

Abortion in South Africa: How We got Here, the Consequences, and What is Needed

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Aborsie op aanvraag is sedert 1997 beskikbaar, maar dit is nie heeltemal ongekend nie, aangesien Suid-Afrika 'n geskiedenis van onvoldoende beskerming van ongebore lewe het. Romeins-Hollandse gemenerereg wat aborsie verbied is voor 1975 toegepas, alhoewel aborsie nooit plaaslik as 'n halsmisdad beskou is nie. Daarbenewens is die ongebore kind nie as 'n regspersoon deur die gemenerereg beskou nie en het dus nie enige regsbeskerming gehad nie. Die 1975-wet het die grondslag gelê vir die aanvaarding (en, uiteindelik, bevordering) van eugenetiese aborsies. Deur verkragting as 'n grondslag vir aborsie te beskou, het die 1975-wet die redes vir die kriminalisering van aborsie ondermyn. Die “bedreiging vir geestesgesondheid”-bepaling in die 1975-wet is wyd gebruik om aborsies toe te laat. Die 1996-wet het aborsie op aanvraag tot en met 20 weke effektief gewettig. Die beskerming van ongebore kinders kan teweeggebring word deur die bepaling dat regsindividualiteit by bevrugting begin. Anders kan regsindividualiteit bepaal word by 'n punt na bevrugting, maar voor geboorte. Vir die huidige toon menslikheidsorg dat daar beter keuses as aborsie is. Die openbaarmaking van materne sterftes as gevolg van wettige aborsies, asook wanpraktyke in die aborsie-industrie, beskik oor die potensiaal om aborsie in diskrediet te bring en die argument dat dit goed is vir vroue, te ondermyn. Soos uit die geskiedenis blyk, sal die kerk se aksies met betrekking tot aborsie beslissend wees.

1. Introduction

In 1996, the *Choice on Termination of Pregnancy* (CTOP hereafter) Act was passed in South Africa, and it came into operation on 1 February

1997. To date over 500 000 abortions have been recorded under this law.¹ This paper aims to survey the legal history of abortion in South Africa, to identify problems arising from legal abortion and to explore possible solutions.

2. The legal history of abortion in South Africa

2.1 Before 1975

2.1.1 Abortion and infanticide in ancient times

Abortion is neither a new nor a modern phenomenon. Both abortion and infanticide were common in ancient times. In ancient Rome unwanted infants were abandoned outside the city to die of exposure or be eaten by animals. Greeks used herbal abortifacients. Persians developed sophisticated surgical curette procedures. Chinese women tried to abort by tying ropes tightly around their waists. Hindus and Arabs pumped abortifacients into the womb. Canaanites sacrificed their children in the fire to Molech. Polynesians beat pregnant women's abdomens with large stones, or heaped hot coals on them. Japanese women straddled boiling cauldrons of abortifacients. Egyptians disembowelled and dismembered unwanted newborns, ritually harvesting their collagen for cosmetic creams (Grant, 1991:12).

2.1.2 The early Church's response

The early Christian church rejected abortion and infanticide, not only in its own ranks, but also in the societies where it found itself. Despite the laws against rescuing abandoned children, Roman Christians took such children in and raised them as their own. Mercy and practical aid was given to pregnant temple prostitutes in Corinth. History has recorded the words and deeds of many brave and selfless leaders who went against their society's acceptance of child killing. This culminated in the Emperor Valentinian's 374 AD decree: "All parents must support their children conceived; those who brutalize or abandon them should be subject to the full penalty prescribed by law." (Grant, 1991:21). Societies gradually changed as the result of Christian influence, and thus, although abortion and infanticide, like other crimes, continued to be

1 Projection from government statistics, from 1997 to 2004, as at January 2006. Note that the government statistics record abortions performed under the CTOP Act and reported as required by the legislation. For various reasons the actual number of abortions in South Africa will be higher (for example, neglect to report or process the report of the abortion through poor administration, woman given pills to take and the abortion occurs at home and is not recorded, and abortions performed outside the CTOP Act).

practised, these were recognised as unlawful and, with varying degrees of enthusiasm, prosecuted.

2.1.3 Abortion as a Common Law crime

In South Africa, prior to 1975, abortion was understood to be a common law crime. Case law indicates that it was not the pregnant woman who was punished for seeking and submitting to an abortion, but rather the person who performed the abortion (with the previously pregnant woman often acting as complainant). It is clear that abortion was not viewed as a very serious crime – in *R v Claasen*², a sentence of £15 or 3 months' imprisonment with hard labour was recorded as imposed by the court *a quo*. In *R v Freestone*³, the court *a quo* had found the accused guilty on five counts of procuring abortion, and one of attempt to do so, and imposed a sentence of 4 years' imprisonment with hard labour. *R v Gaula*⁴ indicates that in addition to the common law, the crime of attempting to cause a miscarriage was included as a crime in the Transkei's Criminal Code. *R v Davies*⁵ recorded a sentence of six months's imprisonment plus a fine of £50 each for one count of procuring abortion and another of attempt.

In *S v Collop*⁶ the appellant's advocate stated that in Roman Dutch law, inducing "an abortion was a capital crime if the woman was quick with child, but was punishable in the discretion of the Judge if the child had not yet quickened."⁷ "Quickening" referred to the woman's first perception of her child's movements. Since the uterus is not very sensitive to touch, this varies greatly from woman to woman. "Quickening" is perceived earlier if a woman has had previous full-term pregnancies. Generally it will not occur before 12 weeks, although sonar has been used to record children jumping strongly as early as 10 weeks. However, practically, this distinction has never been applied in South African law, and abortion has never been viewed as a capital crime. This may be for social reasons (where abortion is widespread, it is difficult to impose severe punishments), or because, from our Roman law definitions, the unborn child is not legally viewed as a person.

2 1936 CPD 28.

3 1913 TPD 758.

4 1940 EDL 1.

5 1956 (3) SA 52 (A).

6 1981 (1) SA 150 (A).

7 *S v Collop*, 1981 (1) SA 150 (A) at 153E-F.

2.1.4 *The legal personhood (or lack thereof) of the unborn*

In Roman Dutch law, legal personhood is viewed as starting at birth. As Cronje and Heaton (1999: 9) put it:

A natural person's legal personality begins at birth. ... The birth must be fully completed, that is there must be a complete separation between the body of the mother and the foetus ... The child must be alive after the separation even if only for a short period. Legal personality is not obtained by a stillborn foetus or a foetus which dies during birth.

