

**A CRITICAL ETHICAL ASSESSMENT OF  
THE SOUTH AFRICAN TERMINATION  
OF PREGNANCY BILL**

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*Assignment presented in partial fulfilment of the requirements of the degree*

***MASTER OF PHILOSOPHY (APPLIED ETHICS)***

*at the*

***University of Stellenbosch***

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***January 2001***

## **DECLARATION**

I, the undersigned, hereby declare that the work contained in this assignment is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

## SUMMARY

Perhaps one of the most talked about subjects worldwide and in South Africa these days is the abortion issue. A growing number of women admit to having had one. Basically there are two opposing views and values on the question of abortion. We normally hear people referring to the 'abortion issue'; my understanding of this is that there is a dialogue going on at the moment concerning abortion. In South Africa before the current Choice of Termination of Pregnancy (TOP) Bill, some activists' women and the ever-growing 'feminists' movements were lobbying and demanding that abortion be decriminalised.

As we may all be aware, up until 1 February 1997, abortion or termination of pregnancy (TOP) in South Africa was conceivable under very restrictive atmosphere. Before the introduction of the current Termination of Pregnancy Bill, a majority of women had no access to abortion services in the country, hence the growing number of back-street job. By implication this means that most women given the choice, would not seek the experience of abortion, but if they do, it would be available to the in safe, legal, accessible and affordable service. Not only does the Act conceal that terminating pregnancy that occurred through criminal acts such as rape and incest is justifiable. The current liberal Termination of Pregnancy Bill also gives pregnant women the 'right' or 'freedom' to abort whenever and for whatever reason they deem fit.

Part of the ethical dilemma of the abortion issue is that there are those who holds a view that always where there is a conflict of rights and interests, the foetus' rights must give way to, or that the foetus' rights must be overridden by those of a pregnant women. Pro-choice advocates maintain that a woman's choice to terminate her pregnancy is her own business and hers alone, in other words, this for them is a private decision.

Well, I argue that this is not necessarily the case, ethically, the father of the unborn child should also be considered in such a decision. Given that virtually every abortion has risks, the parents of the aborting woman and to some extent the society at large are involved. Therefore, to solely talk of the '*mother's right to choose*' is basically suggest that morality is "relative" and such relativism is conceived from the idea of privatisation of abortion and life in general.

In the following pages I will look at the arguments in support of abortion and against it, and these are criticised. Also discussed are the ethical implications of the new South African Termination of Pregnancy Act. Broadly speaking, technology advancement has made it possible to detect the unborn baby's physical condition (sometimes even its mental state) while the mother is still pregnant. The ethical implications of this medical intervention are used to decide whether the unborn child should live or die. Given this, if the purpose of these prenatal diagnosis were for the destruction of the unborn, therefore, advocates of the movements such as 'the right to life', and 'pro-lifers' would argue that because of particularly twisted purpose, prenatal diagnosis must be abolished.

Furthermore, I will acknowledge that the Termination of Pregnancy Bill as we have it, is appraised by feminists movements and others who are not necessarily feminists as allowing increased and unrestricted access to 'free' and 'safe' abortion in the government hospitals and clinics. However, I argue that this was rather prematurely introduced. I argue that a number of pregnant women claiming to be poor still present themselves to private doctors and private clinics for abortion and they pay anything between R 600- 800 or more depending where these services are provided.

On the other hand, for one reason or another, other women still choose to terminate their pregnancies back street way although the risks are high in such servicing stations. In the light of these facts, one wonders whether it is appropriate to legislate for the termination of pregnancy or would it have been a worthwhile decision to delay the legislation of abortion for a while and thoroughly make a research and relevant preparation for it. I also argue that ideology plays an important part in the abortion debates.

Besides, the abortion debate is also characterised by indoctrination, the purpose of which is to leave other confused. In both cases facts are misrepresented or false statements are made, and this for me is ethically unacceptable. I will also comment on the importance of linguistics, that is, the proper understanding of normal English terms and what I refer to as 'deceptive language' used by campaigners.

In the last part of this thesis, I will outline some basic approaches to ethics and which belong to what is referred to as postmodernism. The Postmodern worldview deconstructs

metanarratives so that no one particular belief is more believable than another. This worldview brings with it ethical relativism, which is a theory which holds that morality is relative to the individual. Three movements are given as an example of this move toward ethical relativism, they are:

- (a) Emotivism,
- (b) Subjectivism, and
- (c) Situationalism

While I will argue that rape and incest are evil acts, and support abortion in cases involving such acts, however, I also believe that abortion is not the answer to the problem of rape and incest.

I will propose a number of recommendations the South African government should have made before legislating for abortion. For instance, by creating separate abortion service facilities even in the hospital premises, with properly trained staff; so that people who came to seek advice for abortion are not intimidated by those who go to full terms with their pregnancy. Included in this thesis is a case study to demonstrate the complexity of the abortion issue to every one involved. Some psychological and emotional symptoms following abortion will be outlined and this according to women who do share their abortion story is a reality they have to live with every day of their lives.

