

# The Cost of Silence: The Criminalization of Abortion in Botswana-Between Public Morality and Reproductive Rights

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## ABSTRACT

This paper explores the criminalization of abortion in Botswana through three intersecting lenses: legal positivism versus natural law, feminist legal theory, and the public health perspective. It makes the case that the strict abortion law in Botswana which are deeply rooted in a misplaced sense of morality, presented as moral conservatism and colonial legal traditions, continue to silence women's reproductive autonomy and rights, thus they continue to perpetuate inequality. The discussion illustrates how the reliance of the state on moral and religious reasoning continues to undermine women's rights and public health outcomes, leading to unsafe abortions and preventable maternal deaths. Ultimately, the paper calls for a rights-based reform of Botswana's abortion laws that harmonizes moral values with constitutional and international human rights obligations.

## Introduction

Abortion remains one of the most contentious moral and legal issues in Botswana's social and political discourse. While the country has made significant progress in areas of gender equality and public health, abortion is a clear outlier in that regard, remaining highly restrictive under the Penal Code. The Penal Code of Botswana (Sections 160–163) criminalizes abortion, permitting it only under limited circumstances such as risk to the mother's life, rape, incest, or severe fetal abnormality [1]. These narrow exceptions, combined with strong social stigma, create a culture of silence and fear surrounding reproductive health.

This paper examines the criminalization of abortion in Botswana through three theoretical frameworks legal positivism versus natural law, feminist legal theory, and the public health perspective to highlight how morality, patriarchy, and state law intersect to shape women's reproductive rights. It argues that the current legal regime reflects a tension between moral absolutism and constitutionalism, where the preservation of public morality overrides women's right to autonomy and health. This "cost of silence" manifests not only in legal exclusion but also in the preventable suffering of women who resort to unsafe abortions.

## Legal Landscape: Abortion Law in Botswana

Botswana's legal stance on abortion is heavily influenced by its colonial legal heritage. The Penal Code, inherited from British colonial administration, criminalizes any attempt to procure an abortion, with penalties ranging from imprisonment to fines [2]. Under Section 160, any woman who "unlawfully administers to herself any poison or noxious thing" to procure a miscarriage commits an offence. Similarly, under Section 161, any person assisting in the act is equally liable. The law allows abortion only when performed by a registered medical practitioner and when it is necessary to preserve the woman's physical or mental health, in cases of rape or incest, or when there is substantial risk that the child, if born, would suffer from serious physical or mental abnormality [2]. However, procedural barriers such as the requirement of multiple medical opinions make access nearly impossible in practice [3].

In contrast, neighboring South Africa's Choice on Termination of Pregnancy Act (1996) provides abortion on demand within the first 12 weeks, representing a progressive rights-based approach. Botswana's continued criminalization thus reflects a positivist adherence to statutory law, rather than a pragmatic or human rights-oriented stance.

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### Legal Positivism vs. Natural Law: The Moral-Legal Divide

Legal positivism holds that law derives its validity from its enactment by legitimate authority, not its moral content [4]. From this perspective, Botswana's abortion laws are legally valid because they have been duly enacted by Parliament, regardless of their moral implications. Conversely, natural law theory asserts that an unjust law, one contrary to moral reason, is not true law (Aquinas, 1265/1947).

In Botswana, abortion law reflects a natural law orientation, heavily influenced by religious and traditional morality. The law is seen as upholding the sanctity of life a moral value deeply embedded in Christian and Setswana cultural beliefs. However, this moral absolutism often disregards the complex realities of women's lives, particularly the socioeconomic and health conditions that lead them to seek abortions.

From a positivist standpoint, lawmakers have failed to evolve the law in line with constitutional principles and empirical realities. Botswana's Constitution (1966) guarantees rights to liberty, privacy, and freedom from inhuman treatment, yet these are undermined when women are forced into unsafe abortions [5]. The rigid moral framing of abortion as inherently wrong prevents the development of legal reforms that reflect modern human rights obligations.