This view of the unborn child's total lack of legal personhood was fully supported by the Appellate Division in the *van Heerden v Joubert*⁸ case. It was ruled that an inquest could not be used to investigate the death of a stillborn child, since that child was not a legal person, and inquests could only be conducted after the death of legal persons. Thus, unless their actions comply with the definition of abortion, there is no criminal recourse in South African law against medical personnel who, with either intent or negligence, kill an unborn child during birth. It seems that criminal and civil liability would be limited to any damage done to the child's mother.⁹ A recent case, where an unmarried father allegedly hired "hijackers" to shoot his nine month pregnant girlfriend in the abdomen, causing the baby's death,¹⁰ illustrates this *lacuna* in our law, since the "hijackers" may only be prosecuted for assault on the girlfriend, and not the murder of the unborn child.

Since this counterintuitive treatment of the unborn as non-persons may also lead to inequities in the law of inheritance, for example, no inheritance accrues to the unborn child whose father dies during his mother's pregnancy, the *nasciturus* fiction is employed:

The foetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born, even though before birth his existence is never assumed in favour of anyone else.¹¹

8 Van Heerden and Another v Joubert NO and Others 1994 (4) SA 793 (A).

9 A telephonic discussion with Prof. SA Strauss on 31 January 2006 confirmed this to be the position in our law.

10 "Dad accused of unborn baby's contract killing" *Cape Times* (24 February 2006), 7.

11 Translation of D 1.5.7, a text from Paul, T Mommsen, P Krueger & A Watson (Eds.) *The Digests of Justinian* (1985), cited in ML Lupton "The Legal Status of the Embryo" *Acta Juridica* (1988), 198.

In Pinchin,¹² the court ruled that the *nasciturus* fiction could be extended to allow a child to claim after his birth for injuries inflicted while he was in the womb.¹³ This finding was confirmed in Mtati.¹⁴

According to Snyman, “murder is the unlawful and intentional causing of the death of another human being.” (Snyman, 1995: 401). Since the unborn child is not recognised as a human being or legal person, abortion is not considered to be murder in South African law.

2.1.5 Contemporary medical knowledge

It is important to also note the state of medical knowledge at this time. Knowledge of physiology was still limited, and no sonar equipment was available to detect abnormalities. Because antibiotics were not in common use in the early 1900’s, post-abortion infections could be fatal. The drugs used to cause abortion could and at times did kill the women who took them. As Olasky points out, in the USA mothers often chose infanticide where infants were unwanted, rather than risk abortion in this early period (Olasky, 1992). *R v Dinehine*¹⁵ records the death of Dora Van Breda from blood-poisoning after a perforated uterus caused by a surgical abortion. The abortionist was convicted of culpable homicide and sentenced to three years’ imprisonment, with hard labour. *R v Davies*¹⁶ records the death of Engela de Waal from septicaemia, caused by a septic foetus after a failed combination of medical and surgical abortion methods.

2.1.6 Fundamental reasons for criminalising abortion

There are a number of possible reasons for a society to criminalise abortion. Voet described abortion as:

... the untimely forcing out or getting rid of an embryo which has been conceived, as when either a girl is anxious to conceal stolen loves and a conception which has ensued from them; or she has been bribed to inflict violence on her inward parts by substitutes, or by those who hope for succession in intestacy and others like them who have an interest in no posthumous child being born; or she grudges progeny to a husband whom

12 Pinchin and Another, *NO v Santam Insurance Co. Ltd* 1962 (2) SA 254 (W).

13 However, since it was not possible in this case to prove that the child’s injuries were caused by the accident, the claim was dismissed.

14 *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA).

15 *R v Dinehine* 1910 (CPD) 371.

16 1956 (3) SA 52 (A) at 56A.

she is leaving, and thus brings it about that she will not bear a son to a husband who is already at enmity with her. It does not matter in what way the abortion is procured provided that the guileful purpose of aborting the offspring is present.¹⁷

In addition, society may criminalize abortion to protect women from dangerous medical practices,¹⁸ to protect the lives of all unborn children and as a matter of justice out of a sense of fear of God.

South Africa's early criminalisation of abortion cannot be described as originating from a sense of justice: there is no evidence from the case law that the Roman Dutch provision that abortion after quickening was a capital crime was ever applied here. The Roman Dutch writers' abhorrence and disgust at abortion, viewing it as infanticide and a crime against God's law, was not shared by secularized South Africa in the 1900's. Case law is not clear on whether abortion was criminalised to protect women from dangerous practices, or to protect unborn children from death. The author submits that, prior to 1975, South Africa never really grappled with the question of the philosophical basis for the criminalisation of abortion, but simply applied its inherited common law.

2.1.7 Concluding remarks

Thus early 20th century law did not recognise the humanity of the unborn child, although limited protection was extended through the criminalisation of the act of abortion. If abortion was required to preserve the life of the mother, this breach of the common law could be justified as necessity. There is no evidence of a legal distinction between early and late abortions.

2.2 1975 to 1996

2.2.1 The passing of the Abortion and Sterilisation Act, 2 of 1975

Professor Strauss (1994: 10) records:

When the Abortion and Sterilisation Act 2 of 1975 was finally passed by the South African Parliament it was regarded by many as almost a

17 Voet 47.11.3 (Gane's translation Vol. VII at 255 in the title dealing with "extraordinary crimes"), cited in *S v Collop* 1981 (1) SA 150 (A) at 164D-E.

18 This may include the protection of both current and future fertility. Women who have abortions, especially if an infection follows, may lose their fertility as the result of fallopian tube scarring, or may be vulnerable to (fatal) ectopic pregnancies.

legislative miracle. The outlook of the legislators in general had always been very conservative when it came to abortion. By common law there had for centuries been only one unequivocal ground upon which abortion was permissible, namely that the very life of the mother was at stake. In 1973, following lobbying by certain groups – in particular the prestigious SA Society of Obstetricians and Gynaecologists – a draft bill, modelled to some extent on the English Abortion Act of 1967, was published ... Influential Church leaders, however, supported the Bill subject to certain modifications and the Act was ultimately passed in 1975.

The 1975 Act allowed for abortion, by a medical practitioner, only if the continued pregnancy endangered the woman's life or constituted a serious threat to her physical¹⁹ or mental²⁰ health, where there was a serious risk that the child would be irreparably seriously handicapped as the result of a physical or mental defect,²¹ where the foetus was alleged to have been conceived as the result of unlawful carnal intercourse²² or where the carnal intercourse was illegitimate and the mother's permanent mental handicap made her unable to understand or bear responsibility for the child.²³ Significantly though, section 9 of the Act provided that no medical personnel would be "obliged to participate in or assist with any abortion contemplated in section 3." The 1975 Act, in addition to the recognised common law ground of necessity, introduced eugenics, rape and serious threat to physical or mental health as grounds for abortion. Each of these were significant novelties.

2.2.2 *The introduction of Eugenics*

Eugenics is "the science of improving the population by controlled breeding for desirable inherited characteristics."²⁴ The 1975 law permitted eugenic abortions in the provisions that children with irreparably serious mental or physical handicaps, children conceived in incest and the children of mentally handicapped females may be aborted.