## OPSOMMING

Aborsie is moontlik een van die mees veelbesproke kwessies van ons tyd, sowel in Suid-Afrika as wêreldwyd. 'n Groeiende aantal vroue erken dat hulle al een gehad het. Basies is daar twee opponerende gesigspunte en waardes betrokke by die twispunt rondom aborsie.

Aborsie was voor die aanvaarding van die jongste wetgewing (d.w.s. voor 1 Februarie 1997) in Suid-Afrika slegs moontlik onder streng beperkings. Voor die huidige wet ( die "Termination of Pregnancy Bill") in werking gekom het, het die meerderheid vroue geen toegang tot aborsie gehad in Suid-Afrika nie, wat gelei het tot 'n toename in agterstraat aborsies. Die nuwe wet gee nie slegs die reg om te aborteer aan vroue wat swanger is as gevolg van kriminele optrede soos verkragting of bloedskanie nie. Die huidige, buitengewoon liberale wet gee ook vir alle praktiese doeleindes aan die vroue die reg om aborsie op versoek te ondergaan tot op 20 weke van swangerskap.

Die doel van hierdie werkstuk is om hierdie nuwe liberale wet aan 'n kritiese ondersoek te onderwerp.

Deel van die etiese dilemma rondom die kwessie van aborsie spruit voort uit die feit dat daar diegene is wat reken dat, indien daar enige konflik tussen regte en belange is, die regte van die fetus ondergeskik is aan die regte van die swanger vrou. Diegene ten gunste van aborsie voer aan dat die keuse gemaak moet word deur die betrokke vrou, en dat so 'n keuse uitsluitlik haar eie is.

Ek argumenteer dat dit nie noodwendig die geval is nie. Die vader van die ongebore kind behoort ook 'n sê te hê in hierdie saak. Gegee dat elke aborsie sekere risiko's insluit, het die ouers van die betrokke vrou en die samelewing ook 'n belang by so 'n situasie. Dus is om slegs te praat van die '*vrou se reg om te kies*' om te suggereer dat moraliteit "relatief" is, en sulke relativisme word afgelei van die idee van die privatisering van aborsie en die lewe in die algemeen.

In die volgende bladsye sal ek die argumente vir en teen aborsie analiseer en kritiseer. Die etiese implikasies van die nuwe Termination of Pregnancy Act word veral bespreek. Tegnologiese vooruitgang het dit moontlik gemaak dat die ongebore baba se fisiese (en soms selfs mentale) kondisie bepaal kan word voor geboorte. Die etiese implikasies van die

mediese intervensie word gebruik om te besluit of die ongebore baba moet lewe of sterf. Dus, indien die doel van prenatale diagnose die moontlike vernietiging van die ongeborene insluit, sal diegene wat teen aborsie is, argumenteer dat so 'n verwronge doel veroorsaak dat sulke ondersoek gestaak behoort te word.

Ek sal erken dat die nuwe wet waardeur word deur feministe, en andere wat nie noodwendig feministe is nie, as 'n wet wat dit moontlik maak dat daar toenemende en onbeperkte toegang is tot 'gratis' en 'veilige' aborsies in regeringshospitale en klinieke. Maar ek wil argumenteer dat die wet te vroeg aangeneem is. Ek argumenteer dat 'n groot aantal verwagte vroue voorgee dat hulle arm is en poog om 'n aborsie te kry by private dokters en klinieke, en dan tussen R600 - R800 of meer betaal vir so 'n diens, afhangende van waar dit geskied.

Aan die ander kant, om een of ander rede, kies sommige vroue steeds om hulle swangerskappe te termineer deur agterstraat-aborsies, ten spyte van die risiko's. Gegewe hierdie feit, wonder mens of dit gepas was om 'n wet in te stel aangaande die terminasie van swangerskap, en of dit nie beter sou wees om die wetgewing uit te stel tot volledige navorsing gedoen is en voorbereiding getref is nie. Ek argumenteer ook dat ideologie 'n belangrike rol speel in die aborsie-debat.

Die aborsie-debat word ook gekenmerk deur indoktrinering ten einde mense te verwar. In beide gevalle is daar die wanvoorstelling van feite of word valse stellings gemaak, wat eties onaanvaarbaar is. Ek sal ook kommentaar lewer oor die belangrikheid van taal, dws die korrekte verstaan van normale (Engelse) terme en wat ek na verwys as die 'misleidende taal' wat gebruik word deur sekere kampvegters betrokke by die debat.

In die laaste deel van die werkstuk sal ek sekere basiese benaderings tot etiek ondersoek, veral dié wat na verwys word as "postmodernisme". Die Postmoderne gesigspunt dekonstrueer metanarratiewe sodat geen spesifieke oordeel langer meer geloofwaardig is as 'n ander nie. Hierdie gesigspunt word dan ook vergesel deur etiese relativisme, wat huldig dat moraliteit relatief is tot die individu. Drie bewegings word genoem as voorbeelde van hierdie beweging na etiese relativisme, nl:

- (a) Emotivisme,
- (b) Subjektivisme, en
- (c) Situasië-etiek

Alhoewel ek argumenteer dat verkragting en bloedskande morele verkeerd is, en alhoewel ek aborsie in sulke gevalle voorstaan, glo ek nie dat aborsie 'n antwoord bied op die probleem van verkragting en bloedskande nie.

