The objection filed to certification of the protection of reproductive decision-making has two bases: (1) that the fetus has a right to life thus violating the guarantee to everyone of all universally accepted fundamental rights in Constitutional Principle II; and (2) that the protection of reproductive decision-making is undemocratic, thus violating Constitutional Principle I. It is submitted that both of these bases for non-certification are unfounded.
7. First, the Reproductive Rights Alliance supports the submission of the Constitutional Assembly that "it can..not be said that the protection of pre-natal life is a universally accepted fundamental right, freedom, or civil liberty. The varied responses of open and democratic societies is based on human dignity, equality and freedom, to the issue of abortion, make it clear that there is no universally accepted standard which demands the constitutional protection of pre-natal life"[#2]. Internationally, courts have deliberately avoided deciding the status of the fetus as a rights bearer or have expressly declared that the fetus is not a bearer of rights[#3].

[#2] Submission of the Constitutional Assembly, at 36.

[#3] Courts that have held that the fetus is not a rights bearer include: the Austrian Supreme Constitutional Court in VfSlg 7400/1974-JB1 1975, 310 - EuGRZ 1975, discussed in Albin Dearing, "Austria" in Frankowski and Cole eds *Abortion and Protection of the Human Fetus* (1987) and Oskar Lehner, "Austria" in Rolston and Eggert eds. *Abortion in the New Europe* (1994)) which held that the protection of life in article 2 of the European Convention on Human Rights does not lay down any rule as to when life begins and that reading the article as a whole it applies only to persons after birth; and the Spanish Court decision of 11 April 1985 that held that the fetus is not a person possessing legal rights (see Richard Stith, "New Constitutional and Penal Theory in Spanish Abortion Law" 35 *The American Journal of Comparative Law* 513 (1987) and Rebecca Cook and Bernard Dickens "International Developments in Abortion Laws: 1977-1988" 78 *AJPH* 1305). The European Commission of Human Rights, the Supreme Court of Canada and the Supreme

Courts of the United States have all explicitly avoided answering the question of when life (legally) begins: *Paton v. United Kingdom* 3 E.H.R.R. 408 (1980), *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634 (S.C.C.), *Roe v. Wade* 410 U.S. 113 (1973).

8. In addition, many jurisdictions with constitutionally entrenched rights protection have interpreted the universally accepted rights to privacy, liberty or the right to freedom and security of the person to include the right to make decisions concerning reproduction[#4]. The protection of reproductive decision-making in South Africa, therefore, does not conflict with any universally accepted fundamental rights or freedoms.

[#4] For example, *Morgentaler, Smoling and Scott v. The Queen* (1988), 44 D.L.R. (4th) 385 (S.C.C.); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade* 410 U.S. 113 (1973); *Thornburgh v. American College of Obstetricians and Gynaecologists* 476 U.S. 747 (1986); *Paton v. United Kingdom* 3 E.H.R.R. 408 (1980); *Brugemann v. Scheuten v. Federal Republic of Germany* 3 E.H.R.R. 244 (1977) where although upholding the restrictive abortion legislation being challenged, the European Human Rights Commission also recognised that the regulation of pregnancy touches on the private life of the woman, (though also holding that not every regulation, however, interferes with her right to private life).

9. Second, it is submitted that the protection of reproductive decision-making in section 12(2)(a) and (b) cannot be seen to conflict with the commitment to democracy in Constitutional Principle I. The submissions objecting to s.12(2)(a) argue that the inclusion of this section (which opens the door to Constitutional protection of permissive abortion legislation) violates Constitutional Principle I since "South Africans have overwhelmingly opposed abortion on demand". Putting aside the contentious nature of this claim, it is submitted that democracy is not equivalent to majoritarianism and that a democracy committed to fundamental rights must protect the interests of minorities and disadvantaged groups. The anti-democratic objection to the certification of section 12 is, therefore, invalid.

10. In *S v. Makwanyane* Chaskalson P. held that protection of rights in a democratic system based on Constitutional rather than Parliamentary supremacy means that "public opinion may have some relevance ... but, in itself, is no substitute for the duty vested in the Courts to interpret the Constitution without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication"[#5]. Similarly, in the interpretation of the Constitutional Principles, the Court must be guided only by human rights principles and not majoritarian demands. The unpopularity of a particular provision in the new Constitution, does not, therefore, render it undemocratic nor uncertifiable.

[#5] *S v. Makwanyane* 1995 (3) SA 391, 431C

11. Moreover, it is submitted that the protection of reproductive rights in the new Constitution in fact complements and furthers the commitment to "a democratic system of government committed to achieving equality between men and women and people of all races" set out in Constitutional Principle I. Democracy is achieved when all citizens equally participate in the

democratic process. The barriers to controlling reproduction faced by South African women, and the social consequences flowing from those barriers, result in women's democratic participation being severely diminished. As Wilson J. holds in *R v. Morgentaler*, the struggle for women's reproductive rights, which has been a struggle for women's rights to equality and dignity, is a struggle for inclusion in society:

... the history of the . struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men[#6].

[#6] *R v. Morgentaler*, 555.

12. In addition, free and informed decision-making, which in the new South African Constitution includes reproductive decision-making, is essential to a democratic system of government. As Dickson C.J.C. held in the Canadian context in *R v. Big M Drug Mart Ltd.*, "an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability and efficacy of our system of self-government[#7].

[#7] *R v. Big M Drug Mart* (1985), 18 D. L. R. (4th) 321 (S.C.C.), 361.

13. It is therefore submitted that the right to make decisions concerning reproduction and the right of access to health care services including reproductive health care, are not prohibited by any Constitutional Principle and in fact promote the achievement of fundamental rights and democracy required by the Constitutional Principles.