While the raising of children with serious handicaps is costly, killing children with handicaps or potential handicaps cannot be justified

19 s 3(a).

20 s 3(b).

21 s 3(c).

22 s 3(d).

23 s 3(e).

24 *The Concise Oxford Dictionary*, (Oxford University Press, 1995), 9.

Biblically. Common handicaps like blindness and deafness are said to proceed from God.²⁵ Leviticus 19:14 is emphatic: “Do not curse the deaf or put a stumbling block in front of the blind, but fear your God. I am the LORD.”²⁶

Note that the genetic deficiency of children conceived in incest as well as the children of mentally handicapped females is by no means a foregone conclusion. While incest between blood-relatives increases the probability of recessive genetic diseases, genetics tells us that if both parents have one dominant and one recessive gene, there is only a 25 % chance of the child inheriting that recessive genetic disease.

Similarly, the children of mentally handicapped females will not necessarily inherit the mental handicap. Mental handicaps resulting from accidents and traumas (either before or after birth) cannot be genetically transmitted.

The drafting of the law shows inconsistencies in its references to eugenically unacceptable children. A child (presumably originally wanted by his or her parents) with an irreparably serious handicap was respectfully referred to as a “child to be born”. The child conceived in incest was referred to using the less personal terms “foetus”²⁷ or “pregnancy”. The child of a mentally handicapped female was called either a “foetus” or, disparagingly, the “fruit of coitus”. Eugenics is consistent with the apartheid and Nazi idea of inherited racial superiority (or inferiority). It is not consistent with a Biblical respect for human life.

The inclusion of the concept of eugenic abortions in the 1975 Act had important consequences in case law. In *Friedman v Glicksman*,²⁸ a doctor was held liable for the maintenance costs of a disabled child after he failed to advise the child’s mother that she was at a greater than normal risk of bearing an abnormal or disabled child. The mother’s contention was that she would have aborted the child, had she been informed of the probability of the child’s disability. Thus the doctor was held liable for a “wrongful event” – the birth of a disabled child – by not giving information that would have led to the child’s abortion.

The doctor did not dispute the mother’s allegation that his advice was erroneous. Since a doctor can only supply an estimate of the probability

25 Exodus 4:11, John 9:2, 3.

26 *Holy Bible, New International Version* (1973).

27 According to *The Concise Oxford Dictionary* (note 24), a foetus is “an unborn or unhatched offspring of a mammal, esp. an unborn human more than eight weeks after conception.”

of defects, he is not automatically liable if a disabled child is born, even though he may have stated that this would be improbable. In law, the doctor would only be liable if he negligently evaluated defects as being improbable.

In addition, the case was not clear whether the doctor was obliged to give advice about the potential disability of the child because of a contract with the child's mother to do so, or because of a professional duty to provide such information. If the former, a doctor, when asked to supply such information which may lead to an abortion, would be free to inform the parents that it goes against his conscience to do so. If the latter, all doctors who treat pregnant women are obliged by the 1975 Act's eugenic provisions to evaluate the probability of disabilities and advise women accordingly, even though the provision of such information to facilitate abortion may be morally unacceptable to them.

The *Edouard*²⁹ and *Mukheiber v Raath*³⁰ "wrongful conception" cases both prominently make the distinction that the children born were normal and healthy. The implication is that the birth of abnormal and unhealthy children is an outcome that doctors are under greater obligation to prevent.

There is anecdotal evidence that there were attempts to use the eugenic provision in the 1975 law to access abortion on demand. *Retinoids*, a relative of vitamin A used to treat severe acne, may lead to birth defects if taken during pregnancy. Strauss reported a hypothetical case of a pregnant female who claimed to have taken her friend's retinoids, requesting an abortion on that basis (Strauss, 1991: 4,13).

2.2.3 Rape as a reason for abortion

Rape is the most commonly used argument to justify abortion. Rape is a terrible crime and society's reflex to protect a victim makes it difficult to justify "denying" abortion where children are conceived in such violence. But evidence suggests that far from being helpful to rape victims, the violence of abortion parallels the violence of rape: a masked assailant "attacks" a woman's private parts, causes her pain and leaves her with a feeling of violation and emptiness. Further, although society expects abortion to "undo" the trauma of the rape, it adds an additional layer of trauma: the victim, who could previously have thought of herself as

28 1996 (1) SA 1134 (W).

29 Administrator, Natal v Edouard 1990 (3) SA 581 (A).

30 Mukheiber v Raath and Another 1999 (3) SA 1065 (SCA).

innocent, finds herself in the role of an aggressor against someone smaller and more vulnerable than herself. Randy Alcorn (1994: 178) observes:

Some women have reported suffering from the trauma of abortion long after the rape trauma has faded. ... Aborting the child is an attempt to deny what happened, and denial is never good therapy. ... Having and holding an innocent child can do much more good for a victimized woman than the knowledge that an innocent child died in an attempt to deny or reduce her trauma.

Girls and women who find themselves pregnant in circumstances of which they are not proud, may claim that they were raped rather than confess to being willing participants in sexual intercourse. There are allegations of such dubious claims in both *Christian League of Southern Africa v Rall*³¹ and *G v Superintendent, Groote Schuur*³² cases. Even though only a very small fraction of abortions are performed as the result of rape, as a grounds of justification it is a significant departure from the common law, and undermines both the idea of protecting women from dangerous operations and the concept of protecting the lives of innocent unborn children. Rape is thus used as “the thin edge of the wedge” – if neither interests of women nor of their children should be protected from abortion in the case of rape, why should they be protected in other cases? Rape victims are thus not only “used” by their attackers, but also by other women. In the latter case, rape victims are “used” to undermine philosophical objections to abortion, and thus there is no true basis for refusing abortion on demand (a convenient way of concealing promiscuity).

The effectiveness of provision for abortion in the case of rape can also be questioned. Exact numbers are difficult to determine, but a large proportion of rapes are not reported to the authorities due to fear of retaliation, fear of disbelief or inaction by the police, fear of stigma, fear of economic loss and psychological trauma to the extent that the rape is consciously denied (Hansson & Russell, 1993:512).

2.2.4 Serious threat to physical health

The provision for abortion where there is a serious threat to physical health may be reasonable, but much would depend on how this provision

31 *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O). See also *Rall NO v Landdros vir die Distrik van Heilbron* 1980 (3) SA 287 (O) and *SA Strauss*, “The Abortion Act and the Drama of Miss X” *SAPM*, Vol. 1 No 1, (1980), 4.