Ek sal 'n aantal voorstelle maak aangaande wat eintlik moes gebeur het voor die regering die huidige aborsiewet aanvaar het. Byvoorbeeld, dat aparte aborsie-fasiliteite, selfs by die hospitaal en met opgeleide personeel, geskep moes word ten einde te voorkom dat diegene wat advies vra aangaande aborsie nie geïntimideer word deur persone wat nie wil aborteer nie. Ingesluit in hierdie studie is 'n gevallestudie wat die kompleksiteit van die kwessie rondom aborsie, vir al die rolspelers, demonstreer. Sekere emosionele en sielkundige simptome, veroorsaak deurdat 'n persoon besluit het om te aborteer, sal geskets word. Vir vroue wat 'n aborsie ondergaan het is hierdie 'n realiteit waarmee hulle elke dag moet saamleef.

## **Acknowledgements**

I would like to thank my father-in-law John Mogorosi and his lovely wife for their encouragement, from the beginning of my decision to take up this course with the University of Stellenbosch. My lecturers, Prof. A.A. van Niekerk, Prof. W. van der Merwe, Prof. Johan Hattingh, Dr. Paul Cilliers, Dr. W. Verwoerd, Mr. M. Ngquba, not forgetting Mrs. Lulu Botha for her complete dedication and love and support shown right throughout the course. To my fellow students for working together right through this course without conflict, even though we came from very different cultural backgrounds. Our working together and unity was indeed represented an element of what is meant by the South Africa as a "rainbow nation". My special thanks to my dear friend and fellow student Mojalefa J. Koenane for his continued encouragement and providing some additional information in the writing of this assignment. I also wish to thank Prof. Joum van Bogart who was my class-mate for his proof reading this manuscript and his criticisms.

This assignment is in a special way dedicated to my late father Nqabisile Jonas Gcinumkhonto who died on the 9<sup>th</sup> September 1997 in a car accident, may he rest in peace. I would also like to thank my mother Elizabeth Kearabile and my grandmother Nominithi Elisa respectively for their unceasing prayers for my success. Two people worth mentioning are my colleagues Doctors Thomas Marumo and Mashadi Nong, they were both ever willing to fill in for me in times when I was at the University and when I needed time off for my studies, good people I sincerely thank you for your assistance. My special gratitude goes to Dr. Langa Madyibi for his contribution in the writing of this work.

The experience, insight, positive contribution and encouragement I received from Doctor J.V. Larsen helped me finalise this work, I therefore, thank him too. I also want to thank my best friend Mesh Qinisa who was always ready to help me with this project whenever I needed his help.

Finally, I wish to thank my wife Dikeledi Elizabeth and my daughter Ntombexolo Milliscent for their patience and understanding. I am made to believe that it was difficult for both of them to loose me to my work as a medical practitioner and just when they think I am home to spent time

though I was neglecting my duties as a husband and father. To my wife and daughter I would like to really thank them for allowing me to study, this thesis is thus dedicated to both of you. To all those who though not mentioned above have contributed directly or indirectly to my success I truly thank you. God Bless you all.

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# CHAPTER 1

## INTRODUCTION

The topic of my work is concerned with the whole area of man or woman's moral responsibility with regard to his or her bodily existence, that is, life and health in him or herself and in others. Now a very specific and important area of our human existence is that "in the flesh." In other words, ethics must confront the issues, demands and values of living in a bodily frame. It is for this reason that we have a special branch of ethics that concerns itself with this area of human experience and is traditionally called medical ethics. It was thus called because it was felt that (and rightly so) this area of human existence is best handled by the medical profession.

According to some theologians, human life does not just happen; God wills it and sustains it. Furthermore, theologians argue that God takes human life seriously because it is part of Himself. Hence, insofar as theologies are concerned, only God has the first and last say about human life. One of the most fundamental rights emphasised today, is the right to life. This right therefore, is antecedent to recognition and not to do so is unjust. This right must therefore, be recognised by all irrespective of sex, age, religion, colour or race. Therefore, human life must be respected, affirmed and protected in all and by all for all. Although this seems to be a generally admissible principle, disagreements are derived from practical problems when viewed in the light of differing socio-cultural conditions and religious beliefs.

### **1.2 The Role of Ideology in Abortion Debates**

Mary Ann Warren (1998:133) rightly points out that the difficulty about the abortion issue is not only what people believe about the fetus's right to life but also ideologies influencing everyone's position. For instance, ideologies about the social role of women and their freedom of choice (as advocated by liberals and feminism), conservatism, Catholicism, materialism, socialism, communism, etc. However, it is important to note that not all feminists are pro-choice. These ideologies and many others play an important role in forming one's beliefs about real life issues.

Consequently, some of the debates or arguments supporting or opposing abortion are based on such ideologies. In other words, in most cases people who oppose abortion tend to have conservative views concerning the issue, while liberals, materialist and some feminists support abortion with relative ease. Later on in this work, I will attempt to show how, broadly speaking, a person entrapped in ideologies of materialism and feminism evaluates an issue such as abortion. On the other hand, individuals with dogmatic views follows a certain 'ideology.'