Reproductive Rights are Fundamental Rights

14. It is further submitted that the right to make decisions concerning reproduction is an internationally recognised fundamental right which, under Constitutional Principle II, must be provided for in the Bill of Rights. The following international documents pronounce as a basic human right, the right to determine freely and responsibly the timing and spacing of children:

- (a) The Proclamation of Teheran, 1968[#8];
- (b) U.N. General Assembly Declaration on Social Progress and Development, Art. 4[#9];
- (c) 1974 World Population Plan of Action[#10];
- (d) Cairo Programme of Action, 1994[#11];
- (e) Beijing Platform of Action, 1995[#12].

[#8] U.N. Doc A/Conf. 32/41 (April 22 to May 13), reprinted in *Human Rights, A Compilation of International Instruments* (New York: United Nations, 1988), 43.

[#9] Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969, reprinted in *supra* note 7, 378.

[#10] At the conference, held in Bucharest, representatives of 136 governments stated that "all couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so", cited in B. Hernandez, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right", 17 *Brooklyn J. Int'l L* 309 (1991), 310, n.9.

[#11] from the 1994 Conference on Population and Development, Platform of Action, VII(a), 7.2.

[#12] from the Fourth World Conference on Women

15. The right to make decisions concerning reproduction has also been established as a basic human right in international law by the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): a treaty which South Africa has recently ratified 13 . Article 16(1)(e) of CEDAW requires State Parties to take appropriate measures to eliminate the discrimination against women, and in particular guarantees to men and women, on a basis of equality, the right:

... to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

[#13] Ratified, December 1995

16. The jurisprudence of other jurisdictions has recognised the right to make decisions concerning reproduction as an internationally accepted basic human right. In the Supreme Court of Canada, LaForest J., (Gonthier and L'Heureux Dube concurring), recently held in *Chan v. Canada (M.E.I.)* that Chinese nationals fleeing China's one child policy and threats of forced sterilisation, are protected under Canadian refugee laws on the ground that China is denying them the exercise of a "fundamental human right". Relying on CEDAW and the Cairo Programme of Action he defined the fundamental right in question as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children" 14 . Although the decision of LaForest was a dissenting opinion, the majority decision assumed that the claimant was a refugee for purposes of Canadian law (therefore assuming that a fundamental right of the refugee was being violated) and dismissed the appeal on other grounds".

[#14] *Chan v. Canada* (1995), 128 D.L.R. (4th) 213 (S.C.C.), 249.

[#15] The majority upheld the claimant's deportation order on the basis that he had not sufficiently demonstrated a well-founded fear of persecution in order to qualify as a refugee. The right to procreate was also upheld by the United States Supreme Court in *Skinner v. Oklahoma* 316 U.S. 535 (1942) where the Court characterised the right to reproduce as "one of the basic civil rights of man" and therefore held as unconstitutional the forced sterilisation of convicted felons.

17. The right to health is also an internationally recognised basic human right. Articles 10 and 12 of CEDAW, like section 27(1)(a) of the new Constitution, explicitly protect reproductive health. Other health provisions in international law implicitly protect reproductive health since one of the aims of protecting reproductive health is to benefit both women and the children they bear. For this reason Article 12(2) of the Covenant on Economic, Social and Cultural Rights requires State Parties, in the realisation of the highest standard of physical and mental health of its citizens, to make provisions for the reduction of the stillbirth and infant mortality rates. Similarly, article 12 of CEDAW is both concerned with family planning and with the provision of appropriate services in connection with pregnancy, including adequate nutrition during pregnancy and lactation. The international treaties which protect a right to health therefore include:

- (a) Covenant on Economic, Social and Cultural Rights, Art. 12[#16];
- (b) CEDAW, Arts, 10(h) and 12;
- (c) Convention on the Elimination of All Forms of Racial Discrimination, Art.5[#17];
- (d) Convention on the Rights of the Child, Art. 24[#18],
- (e) African Charter on Human and People's Rights, Art.16..

[#16] South Africa is a signatory, 1994.

[#17] South Africa, signatory, 1994.

[#18] Ratified, 1995.

18. It is therefore submitted that the right to make decisions concerning reproduction and the right to reproductive health are universally accepted fundamental rights, the inclusion of which in the new Constitution complements and does not conflict with Constitutional Principle II.

**(Signed by) Cathi Albertyn, Management Committee
Reproductive Rights Alliance**

APPENDIX

The Reproductive Rights Alliance

The Reproductive Rights Alliance was formed in response to increasing demands in our country for overt, organised support for Reproductive Rights and comprehensive reproductive health care services. We are a network of organisations and structures, committed to creating and promoting a liberalised, safe and legal framework for reproductive health and well-being. The organisations within the RRA have a long history of activism for reproductive freedom and rights and support the reproductive health priorities identified in the government's health plan and in the RDP.

Reproductive Rights Alliance Members Organisations

1. Planned Parenthood Association of South Africa (PPASA)
2. Primary Progressive Health Care Network (NPPHCN)
3. Women's Health Project (WHP)
4. Centre for Applied Legal Studies (CALS)
5. Abortion Rights Action Group (ARAG)
6. Marie Stopes
7. People Opposing Women Abuse (POWA)
8. Women's Lobby
9. Reproductive Rights Campaign (RRC)
10. Reproductive Health Research Unit (RHRU)
11. Lawyers for Human Rights (LHR)
12. SANCO (National Office)
13. Women's Health Unit (UCT)
14. Gauteng Regional Network on Violence Against Women
15. Women's Charter (KZ-Natal)
16. Young Women's Network (YWN)
17. Sexual Harassment Education Project (SHEP)
18. Human Rights Committee (HRC)