32 *G v Superintendent, Groote Schuur Hospital, and Others* 1993 (2) SA 255 (C).

is interpreted. If it is interpreted strictly, it would constitute a small extension of the common law ground of necessity. There are medical conditions which, while not inevitably fatal, may be a serious and unpredictable threat to physical health in pregnancy. These would include the failure to remove a cancerous uterus due to pregnancy and hypertension (which can be worsened by toxæmia).

Since the “mental health” provision (see section 2.2.5) provided plenty of opportunity to circumvent the 1975 Act, no attempt to exploit the “serious threat to physical health” provision by interpreting it loosely was recorded. However, if there had not been a “mental health” loophole, it is possible that attempts would have been made to argue that the perils of childbirth were greater than those of abortion. A “snapshot” comparison of childbirth and abortion where modern medical facilities are available suggests that abortion is safer. However, longer term approaches, incorporating factors such as increased risk of breast cancer, increased risk of complications in future pregnancies, and self-inflicted harm due to regrets about the decision to abort, show that childbirth is safer than abortion, not only for the child, but also for the mother (Alcorn, 1994:141-145).

2.2.5 *Serious threat to mental health*

On the other hand, the provision for abortion where there is a serious threat to mental health, is far from reasonable. Abortion has well-documented psychological consequences,³³ with post-abortion syndrome a diagnosable psychological condition. While some post-abortive women experience immediate psychological consequences, in others these are successfully suppressed and only manifest several years later. A psychologist’s list of consequences of induced abortion includes:

Guilt, depression, grief, anxiety, sadness, shame, helplessness and hopelessness, lowered self-esteem, distrust, hostility towards self and others, regret, sleep disorders, recurring dreams, nightmares, anniversary reactions, psychophysiological symptoms, suicidal ideation and behaviour, alcohol and/or chemical dependencies, sexual dysfunction, insecurity, numbness, painful reexperiencing of the abortion, relationship disruption,

33 See, for example, the Elliot Institute, Springfield, Illinois, Fact Sheet *A List of Major Psychological Sequelae of Abortion*, Dr. Theresa Burke’s book *Forbidden Grief: The Unspoken Pain of Abortion* and Dr. David Reardon’s book *Aborted Women: Silent No More.m*

communication impairment and/or restriction, isolation, fetal fantasies, self-condemnation, flashbacks, uncontrollable weeping, eating disorders, preoccupation, confused and/or distorted thinking, bitterness, and a sense of loss and emptiness (Alcorn, 1994:152-153).

Performing an abortion on a woman who is already mentally vulnerable is not an act of kindness. Even though such a woman may sincerely believe that the abortion will help her, and that she is mentally too vulnerable for childbirth, it is more likely that an abortion would exacerbate her existing mental problems.

In practice, the “serious threat to mental health” provision in the 1975 Act was primarily used by rich white women who had the means to find sympathetic medical personnel, in order to complete the required formalities and have a legal abortion. In 1975, 570 legal abortions were recorded in South Africa. By 1993, the steady increase in abortions led to 1 582 abortions being recorded that year.³⁴ The majority of these legal abortions were justified on the “mental health” ground. The well-heeled did not only use the “mental health” provision to obtain abortions. Strauss records: “It is also known that about 500 White women from the more affluent section of the population fly to England every year to obtain an ‘easy’ and safe, legal abortion.” (Strauss, 1994:10)

2.2.6 Cases and the beginnings of the South African Pro-Life Movement

In the Rall cases,³⁵ some of the practical problems an alleged rape victim may face while attempting to have a legal abortion performed under the 1975 Act were highlighted. An urgent application by the Christian League of Southern Africa for a *curator ad litem* to be appointed to protect the interests of the unborn child was rejected on the basis of the unborn child’s lack of legal personhood and the League’s lack of legal standing in the matter. Similarly, in *G v Superintendent, Groote Schuur*,³⁶ an alleged rape victim, N, sought an abortion. N’s estranged mother, G, sought an interdict prohibiting the abortion, with the help of Pro-Life. The court ruled that G’s mother’s consent was not required for the abortion.

Neither of the above cases was a good strategic choice, since public sympathy often lies with rape victims. In addition, the legal grounds for

34 From document compiled by Margrit Sokolic of Pro-Life South Africa, 19 February 2004, received by private correspondence.

35 Note 31.

36 Note 32.

the challenges were weak. However, it was significant that Christian groups pro-actively opposing abortion had started to emerge.

2.2.7 Gestation periods and penalties

The Abortion and Sterilisation Act, No. 2 of 1975 made no distinction on the basis of the age of the unborn child. Abortions which did not meet the Act's requirements were equally subject to a fine of up to R5 000 or imprisonment up to five years or both.³⁷ The South African medical fraternity was self-governing in this respect. In *G v Superintendent*, the judge stated: "N is probably in her nineteenth week of pregnancy, and if an abortion is to be performed this must take place with the minimum of delay."³⁸ Similarly, reporting on the Rall cases, Strauss comments: "Time was marching on, and soon Miss X would reach the point where no doctor would be prepared to terminate her pregnancy, even if all the formalities were observed. Soon she would enter the 22nd week of pregnancy."³⁹

The 1975 Act's definition of "live foetus" was challenged in *S v Collop*,⁴⁰ with an attempt to prove that before "quickening" the Act did not apply. This attempt failed, and the penalties of the Act were upheld.

In this legal framework, theoretically, there would not necessarily have been a greater penalty for a "partial birth" type abortion than for an early abortion. However, law is not the only factor that influences human behaviour – doctors's refusal to perform late abortions prevented these from becoming prevalent.

2.2.8 Contemporary medical knowledge

Medically, this period was the "golden age" of the sexual revolution. Condoms, the Pill and other reliable methods would prevent most pregnancies. The common sexually transmitted diseases were treatable with antibiotics. Social mores against promiscuity were crumbling.

The development of amniocentesis testing enabled doctors to identify children who would probably be handicapped, long before they were born. As these tests were performed, the expectation that eugenically

37 s 10(1). Section 10(2) provided for a lesser fine or imprisonment if administrative requirements were not met.

38 *G v Superintendent, Groote Schuur Hospital, and Others* 1993 (2) SA 255 (C) at 258G.

39 SA Strauss, "The Abortion Act and the Drama of Miss X", *SAPM*, Vol. 1, No. 1, (1980), 4.

40 1981 (1) SA 150 (A).

unacceptable children would be aborted rose (Jenkins, 1981:5, 9). Sonar scanning was also developed during this period, revealing further abnormalities.

On the other hand, advances in medical knowledge also led to better treatments and survival probabilities for disabled children. This raised the difficult practical question of whether there was an unlimited obligation to provide medical treatment for (and thus, spend money on) disabled children. Prof. Jenkins of Witwatersrand University “observed that the law permits selective abortion and concluded that ‘perhaps the time has come for us to consider seriously legalising selective infanticide.’” (Strauss, 1996:10-11, 15).