What then is an ideology? For clarity on this question, I refer to a number of philosophers and sociologists. The World Book Encyclopaedia defines ideology as a pattern of logically related beliefs, assumptions and cause-and-effect explanations that make up a belief system and constitutes a fundamental aspect of human life.

As expected, ideologies of different groups are often incompatible because acceptance of a particular ideology insinuates acceptance of a specific set of norms, which are to varying degrees, internally compatible. However, they cannot be reasonably challenged from within a different ideology since the arguments are grounded by a divergent or opposing set of ideas. John Cuber in the World Book Encyclopaedia maintains that once a person has accepted the original premises of an ideology, only one set of conclusions seems possible or right.

However, it was Destutt de Tracy, in 1796 who first coined the term '*ideology*' so as to study how ideas are formed, or generated from sensations, and how they can be influenced. Napoleon Bonaparte was the first to oppose the new discipline and criticised its role in his military failure after his unfortunate Russian campaign (Thompson 1989:29). Thereafter, the concept '*ideology*' has mostly not been able to shake off the implication of an *evil manipulative exploitation* of the mind.

A supplementary view of ideology comes from the Marxist perspective. Karl Marx contributed significantly to the modern concept of ideology. He argued that ideologies are false systems of political, social and moral thinking invented and preserved by the ruling classes out of self-interest. According to Marx, religious hierarchies, for example, perpetuate systems of faith that at bottom protect the economic well-being of those in power. Following Marx, proponents of a particular socio-political system felt free to dismiss arguments offered

by opponents as ideologically based, that is, false because they reflect only the ideological biases of the opponent and not the true state of affairs. Therefore, because this tactic could be used to argue against every ideology, the clash of modern ideologies became a strident and passionate affair dominated more by propaganda than by rational arguments.

Marx's primary intention was to scrutinise and criticise the social structures and relations in order to change them. In particular, Marx wanted to see social relations that are perceived as *gross injustices* and *inequalities* created by capitalist economic relations radically changed. According to Marx, the economic foundation creates a social formation, (i.e. the superstructure) which consists of all different kinds of nonmaterial components, including politics, religion, philosophy, morality etc. Furthermore in his view, the methods through which the economy supports the superstructure is called '*ideologies*'. Marx's definition of '*ideology*' can be summarised as follows:

“An ideology is a theoretical doctrine and activity which erroneously regards ideas as autonomous and efficacious and which fails to grasp the real conditions and characteristics of social historical life”  
(Thompson 1989:36).

In addition for Marx, ideology is viewed as a system of ideas, which expresses the interests of the dominant class. He added that ideology also represents class relations in a deceptive form. In the light of what has been asserted so far, I will later argue that Marx's ideology of '*dialectical materialism*' plays an important role and influence on the abortion debate.

Another interesting view on ideology is that of Althusser who maintains that state apparatuses confer identity on an individual who becomes a subject, acted upon by these all-pervasive and unconscious vectors of ideology, which in all their diversity, support the ruling class.

Thompson (1989) is mainly concerned with the importance of mass communications. He holds that a view that states that the mass media are merely the glue that holds society together in particular ideological arena is an *elementary* or *simplistic view*. For Thompson, ideology is a '*meaning*', which serves to establish and sustain relations of power, which are

systematically asymmetrical. In other words, for Thompson, ideology is '*meaning in the service of power.*'

From Thompson's definition, by power is meant the socially or institutionally endowed capacity that enables some individuals to make decisions, pursue ends and realise interests. On the other hand, domination is present when permanent relations of power are systematically asymmetrical. For example, when some individuals or groups are endowed with power in a durable way, which excludes others, and to some meaningful extent stays inaccessible to other groups, regardless of the foundation upon which such exclusion is carried out.

Thompson's project is to study the ways in which meaning is shaped and transmitted in various symbolic forms from simple speech to complicated mass media messages, and to question these forms in order to identify ways in which they assist arranged disproportionate (*asymmetrical*) power relationships.

Obviously, politics is the area where ideology commonly occurs. Nevertheless, Thompson points out that for many of us, power and domination occur in our homes, at schools, in the Church and in our working places etc (ibid.). Generally speaking, social life is a struggle that utilises symbols and physical force. Ideology is an integral part of this struggle. To some extent, religion has lost its grip on people, and it is constantly being substituted by a set of secular belief systems.

Thompson differentiates between two types of ideology:

- (a). Neutral conceptions of ideology, which are not specifically misleading or illusory, and
- (b). Critical conceptions of ideology, which carries a negative or pejorative, sense and can be perceived as illusory or one-sided.

For the purpose of this project, I am also going to focus on what Thompson focuses on, that is, type (b) of ideology, which is the *critical conception*. Thompson furthermore discusses an assumption that within the contemporary society, there are no more absolutes or universal

beliefs.<sup>1</sup> Another postmodern view is to deconstruct these binary oppositions in order to bring to light the hidden ideology they represent in order to reach a consensus. In other words, there is more to the abortion debate than just pro-choice or pro-life. The contrasted consensual theory suggests that sets of values are equivalent to specific roles in society. As an individual takes on that role, the values are taken too. This is called a role-specific value system and requires no generally agreed set of values; the only requirement is the agreement with values attached to particular roles. Thompson maintains that there is an element of truth in this theory. However, it overemphasises the degree to which individuals are moulded by social processes. In Thompson's view, individuals are readily capable of criticising, and rejecting them.