Thus, the interplay between positivism and natural law in Botswana's abortion regime reveals a contradiction: while positivism justifies the law's formal existence, natural law sustains its moral rigidity, both converging to silence women's agency.

### Feminist Legal Theory: Patriarchy, Power, and Reproductive Autonomy

Feminist legal theory exposes how laws are shaped by patriarchal structures that marginalize women's experiences. From this lens, Botswana's abortion laws are not gender-neutral but rather instruments of control over women's bodies and sexuality [6]. By criminalizing abortion, the law assumes that women cannot be trusted to make moral decisions about their own reproductive health.

In Botswana, societal norms dictate that women's primary identity is as mothers and caretakers, reinforcing the belief that motherhood is compulsory [3]. The criminalization of abortion thus enforces women's reproductive labor as a social duty. Moreover, it silences public discourse around sexual health, denying young women access to contraception and information.

Feminist scholars argue that the criminalization of abortion reflects a broader "moral paternalism" that privileges male-dominated institutions Parliament, the church, and the medical establishment over women's lived realities [7]. This patriarchal framing undermines constitutional guarantees of equality under Section 15 of the Constitution of Botswana, which prohibits discrimination on the basis of sex.

The result is a legal regime where women's moral agency is subordinated to patriarchal morality, and their silence becomes both a product and a perpetuator of systemic inequality.

### The Public Health Perspective: The Hidden Cost of Criminalization

The criminalization of abortion has profound implications for public health in Botswana.

According to the World Health Organization, unsafe abortions account for approximately 13% of maternal deaths globally, with sub-Saharan Africa carrying the highest burden [8]. In Botswana, official data on abortion-related mortality is scarce due to stigma and underreporting, but regional trends suggest that restrictive laws correlate with high rates of unsafe procedures [9].

Women facing unintended pregnancies often resort to traditional or clandestine methods, risking infection, infertility, or death. The Botswana Family Welfare Association notes that limited access to reproductive health services and the fear of legal consequences deter women from seeking medical care, even in emergencies [10].

From a public health viewpoint, criminalization not only endangers women's lives but also imposes significant costs on the healthcare system. Treating complications from unsafe abortions diverts scarce medical resources from other priorities [11]. This creates a paradox: a law intended to protect life instead contributes to preventable deaths.

The public health framework thus exposes the tangible, measurable consequences of moralized legislation. It shifts the conversation from abstract morality to lived human suffering, reinforcing the need for evidence-based, rights-oriented policymaking.

### Reconciling Law, Morality, and Rights: A Call for Reform

Botswana's legal and moral stance on abortion cannot remain static in the face of social change. The challenge lies in reconciling public morality with women's constitutional and human rights. Reforming abortion law does not necessitate moral abandonment; rather, it requires recognizing that protecting women's lives is a moral imperative in itself.

Botswana has ratified key international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Maputo Protocol, both of which affirm women's right to reproductive autonomy and access to safe abortion [12]. However, the state's reluctance to domesticate these provisions into national law reflects the enduring dominance of natural law morality over rights-based governance.

A reformed legal framework could follow the South African model, where abortion is treated as a matter of health and choice rather than criminality. Public education and expanded reproductive health services would reduce unsafe abortions while respecting diverse moral convictions.

Ultimately, reform must be grounded in a holistic understanding that women's autonomy, equality, and health are not threats to public morality but essential components of Botswana's democratic and developmental aspirations.

## Conclusion

The criminalization of abortion in Botswana stands at the crossroads of law, morality, and human rights. Through the lens of legal positivism and natural law, it reflects a state's struggle to balance moral order with constitutional freedoms. Feminist legal theory reveals how this balance often reinforces patriarchy, denying women moral and legal agency. The public health perspective exposes the human cost of this moral rigidity unsafe abortions, preventable deaths, and enduring inequality.

Breaking the silence around abortion requires confronting these intersecting forces with courage and compassion. Legal reform grounded in evidence and human rights can preserve moral values while affirming women's dignity and autonomy. Until then, the cost of silence will continue to be borne by the most vulnerable women not in courts or parliaments, but in clinics and homes across Botswana.

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