As *Chalk v Fassler* (1995:12-13, 16)⁴¹ illustrated, as is also the case with contraceptive methods, abortion methods during this period were not foolproof – a woman may remain pregnant after an attempted abortion. Ms. Chalk was not able to hold Dr. Fassler liable for the birth or maintenance of her child, since the court ruled that she was negligent in not returning for follow-up appointments and not having a second abortion after the first one failed.

It is important to note that despite the multitude of doctors involved in each abortion approval, there were a significant number of maternal deaths from legal abortion. A study from 1980 to 1982 revealed six deaths associated with legal abortion. In the study period, 1192 “therapeutic” abortions were recorded, making the maternal death rate from legal abortion at least 503 maternal deaths per 100,000 legal abortions (Boes, 1987:158-161). Deaths from legal abortion are in a sense the tip of the iceberg, though, and point to a much larger number of serious injuries. “There is also strong evidence that the problems of care in maternal deaths are similar to those where pregnant women suffered acute severe morbidity but survived.”⁴²

2.2.9 *Summing up this era*

The impact of the 1975 legislation is not widely appreciated in South African pro-life circles. The perception is that abortion on demand began with the 1996 legislation. However, the 1975 legislation introduced and

41 *Chalk v Fassler* 1995 (WLD) unreported, discussed in SA Strauss, “First South African Case on Failed Abortion: Woman’s Claim for Damages in Respect of Birth of Child Refused” *SAPM*, Vol. 16, No 4 (1995), 12-13, 16.

42 *Saving Mothers – Second Report on Confidential Enquiries into Maternal Deaths in South Africa, 1999- 2001* Department of Health, 255.

entrenched *via* case law the concept of eugenic abortions. Through the “rape” provision, a philosophical basis for future abortion on demand was laid. The contraceptive and sexual revolution of the 1950’s and 1960’s led to a severing of sex from parental responsibility. The idea that abortion and freedom from parenthood would be good for mental health began to be accepted.

2.3 1996 onwards

2.3.1 Working towards abortion

Three arguments were used to justify the legalisation of abortion on demand in South Africa. Firstly, the lack of access of poor women to “mental health” abortions under the 1975 Act was protested as an inequality. Rather than recognising that the “mental health” abortions were an abuse of what was in any case a psychologically dubious provision, proponents argued that access to abortion should be extended to all without requiring any “mental health” justification.

Secondly, media reports argued that widespread backstreet abortions were leading to tens of thousands of complications and hundreds of maternal deaths. However, the actual evidence did not support this claim. A study (conducted over two weeks in 1994) of women reporting at public hospitals (Rees *et al.*, 1997:432-437) found 803 women in 56 public hospitals with serious complications of pregnancy. However, the 803 women represented ALL early pregnancy complications (i.e. spontaneous miscarriages as well as illegal abortion). A much lower figure, 7.5% of those suffering complications, or 60 women, could definitely be associated with illegal abortion. The hundreds (425) of deaths per year applied to both miscarriage and illegal abortion and were projected from three actual deaths, leading to a large possibility of statistical error. Multiplying the projected 425 deaths by the 7.5% of women who could be associated with illegal abortion, one gets a projection of 32 maternal deaths per year from illegal abortion. Significantly, the maternal death rate claimed in the 1994 study was questioned in a later study, which found a much lower rate (one sixth of that found previously).⁴³

Approximately 1600 legal abortions were performed in 1994. If Prof. Boes’s mortality rates (above) apply, 8 maternal deaths per year from this source would also be expected.

43 *Saving Mothers, Report on Confidential Enquiries into Maternal Deaths in South Africa 1998*, Department of Health, 53.

While the spurious arguments above were useful public propaganda, the nail in the coffin was provided by the South African Constitution. The Bill of Rights promised “Everyone has the right to bodily and psychological integrity, which includes the right ... to make decisions concerning reproduction.”⁴⁴ Even though at the time of the Constitutional negotiations it was denied that this “right” would lead directly to abortion on demand, even before the final Constitution was enacted, legislation was passed to enable abortion on demand.

2.3.2 *The 1996 Choice on Termination of Pregnancy Act*

Abortion on demand during the first twelve weeks of pregnancy was legalised by the passing of the 1996 *Choice on Termination of Pregnancy* (CTOP) Act.⁴⁵ However, the Act allows that a pregnancy may be terminated up to and including 20 weeks if a medical practitioner is of the opinion that “the continued pregnancy would significantly affect the social or economic circumstances of the woman.”⁴⁶ Thus, since every pregnancy at least significantly affects the mother socially, abortion on demand is effectively available from willing medical practitioners for the first 20 weeks of pregnancy. Enquiries to private abortion clinics confirm that this is the case.

The wide range of problems in the Act have been discussed by van Oosten⁴⁷ and I will not repeat them here. His detailed critique of the Act concludes as follows:

That the Choice on Termination of Pregnancy Act is hardly a model of legislative genius is abundantly clear. Behind its ideological facade, and political clichés, it consists of little more than the decriminalization of abortion, and that result could have been achieved in a fraction of the space occupied by the Act. For the rest, the Act bristles with lacunae, contradictions, inconsistencies and incomprehensibilities, and demonstrates a stunning ignorance of the basic principles of criminal law, an inexplicable ambivalence on the issue of abortion, and a surprising insensitivity to the meaning of words on the legislator’s part. (Van Oosten, 1999:76).

44 Constitution of the Republic of South Africa 1996, s 12(2) and (2)(a).

45 s 2(1)(a).

46 CTOP s 2(1)(b)(iv).

47 F van Oosten, “The Choice on Termination of Pregnancy Act: Some Comments” *SALJ*, 116(1) (1999), 60-76

2.3.3 *No conscience clause in 1996 CTOP Act*

Abortion is a gruesome business. From 6 weeks after conception, a lay person can identify the child as clearly human. At 8 weeks, although only 3 cm long, the child has clear facial features and all his or her limbs and digits. South African hospitals and clinics predominantly practise two types of abortion. In surgical abortion, either the manual vacuum aspiration (MVA) or dilatation and curettage (D&C) technique is used to suck or cut the child out of the womb. The doctors and/or nurses see the pieces of the dismembered child as they come out, and in order to avoid infections should re-assemble the child to ensure that all pieces are present and nothing has been left behind. In medical abortions, the mother is given pills either orally or vaginally to induce labour. After a painful labour, the child is delivered prematurely. In some cases, especially if the child is near 20 weeks old, the child is delivered alive and lives for anything from a few minutes to several hours. Since the child's lungs are insufficiently developed, he or she will be unable to survive outside the womb and will die. Understandably, many medical personnel do not want to be involved.