In principle what I have just analysed indicates that it is not easy to see how entrenched rivals can unravel their disagreement over a matter such as abortion. But to some of us, there is still little hope that there is a way out of this and other ethical predicaments. Therefore, abortion continues to be a problem, one with no satisfactory answer. Almost all modern conflicts such as the 'abortion issue' have ideological overtones. Perhaps the main example of an ideological conflict is the abortion issue, in which the principal antagonists (Anti-abortionists or Pro-lifers and abortionists or the Pro-choice lobby) wage a political and psychological struggle for influence in every part of the world.

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<sup>1</sup> This view is generally promoted within the circles of postmodernist theories.

## **CHAPTER 2**

### **ABORTION**

In the next section, I will look at the historical facts surrounding the abortion issue, the terminology used and the difference between direct abortion and indirect abortion. I will also look into the doctrine of double effect debate and the its understanding insofar as the abortion debate is concerned.

#### **2.1 Historical Facts**

Abortion is a hotly controversial issue around the world and also in South Africa, and it has polarised society into pro-abortion and anti-abortion forces, especially since the 2<sup>nd</sup> half of the 19<sup>th</sup> century. Unfortunately, both sides sometimes use dishonest and immoral tactics to carry their point. From time immemorial, man or woman has performed abortion. South Africa has comparatively new legislation, which provides for abortion on demand to be done by midwives as well as the medical staff, for the abortion of pregnancy in minors without parental consent, and for the abortion of a wife's pregnancy without her husband's consent. It is a law that provides, on conviction, for a fine or imprisonment for up to ten years to any one who:

- ❖ Prevents the termination of pregnancy, or
- ❖ Obstructs access to a facility for termination of pregnancy.

The penalty of conviction for refusing to comply with performing abortion is draconian: a fine or imprisonment up to ten years or both. This suggests an ideological agenda behind the Bill, namely the forcing of the value of an atheistic-humanist base, in the place of a biblical base, as a basis of law upon the people of South Africa. This means that parents or husbands could be prosecuted for attempting to talk their daughters or wives out of going for an abortion. It also means that a health care worker's task of providing realistic and effective counselling to a woman or teenager requesting an abortion becomes problematic.

Looked at from a different perspective, the Abortion Bill also threatens to reduce medical staff to technician status, who must take the serious step of performing an abortion in late pregnancy, (i.e. five months of pregnancy), but there are conditions attached to it with all its potential consequences.

In this work I will attempt a dispassionate and ethical discussion of the topic by observing some guidelines for my discussion. I will outline the following:

1. Identify, if possible, areas of agreement such as the tragic nature and undesirability of abortion because this might lead us all to co-operate in supporting policies aimed at eliminating the personal and social causes of abortion or seeking alternatives to abortion.
2. Represent the opposing positions accurately and fairly.
3. Distinguish carefully the *objective right and wrong* from the *subjective good or bad intention*. I believe that in this way, we can disagree with one another without necessarily imputing moral evil to one another.
4. Identify, if possible, the central issue at stake in the argument and separate other issues that cluster around abortion without demeaning those other issues.
5. Admit doubts, difficulties and limitations in my own position and not claim clarity and certainty beyond what the facts warrant.
6. Take care not to confuse morality with public policy, because legality does not necessarily coincide with morality. I will explain this matter further during the course of this work.
7. Incorporate women's perspectives as an important ingredient in any discussion of abortion. Put differently, I will look at the feminist position concerning the abortion debate.

Most countries have now legalised abortion. In Africa, only South Africa and Tunisia allow abortion on demand. One of the first, Hungary, has the peculiar distinction that its number of legal abortions has exceeded its number of lives births. Since the passing of the Abortion Act of 1967 in the United Kingdom, other countries have quickly followed suit. For example, the United States of America in 1973, and two years later in 1975 the Republic of South Africa joined the party. It was actually noted in the United States that abortion was by 1972 the second most common surgical procedure after tonsillectomy.

Abortion is a phenomenon of vast proportions today, a social fact. Not everybody has accepted abortion as a fait accompli. There are still many Christians of all denominations, Jews, Moslems and humanists who simply reject the acceptance of abortion. It is a very significant fact that the medical profession generally condemned abortion, the only exception being when the mother's life is in real danger. The Hippocratic Oath, considered satisfactory for almost twenty-five centuries (but no longer), runs:

“I will not give a woman a pessary to produce abortion.”

In addition, the World Medical Association Declaration of Geneva in 1948 states its medical vow as follows:

“I will maintain the utmost respect for human life from the time of conception.”

## **2.2 Terminology**

Abortion is such a complex human problem that there are innumerable ways of approaching it. In general, they can all be boiled down to two namely:

- ❖ Scientific and
- ❖ Emotional

These two elements are both valid in their own right but, both incomplete when taken apart. We are dealing here with a matter which touches the most basic of all human values that is, human life in its initial stages. Therefore, a question may be raised at this point: What is abortion? The World Health Organisation's definition may help to clarify matters. The World Health Organisation defines abortion as follows:

“The termination of a pregnancy before the foetus has attained viability.”

