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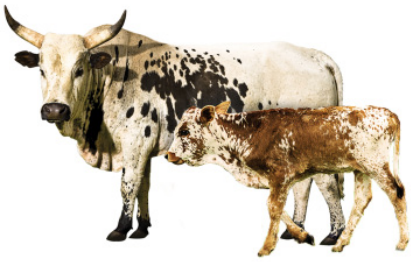
# ABORTION: DOES LEGAL PRINCIPLE AND PUBLIC POLICY ALWAYS CO-INCIDE?



The purpose of any legal system is to provide rules for citizens to live by and more importantly to administer justice, and to do so in an even-handed manner, no matter how inconvenient that may be. Legal principles should be rationally justified and coherent in their application across the legal system. Where there are deviations, the rationality and justifiability thereof should be apparent.

The recent Constitutional Court judgment on the Nkandla saga underscores the independence and importance of a strong and independent judiciary in ensuring justice for all. Within our South African society there is a legal area around which there is an unusual silence, this being the issue and legal implications of abortion.

Presently South Africa's health system reports approximately 90 000 abortions being conducted per year. Abortions are regulated by the Choice on Termination of Pregnancy Act 92 of 1996. The preamble to the Act recognises that women and men have the right to have access to affordable and acceptable methods of fertility regulation, but that (I suggest - contradictorily) the termination of pregnancy should not be seen as a form of contraception or population regulation.

The Act balances these seemingly contradictory objectives in the following way. Until the foetus is 13 weeks, pregnancies may be terminated at will. Between 13 and 20 weeks, pregnancy may be terminated (defined as only the expulsion of the contents of the uterus) should, inter alia, a medical practitioner, after consultation with the woman, determine that the continued pregnancy would significantly affect the social or economic circumstances of the woman. Practically I know of no pregnancy which would not have a significant effect on the social or economic circumstances of a woman, or a man for that matter.

Accordingly, it appears that up until 20 weeks of gestation, termination of pregnancies is in reality, at least (and again contradictorily) for those most economically or socially disadvantaged women, at will. The latter proviso in itself raises concerns for the equal application of the law for women across the full spectrum of social and economic standing.

Post 20 weeks, the medical practitioner has to be of the opinion (reached after consultation with another medical practitioner or registered midwife) that the continued pregnancy would endanger the woman's health, would result in severe malformation of the foetus, or pose a risk of injury to the fetus.

Whilst these developmental milestones are no doubt informed by the viability of the foetus, reference to such viability is conspicuously absent, no doubt in part due to the jurisprudential conundrum created by linking legal principle to the ever advancing feats of medical science in pushing back old boundaries of viability but also conceivably due to the inevitable collision course of the Act with the constitutional rights to life, dignity, freedom and security of the person accrued and enjoyed by every "person". The recognition of a fetus as a legal person would preclude the present formulation of the Act.

When a person becomes a person (a legal subject capable of enjoying rights) is not fixed in our law. In terms of the Births and Deaths Registration Act" birth" is defined as a child born alive. Although not defined, this generally means complete separation from the mother and some sign of life, even if fleeting. Still-born is defined as having been at least 26 weeks intra-uterine and having showed no signs of life after complete birth (complete separation from the mother). A death certificate is issued if a child is born alive as defined aforesaid but dies (namely after 26 weeks of gestation).

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In its application the above two competing principles, amongst others of the Act, seem to be: pre-20 weeks (barring those instances where the pregnancy is the result of rape or incest or the health of the mother or child are in issue) the matter is primarily one of fertility regulation for those significantly socially or economically impacted. Post 20 weeks, it is no longer capable of being seen as an acceptable method of fertility regulation, regardless of social or economic standing.

Given the advancements of medical science, the reality that foetuses may in many instances show signs of life (draw breath, register heart activity) once fully separated from the mother, are the legal principles expressed in the Act really jurisprudentially sustainable and coherent or are they in truth a matter of public policy, for once perhaps in conflict with proper legal principles as opposed to underpinning these principles? Perhaps the modern moves to legalise euthanasia would serve as a more jurisprudentially sound legal footing for the abortion debate?

In many countries around the world abortion is not only hotly debated but in many instances divisive, invoking strong reactions both for and against the practice to such an extent that in countries such as the United States, there are physical attacks on abortion clinics and abortion doctors (incomprehensible considering the proponents are pro-life). When scientific advances are such that a foetus can develop from zygote to full term foetus, the decision will no longer be whether to abort the child, but whether the child should be raised by the parent/s or a state orphanage / foster / adoptive parents or euthanised before set forth from his/her petri dish.

In a country in which it is illegal to touch the eggs of endangered species of certain birds (whether the eggs are viable or not) or to trim the branches of protected trees such as the Yellowwood, without a permit, can legal principle truly justify the definition of a person (where such can be gleaned, if at all), in a manner which justifies the wholesale denial of rights before 20 weeks?

In our law, death is defined in the National Health Act as being brain dead. Traditionally from a medical standpoint, this means at the point that the brain stem is no longer functional/active. The opposite, however, brain activity (reached at approximately 8 weeks of fetal development), is not defined as life. Foetuses are in truth seen as part of the mother until at least 20 -26 weeks based on the above considerations, to do with what she wants until at least 13 weeks.
It is a matter of acceptable fertility regulation.

At the very least, South African citizens, should recognize that should they truly wish to realise one of the expressed objectives of the Act, namely that the termination of pregnancy should not be seen as a form of contraception or population control, then a commitment to a single definition of when a person assumes legal status, and in so doing accrues rights and privileges, needs to be revisited. The right to fertility regulation, for which there are presently many accessible options, are capable of being achieved without the right to empty the contents of one's uterus at will. As it presently stands, abortion at will until 13 weeks, is in fact no more than an alternative form of birth control, regardless of the fact that the contents may not be brain dead and surely deserving of more consideration than avian counterparts or endangered plant life?

If public sentiment and policy have evolved to such an extent that euthanasia (actively hastening the death of a human as opposed to withdrawing life support) is on the negotiating table, then perhaps so too is it capable of bringing the abortion debate onto a jurisprudential basis on which the termination of human life, properly defined, is endorsed regardless of whether that life can exist independent of withdrawal of the support necessarily provided by the mother to sustain life.

Let us embrace this evolution of moral fibre, if it exists, let us openly accept that public policy may not recognise the inalienability of the right to human life, at least not outside the contents of the uterus.