In a significant departure from the 1975 Act, no provision was made in the 1996 Act for conscientious objection. When the parliamentary committee on health was challenged by Ms C Dudley to include a provision "whereby any person who coerced their colleagues into performing termination of pregnancy or disadvantaged them for not performing the procedure should also be liable to a fine", a member queried "whether it was not the medical practitioners' obligation to perform the act under their oath and commitment to their work." The chair, Mr. J Nculu, "said that it was not appropriate to create conditions within the law which might undermine the very conditions that they were trying to create."⁴⁸ Further record of the meeting indicates that the majority of the committee did not think that their refusal to include protection of conscientious objection undermined medical personnel's freedom of choice.

The Rall cases⁴⁹ illustrated that finding medical personnel willing to perform abortions can be difficult. In an article titled: "Abortion: Damned if you do or you don't" (Bateman, 2000:750-751), Eddie Mahlangu, the Chief Director of Maternal and Child Health Services, "appealed to them (medical workers) to separate their religious beliefs from their roles as

48 Parliamentary Monitoring Group *Minutes of the Health Portfolio Committee meeting* (4 August 2004).

49 Note 31.

doctors meeting vital needs.” Slabbert suggests: “Omitting the conscience clause has furthermore created the impression that the right of women to make decision about reproduction takes precedence over the medical practitioner’s right, on religious or moral grounds, to refuse to participate in performing an abortion.” (Slabbert, 2001: 742)

The question of whether medical workers’ consciences will be protected from having to perform abortions is before the courts.⁵⁰ On the positive side, the Constitution’s Bill of Rights guarantees: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”⁵¹ In addition, courts are reluctant to use rights to impose on others duties to act positively. The protection of life is a noble cause, and many South African medical workers put in long hours to save and improve life. The original Oath of Hippocrates included the promise:

I will follow that method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, or suggest any such counsel; furthermore, I will not give to a woman an instrument to produce abortion. (Wilke, 1997:301)

However, the Constitutional Court has not been generous to minorities in their interpretation of the right to freedom of conscience: both the Christian Education case⁵² (regarding the right of parents to children in private schools to consent to Biblical corporal punishment of their own children while at school) and the Prince cases⁵³ (regarding the right of a Rastafarian to smoke dagga as part of his religious “worship”) have been decided against individual freedom and conscience.

2.3.4 Constitutional “right to abortion”?

Slabbert (2001: 743) suggests:

The question arises of whether section 2(1)(a) of the Choice on the Termination of Pregnancy Act ... gives expression to a constitutional right to an abortion. The inference that it does can

50 The Doctors for Life Vereeniging Theatre Sister case began in 2004 and as at January 2006 is still ongoing.

51 s 15(1)

52 *Christian Education SA v Minister of the Government of the Republic of South Africa* 1999 (3) SA 609 (SE).

53 *Prince v President of the Law Society, Cape of Good Hope and Others*, 1998 (8) BCLR 976 (C); *Prince v President of the Law Society of the Cape of Good Hope and Others*, 2000 JOL 6579 (A); and *Prince v President of the Law Society of the Cape of Good Hope & others* 2002 (3) BCLR 231 (CC).

be drawn from the wording of the preamble ... which echoes ... subsections 12(2)(a) and (b) of the constitution. ... The impression that the act expresses a constitutional right to abortion is further strengthened by the fact that ... non-compliance with any of the prescribed procedures and conditions is not criminalised.

If women have a constitutional right to an abortion, there has been a huge shift in South African law from the common law, which historically recognised abortion after quickening as a capital crime.

2.3.5 Challenges to abortion on demand

The Christian Lawyers Association (CLA hereafter) of SA brought two high profile court challenges to abortion on demand. In the first, where the CLA argued that the unborn child's right to life was infringed by abortion, the court adopted a positivist approach and ruled that the unborn child was not a legal person, and thus not part of the "everyone" whose rights were protected by the Constitution.⁵⁴ In the second CLA case, the CLA argued that minor females were incapable of consenting to abortion without assistance. The court ruled that the only qualification in the Act for consent was that it be "informed". Minor females were not all inherently incapable of giving informed consent (although this may be true of individuals), and thus the CLA did not have a case.⁵⁵

Doctors for Life (DFL hereafter) has also been active in bringing court challenges, but has adopted a different approach. DFL has challenged the procedure in the passing of the Abortion Amendment Act, and has filed proceedings in the High Court on behalf of a Durban schoolgirl who was the victim of an abortion at 28 weeks. Both cases are currently before the court.

Since 1994, strong pro-life organisations have emerged. These include activists, networks which support pro-life initiatives and mercy ministries. At the 2004 Parliamentary hearings on the amendments to the CTOP Act, representatives from ChristianView Network, Human Life International, Pro-Life South Africa, The Evangelical Alliance of South Africa (TEASA), Healthcare Christian Fellowship, Africa Christian Action, the SA Catholic Bishops, Crisis Pregnancy Centres in South Africa, Africa Cares for

54 Christian Lawyers Association of SA and others v Minister of Health and others 1998 JOL 3617 (T).

55 Christian Lawyers' Association v National Minister of Health and others 2004 (4) SA 31 (T).

Life, SA Cares for Life and Doctors for Life made submissions. Other active pro-life organisations include Christians for Truth, the African Christian Democratic Party and the Christian Lawyers Association.

2.3.6 Contemporary medical knowledge

The legalisation of abortion was supposed to lead to fewer deaths from backstreet abortions. But, not unexpectedly, the explosion in legal abortions has led to an increase in legal abortion maternal deaths. Bruce Venter claimed in a report published in the Pretoria News on 5 March 2004 that an estimated 500 women died annually from legal abortions in South Africa (compare this to the 32 maternal deaths annually from “backstreet abortions”, estimated from the study in 1994). The newspaper surveyed 18 national State primary healthcare facilities, and each one admitted that women had died from their legal abortions. This was primarily the result of the use of the drug, *Cytotec*, to cause abortions, since it can lead to severe bleeding.

Marie Stopes private abortion clinic admits that deaths of women undergoing legal abortion can and do occur. When asked about a woman who bled to death after being neglected in a Nelspruit Marie-Stopes clinic, their national director Mr. Paul Cornelissen responded, “Almost every day women bleed in our clinics.”⁵⁶

The author has personally been told of two deaths from legal abortion in the Western Cape. Neither of these was recorded by the Western Cape Department of Health. Abortion providers admit that abortion is distasteful, but defend it as necessary to help women. The state, complicit in promoting and providing legal abortion, is also keen to defend this procedure, and thus deaths from legal abortions are rarely reported, while those from illegal abortion are trumpeted. If Prof. Boes’s mortality rates (above) for legal abortions are applied to the current abortion figures, we could expect over 420 maternal deaths from legal abortions each year. In addition, as for deaths from HIV/AIDS, there is a social stigma attached to deaths from legal abortions. Death certificates politely refer to haemorrhages and infections. The family has no incentive to push for the truth, and the abortionist does not want to admit that the abortion, meant to help women, has in fact harmed them.