Therefore, since deliberate abortion can be said to be a decision to terminate pregnancy, this to some people means the decision to end life or a deliberate killing of an innocent life. On the other hand, others feel it is not; others go as far as saying even if abortion was indeed equal to ending human life in its initial stages, then, what is a big deal about it? The term '*viability*' denotes the capacity of the fetus to survive outside the womb, that is, the point of foetal development at which the fetus is capable of living independently of the mother. Medically speaking, the fetus can exist apart from the womb and continue to develop after about twenty-eight weeks of gestation. With the modern technological advances, in incubators it is possible to keep a fetus alive even as early as the twentieth week after conception.

The expulsion from the womb before viability can happen in the following ways:

1. Natural or Spontaneous Abortion, and
2. Induced abortion, and hence the different types of abortions

*Spontaneous abortion* is where nature herself expels the fetus from the womb before the time of its natural birth. Normally, this is referred to in common parlance as a '*miscarriage*.' A miscarriage therefore is a purely accidental interruption of a pregnancy over which neither the mother or the medical profession has any control. Its actual causes are too many and varied to be entered into. Usually the fetus is dead on delivery, especially if this occurs before the time of viability. However, it is also possible that the fetus could live after viability, in which case it is a "*premature birth*." Fetal death after viability results in what is technically called a "*still birth*."

It is estimated that about twenty five percent of all pregnancies terminate spontaneously, with three out of four abortions occurring during the first three months of pregnancy. Some women apparently have some tendency to abort, and therefore, recurrent abortion decreases the probability of subsequent successful childbirth. The causes of spontaneous abortions, or miscarriages are not clearly established. Abnormal development of the embryo or placental tissue, or both, is found in about half the cases; these abnormalities may be due to inherent faults in the germ cells or may be secondary to faulty implantation of the developing ovum or to other characteristics of the maternal environment. *Hormone* deficiencies have been found in women who are subject to recurrent abortions. Spontaneous abortions may also be

caused by maternal abnormalities such as acute infectious diseases, systemic diseases such as diabetes and severe trauma. Uterine malformations, including tumours, are in other instances also responsible.

Induced Abortion: In this instance, a human person intervenes by killing the fetus to terminate the pregnancy. However, this act of aborting could be done either:

- ❖ Directly, or
- ❖ Indirectly.

A direct abortion is a case of a deliberate intention to remove the fetus from the womb with only one aim, its termination and destruction. It is any medical procedure whose sole immediate purpose is the expulsion of a non-viable fetus. This is also called "*induced*, or *artificial*" abortion. An indirect abortion means that abortion may also be performed not as a direct intended result but for another intention or purpose: in most cases in the interest of the mother's life and health. This is technically called a "*therapeutic*" or "*legal*" abortion. Furthermore, it is this that causes most of the legal, medical and moral problems.

However, abortion as a medical procedure is not easy even in the most ideal circumstances of modern medical advances. Certainly in the past, it has had a long history of experiments. For instance, "*back street abortions*," (which are mostly not medical) are still very common today despite all the efforts to outlaw it. This is one of the main aims of legalisation of abortion.

### **2.3 Direct Abortion**

Earlier on, I referred to direct abortion as a deliberate disposition concerning innocent human life, which aims at its termination either as an end in itself or as a means to another even illicit end. Although in all human cultures people have valued, loved, and protected their children and this care has been recognised as one of the most fundamental of ethical responsibilities, direct abortion has also been widely practised. According to Ashley and Kevin O'Rourke (1980: 228), a study of primitive cultures by Devereux indicated that the motivation for abortion in these cultures highly varied.

Abortion was thus not performed for pragmatic reasons only, but also for religious and symbolic reasons arising unconsciously. This was also true of the ancient civilisations, although here economic and demographic considerations prevailed more and more. Within these cultures, it is generally said that abortion and infanticide were not distinguished. In the Roman culture, for example, an infant did not have legal status until accepted by the *pater familias*. Hence the tradition that illegitimate children are in effect non-persons.

Therefore, abortion in these instances is directly willed or intended. Important to note, is a fact that originally the Abortion Act of 1967 in the United Kingdom was mainly based on the argument of a case of conflict between the life of the mother and that of the unborn fetus. However, since then there has been a widening of the indications favouring abortion. Evidently, state laws have swung over to a fairly lenient and permissible legislation of abortion. Most of the arguments in these cases derive from a compassionate ethics, that is, abortion would be a merciful release for all concerned.

I now wish to examine the cases advanced to favour therapeutic abortion. Under the Abortion and Sterilisation Act of 1975 repealed by the 1996 Act, in South Africa, abortions may be legally procured in the following circumstances:

- i. Where the continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health,
- ii. Where the continued pregnancy constitutes a serious threat to the mental health of the woman concerned, that is, danger of permanent damage,
- iii. Where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he or she will be irreparably and seriously handicapped, and finally
- iv. Where the fetus is alleged to have been in consequence of unlawful carnal intercourse:
  - ❖ In a case of alleged rape or incest, or
  - ❖ In the case of alleged unlawful carnal intercourse in contravention of the Immorality Act of 1957, that the woman concerned is an idiot or an imbecile.