After 32 years of legal abortion in the USA, and extensive experience in other parts of the world too, a growing body of studies is pointing to the physical and psychological dangers of abortion, in both the short and the long-term.

56 *Lowvelder* (1999, August, 13).

South Africa is also faced with an HIV epidemic. This sexually-transmitted disease has begun to affect behaviour, since the use of condoms has been widely promoted. Condom use will in turn reduce conceptions, but it is too early to say whether this will have a major impact on the demand for abortions in South Africa.

2.3.7 Summing up

Dubious arguments about deaths from backstreet abortions and equality were used to justify the legalisation of abortion on demand. The 1996 CTOP Act built on the 1975 Act's foundations and effectively legalised abortion on demand up to 20 weeks. The absence of a conscientious objection clause in the CTOP Act jeopardises the rights and consciences of medical workers, and the possibility cannot be excluded that abortion has been elevated to the status of a Constitutional right. However, legal, activist and compassionate challenges to abortion on demand have emerged. In addition, the numbers of maternal deaths from legal abortion, and changes in sexual mores as a result of HIV, have the potential to lead to the discrediting and reversal of the 1996 Act.

3. Problems arising from legal abortion

3.1 Conscience?

Conscience, like the humanity of unborn children, is neither wiped out nor negated by legal fiat. If a constitutional right to abortion exists, it may conflict with medical workers' desire for freedom of conscience. The legal decision as to how this conflict will be resolved has not yet been made. If the legal decision requires that the consciences of medical workers be overridden, this will not necessarily "solve" the problem. Medical workers have extra-legal options, including choosing to work in other countries and choosing to work in other areas of medicine. Such a decision against conscience may appear to increase access to abortion, but in fact has negative consequences for all practice of medicine in South Africa, by driving highly mobile workers elsewhere.

3.2 Duty to recommend eugenic abortion?

It is not clear from *Friedman v Glicksman*⁵⁷ whether doctors are currently professionally obliged to investigate the probabilities of abnormalities in pregnant women who consult them and recommend abortion. If this is the

⁵⁷ 1996 (1) SA 1134 (W).

case, it puts pro-life doctors in a difficult position. In addition, to what extent does the doctor have a “therapeutic privilege” to reassure a pregnant woman, rather than expound on the possibilities of deformities?

Gynaecologists and obstetricians are the doctors most targeted by litigation, and currently pay R120 000 per year to the Medical Protection Society for insurance against lawsuits. Prof. Strauss’s view is that a doctor, who either wished to not perform eugenic tests, or to not recommend abortion on that basis, would fall foul of both the Health Professionals Council of South Africa (HPCSA) and the National Health Act for withholding information relevant to their patient’s health status. In addition, the doctor would be vulnerable to lawsuits for maintenance of any disabled children born to his patients. Prof. Strauss’s view was that in these cases, the doctor should err on the side of caution, provide all the information about potential abnormalities to the patient (even if this would be disturbing to her), put it in writing, and make sure he had a signed copy from the patient (proving that she had been informed of the risks that her child may suffer an abnormality).⁵⁸

3.3 Duty to abort?

An unexpected pregnancy can lead to maintenance liability for the child from the father, grandparents and doctor (liability only arises for the latter if his negligence led to the pregnancy). In both contract and delict, the person making the claim is obliged to act reasonably to minimise the other party’s liability.

In *Administrator, Natal v Edouard*,⁵⁹ the court held that it would be against public policy to require the victims of wrongful conception to minimise the doctor’s liability by offering that child for adoption. In *Mukheiber v Raath*,⁶⁰ no mention was made of minimising liability through either adoption or abortion. In *Chalk v Fassler*,⁶¹ the doctor’s liability for the child was excluded by the mother’s neglect to submit to a second abortion after the first one failed. It is not impossible that future maintenance claims may be frustrated by a claim that the mother’s unreasonable refusal to submit to an abortion renders others not liable for the child’s maintenance. A case of this nature has not yet been reported, but it may just be a matter of time before this occurs.

58 Telephonic conversation with Prof. SA Strauss, 31 January 2006.

59 1990 (3) SA 581 (A).

60 *Mukheiber v Raath and Another*, 1999 (3) SA 1065 (SCA).

61 Note 41.

3.4 The right to abort

In the case of a severely mentally disabled or continuously unconscious woman, section 5(5)(a) of the CTOP Act allows two doctors the right to agree to perform an abortion up to 20 weeks gestation if “(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.” Provision is also made in section 5(5)(b) for later abortions. Although the doctors must consult the woman’s “natural guardian, spouse legal guardian or curator personae”, “termination of pregnancy shall not be denied” on account of refusal of consent by the latter.

Doctors thus have a powerful “right” to perform abortions on unconscious women, on the tenuous ground of mere “risk of injury to the woman’s physical or mental health”.

Just as self-government prevented doctors from performing late abortions under the 1975 Act, there is no evidence that the “right to abort” is currently being used. However, that does not alter the fact that this provision is bad law, reflecting the Act’s philosophy that terminating pregnancies through abortion (even if unsolicited by the woman and her family) is generally a good thing. This provision is also bad economically: it grants power to those who may profit from it (by charging for performing the operation), without providing checks or balances.⁶²

3.5 Late abortions – the opportunity to perform with no duty to report

The CTOP Act requires that the person who performs an abortion up to 20 weeks must record the prescribed information and that this information must be forwarded to the Director-General.⁶³ However, there is no legal obligation to report an abortion after 20 weeks, even if it is performed for the ridiculous reason provided in section 2(1)(c)(iii) that “the continued pregnancy would pose a risk of injury to the fetus.” Department of health statistics record gestational age as “unknown, before 12 weeks and after 12 weeks.” Section 2(1)(c)(iii) is a wide open door for late abortions, yet there is no duty on medical personnel to report that these are being performed.

62 In this regard, the 1975 Act was careful to provide that the doctors consenting to the abortion would not be allowed to perform the abortion. The risk that clinical judgment be obscured for sake of profit was thereby reduced.

63 s 7.

4. Possible Solutions

4.1 Legal personhood begins at conception

A recognition in law that personhood begins at conception would provide a philosophically consistent and defensible basis. Further, it would bring law in line with logic, science, religion and intuition. Such recognition could also be enacted in a statute changing the common law, thus circumventing the need for constitutional change. However, recognising legal personhood from conception would have consequences in many areas.

The biggest challenge results from the fact that the mechanism of many “contraceptives” is not the prevention of conception, but the prevention of implantation (implantation occurs about a week after conception). In this regard, devices and pills where the primary mechanism is the prevention of implantation include: Intra-Uterine Devices (IUDs), RU-486 (the “abortion pill”), the Emergency Contraceptive Pill (the ECP or “morning-after pill”), Depo-Provera (a progestin injection every three months) and the Mini-Pill (Progestin-only). Popular “contraceptive” methods including Norplant and The Pill (combination estrogen-progestin) primarily suppress ovulation, but this suppression is not 100 % effective, and as a side-effect they make the uterus less hospitable to a newly conceived child.⁶⁴ If we wish to recognise legal personhood from conception, we will have to grapple with the difficult question of whether we have an absolute right to avoid parenthood and the ethical questions raised by the various available methods of fertility regulation.

Privacy issues may become significant if legal personhood is recognised from conception. The state has an interest in legal persons, but parents may be unaware of the presence of a new legal person, or be hesitant to allow the state into their private sphere.

Miscarriage is sadly very common. If legal personhood is recognised from conception, the proof of the existence of a legal person who was miscarried, the possible incentive to parents to harm such an unborn child in order to inherit intestate from him or her and the administration of property may become significant challenges. However, these challenges can be overcome by a modified *nasciturus* rule, recognising the unborn child as a legal person, but only making property rights applicable if the

64 Randy Alcorn, *Does the Birth Control Pill Cause Abortions?* Eternal Perspective Ministries, (Oregon, 2000), 5.

child is born alive. The question of liability of third parties to parents for pre-birth accidental or deliberate killing of the child would also have to be given consideration.

If the unborn child is a legal person, killing in self-defence would be possible if the mother's life is endangered by the pregnancy. Where the child presents a threat to the mother's health the situation would be more difficult to resolve. However, the unborn child's legal personhood would permit the court to appoint a curator to protect the child's interests in such a case.

There is currently widespread acceptance of eugenic abortion. But South African law does not allow for people to be killed on the basis of their disability. If life before birth is to be consistently protected, eugenic abortions will have to be forfeited.

Perhaps the biggest obstacle to recognising children as legal persons from conception is the idea that "sexual freedom" is a right. LoveLife's materials have proclaimed: "You have the right to choose: When you want to have sex. Who you want to have sex with." Recognising children as legal persons from conception implies that sex is not the unfettered recreation our society likes to believe it is, but, beyond the pleasure it brings, it is a serious act with potential legal consequences. If unborn children are recognised as legal persons, those who are newly conceived cannot be wiped out by "contraception" or abortion in order to ensure their parents' sexual freedom and convenience.

4.2 Early recognition of legal personhood

A modified early recognition of legal personhood, for example, from conception for property,⁶⁵ but from implantation for the sake of protecting life, may overcome the "contraceptive" obstacles listed above. "Contraceptive" choices would then be subject to personal conscience as a matter of private self-government, and not be treated as a public matter. The logical consistency of the position would be undermined, but the probability of social acceptability would be increased.

4.3 Criminalisation of abortion

Social disapproval of abortion can be expressed by simply criminalising it, without giving it the weight of murder. As Olasky (1992) argues, the

65 This would be required to protect the inheritance of a child whose father dies after conception but before implantation.

problem with abortion penalties that are perceived to be too hard is that they are then not applied to “day-to-day” abortions, but only in the most extreme cases. Very harsh penalties can thus prevent the prosecution of most abortions, and result in many more abortions than milder penalties would. On the other hand, simple criminalisation of abortion would face constitutional challenges. In addition, it lacks a consistent philosophical basis.

4.4 1975-style legislation

Some may argue that the current abortion on demand legislation is the cause of widespread abortion and that a return to the 1975 legislation would solve these problems. However, significant and sustained effort will be required to reverse the current “abortion on demand” regime. As illustrated in this paper, legislation that is morally confused provides the foundation for its own future overthrow: would the effort required to reverse “abortion on demand” be well spent for such a result? To be content with legalising abortion for eugenic, rape and mental health reasons suggests that we have learned little from history. As the teacher warned: “Do not say, ‘Why were the old days better than these?’ For it is not wise to ask such questions.”⁶⁶

4.5 Exposing abortion for what it is

Abortion, even if legal, is not pretty. Continued protests, debates and education about abortion can serve to alert the public to the reality of abortion. Continued provision of compassionate care shows that women have better choices available to themselves and their children than to kill them. Women still die or are permanently injured as a result of legal abortion. The very ugliness and widespread practice of abortion gives activists an opportunity to expose it, in order to de-popularise it. Educating, encouraging and supporting women injured by abortion to take action against their assailants puts pressure on abortionists. In the case of abortions performed on minors, the second Christian Lawyers Association case⁶⁷ left the door open for parents to bring abortionists to account by showing that their child was not capable of giving informed consent for an abortion.

66 Ecclesiastes 7:10.

67 Christian Lawyers Association v National Minister of Health and others 2004 (4) SA 31 (T).

People who silence their consciences and perform abortions are likely to transgress the law of the land in other ways too.⁶⁸ Vigilance, research and exposure can bear fruit as society is given an opportunity to recognise the true nature of the bloody abortion business.

In the short term, exposing abortion (both through legal pressure on those who practise it and through public education regarding its true nature) is the most promising option available. If this is done well, it can build respect for both human life and maternity and lay the foundation for the repeal of abortion on demand.

5. Conclusion

Many Christians believe that abortion is murder, and thus inherently immoral. Many South Africans are Christians. By legalising – and thus morally endorsing – abortion, government and law find themselves at loggerheads with the people. In addition, South African abortion law is intrusive and it is possible that the Constitutional “right” to abortion may be used to override the consciences of those who object to abortion. This situation cannot last indefinitely. History shows it is possible that people will organise themselves and pressure leaders to either represent their values, or be replaced. Slavery was certainly in the short-term economic interests of Britain, but the leaders and people of Britain chose to forego the “advantages” of slavery to uphold principle. Similarly, while child-bearing and -raising are costly, abortion is cheap, and any attempt to re-criminalise it will require commitment and sacrifice. However, it is also possible that the power, influence and patronage of government will lead to the people assimilating the Constitution’s values, thus reducing the tension.

If the church desires to make a difference, it will have to speak and awaken consciences about abortion. The church will also have to decide to what extent it is prepared to “inconvenience” itself and its members by adopting a consistently pro-life stand, by supporting those in crisis pregnancies and by devoting resources to fighting abortion.

68 Mark Crutcher’s book *Life 5* (Life Dynamics, Texas, 1996) is a devastating exposé of the American abortion industry, documenting abortion injuries and deaths, rape and sexual assault by abortionists, cover-ups and manipulation of data, the psychological coping mechanisms used by abortionists, and the reasons why women injured by abortion find it hard to press charges against their assailants and recover damages.

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