Against the background of the Abortion and Sterilisation Act of 1975, I now wish to evaluate the present South African Termination of Pregnancy Bill (i.e. Termination of Pregnancy Bill of 1996). To begin with, the South African Bill of Rights states the following:

- ❖ Section 15, article 1 affirms that: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”
- ❖ Section 16, article 1(b) says the following: “Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.”
- ❖ Section 9 states that: “Everybody is equal before the law and has the right to equal protection and benefit of the law.” It goes on to mention that “No person may be unfairly discriminated against directly or indirectly on any one or more grounds including amongst other things religion, conscience and belief.”

Yet, about thirty per cent of all pregnancies are aborted annually throughout the world. The liberal South African Bill on abortion was only implemented in October 1996. This law allows abortions on request to be performed in government hospitals and institutions approved by the government during the first twelve weeks of pregnancy after the mother has been counselled. The previous South African law permitted abortion only when the mother’s physical or psychological health was at risk or in a case of rape or incest. What I wish to note about the Abortion Act of 1996 is that the Bill now allows for an easy access to abortions at any stage up until 20 weeks.

Insofar as the new Termination of Pregnancy Bill is concerned, the above selected sections of The Bill of Rights seem very clear and straightforward. However, they still leave much to be desired insofar as the health care workers are concerned. The punitive attitude of the Abortion Bill towards health care workers who have conscientious objections to performing abortions suggests that there is more than concern for women in the minds of the legislators.

Another issue at stake in the controversy is the rights and freedoms of those individuals who cannot participate in the destruction of human life. This includes doctors, nurses, hospitals, laboratory technicians and others connected with such practice. A question arises whether an abortion-ridden society will permit those with conscientious objections to refrain from

abortion procedures without jeopardy to their position and professional opportunity. In principle, the right of conscience is defended through prompt legislation and in the courts.

The South African Termination of Pregnancy Act regarding their participation in abortion, puts the legal position of health workers as follows:

- i. To refuse to carry out or take or participate in any abortion,
- ii. To refuse to furnish any information concerning the rights of an applicant for abortion or any aspect of the “Termination of Pregnancy” Act.
- iii. To inform others of their ideas and views about abortion; and
- iv. To resist in the Labour Courts and other Courts of law any attempt to refuse employment or to discriminate against any worker or to intimidate any worker into carrying out any activities concerning abortion.

The current Termination of Pregnancy Bill permits health care workers to refuse to take part in an abortion on grounds of conscience. However, it then compels those same workers to immediately refer any woman requesting an abortion “to a medical practitioner or a registered midwife, as the case may be, who shall terminate the pregnancy.” This practically suggests that the conscience clause does not operate for health care workers to whom the woman is referred. Moreover, it also makes the referring health worker an accessory to the act, that is, *participatio in malo*.<sup>2</sup>

The following is the outline of the present Termination of Pregnancy Bill. The circumstances and conditions under which pregnancy may be terminated are as follows:

- (a). Pregnancy may be terminated upon request of a woman during the first twelve weeks of conception or gestation period.
- (b). Pregnancy may be terminated from the thirteenth week up to the twentieth week of gestation if the medical practitioner, with consultation with a pregnant woman is of the opinion that:

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<sup>2</sup> The expression “*participatio in malo*” is the Latin for participation in evil.

- (i). The continued pregnancy would pose a risk of injury to the woman's physical or mental health.
  - (ii). There exists a substantial risk that the fetus would suffer from severe physical or mental abnormality, or
  - (iii). The pregnancy resulted from rape or incest, or
  - (iv). The continued pregnancy would significantly affect the social or economic circumstance of the woman
- (c). After the fifth month of gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy would:
- (i) Endanger a woman's life,
  - (ii) Result in a severe malformation of the fetus, or
  - (iii) Pose a risk of injury to the fetus.

Given the above arguments, in practice the termination of pregnancy could be considered beyond the stipulated 20 weeks period. As we now are aware, the current abortion law maintains that two doctors are required to certify that a continuation of pregnancy would be more damaging to the woman's health than an abortion, that is, from the 13<sup>th</sup> week until the 20<sup>th</sup> week of gestation. Pro-abortion groups argue that this requirement is burdensome, while pro-life groups seem to hold a view that this makes abortion cheap by destroying the only chances of the unborn child only at a majority of two doctors' decision and the woman's request. Important to note is that even a late-term abortion also requires consent of two doctors.

## **2.4 Indirect Abortion**

There are certain cases where clinical abortion takes place unintentionally. In the Roman Catholic tradition, an indirect abortion is an instance in which a treatment or operative procedure is performed for some other purpose but incidentally or secondarily does cause the expulsion of the fetus. In such cases, the abortion is ethically speaking indirect because the

primary thrust of the surgical intervention is to remove a pathological organ. The classical example of this theory is a cancerous womb or tube and ectopic pregnancy.

To justify this case, Catholic moralists have adopted *The Principle or Doctrine of Double Effect*. This in practice means performing an action that has a harmful effect is permissible if the underlying action is good in itself. However, the intention is directed solely to a good effect, and the good effect is not achieved through the harmful means, and there is a sufficient reason to allow the harmful effect. Factors to be considered are as follows:

- ❖ The act is a medical operation which in itself is not harmful, or
- ❖ The intention is an upright one, namely the health of the mother is the primary concern, and it is not obtained through the harmful effect. This implies that both the mother and the doctor's circumstantial intention are not evil and they would save the unborn child if they could.
- ❖ The good effect is produced by operation, but at the same time the operation has an ill result in the removal of the fetus as well, although this is predictable and foreseen, was not necessarily desired.
- ❖ Finally, there is a good chance of the success of the operation in regard to the mother's health as well as a serious reason for undertaking it.

## **2.5 Application of the Principle of Double Effect**

Today we are no longer living in the world that simply rejects abortion and judges it as always immoral. There are some cases of indirect abortion that ethicists justify in accordance to the principle of double effect. A question may be asked then: what is the principle of double effect? The principle of double effect originated in the Thomist<sup>3</sup> moral philosophy concerning the relation between action, consequences and intentions (Blackburn 1996:109 and Gillon 1996:134). Generally speaking, it is a theory, which maintains the following:

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<sup>3</sup> Although St. Thomas Aquinas is credited with the principle of double effect, strictly speaking this principle dates back to the times of St. Augustine or even earlier (Beauchamp & Childress (1994:252) note 39.

“Sometimes it makes a difference to the permissibility of an action involving harm to others that this harm, although foreseen, is not part of the agent’s direct intention (Foot 1976:269).”

On the other hand, George Smith<sup>4</sup> writes:

“The principle of Indirect or Double Effect, one of the basic principles of Catholic medical ethics, and one also intuited by many others not necessarily members of the Roman Catholic Church, is best understood by an understanding or often times but a vague feeling... that it is a halfway ground between a straightforward utilitarianism... and sterner moral positions emphasising rather motivations” (Smith 1993:9).

Deducting from Smith’s understanding, the principle of double effect is directly concerned with cases involving indirect abortion only. This implies that this principle is of no value in cases of direct abortion. Insofar as the subject of direct abortion is concerned, there is an age-old controversy. In this case the act itself is directly destructive to the fetus, and the bad effect, death to the fetus, is not a merely permitted side effect but is the means used to accomplish whatever good effect may result to the mother. Since the first two conditions of the principle of double effect are not verified, it makes no difference whether there is good intention and a sufficient proportion. Therefore, it is useless to try any ethical justification for direct abortion on the basis of this principle. However, it is a different situation if the death of the fetus is only an indirect effect.

What the principle of double effect suggests, is that in case of conflict or two differing effects, one must fully examine all the details of the intended, and more especially the intention of the acting agent. Insofar as the principle of double effect is concerned, one could go ahead and perform an act that would inescapably cause harm, *if and only if* the agent directly intended the good consequences. In addition the good which is intended ought to be achieved by the act itself and not by its harmful effect. To put this principle more concretely, I will elucidate its conditions:

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<sup>4</sup> George Smith is a professor of Law at the Catholic University of America, Washington .

- ❖ The act itself must be ethically (i.e. morally) correct and not wrong, (i.e. the nature of the act plays an important role).
- ❖ The agent or doer must directly intend only the good effect.
- ❖ The good effects or consequences ought not to be the means toward the achievement of good results. In other words, the way the good result or outcome is obtained should not undermine other things, (i.e. should not lead to the '*slippery slope*').
- ❖ There must be a serious or proportionate reason for executing the act, for instance, good results far outweighs the harmful consequences. This means a balance between the good and harmful consequences and the proportionality condition.

Here is an example of how the principle of double effect proceeds. The situation of indirect abortion arises when the mother has some serious illness and the only workable treatment, whether medical or surgical, will have two effects: the cure of the mother's disease and the death of the fetus. This would be a kind of a case in which the principle of double effect applies. The fetus is not directly "attacked", and its death even if certain to follow, is unavoidable by-product in the performance of a legitimate act.

The mother herself needs the treatment no matter what effects it may have on the fetus, and the death of the fetus is not the means by which she is cured. This suggests that the mother has all the rights to take such a treatment and she is ethically admissible to do so. The medical professional, on the other hand, has the responsibility of deciding whether the mother's condition is truly pathological and whether the treatment contemplated is the only effective remedy.

Practically, this means that there are a very restricted number of conditions that fulfil the principle of double effect, and they are as follows:

1. The removal of a Fallopian tube, (i.e. the site of the ectopic pregnancy) where the removal of the disease tubes leads indirectly to the death of the embryo (Luker 1984:231). The fetus in the ectopic would also die if not operated.
2. The removal of pregnant uterus with cervix cancer,

3. When the mother's health is seriously worsened by pregnancy (Beauchamp & Childress 1994:207) and
4. Craniotomy

The principle of double effect implies that the end does not justify the means. Gillon (1996:135) argues that the nature of the act must be good or at least, ethically neutral or not inherently harmful. Sumner (1981:115) on the other hand, maintains that the intended act in itself is not permissible, while Shannon (1993:6) holds a view that the intended act must not be evil or wrong. Insofar as the balancing of the good and the bad effect is concerned, Sumner (1981:115) maintains that the good and the evil should be more or less equally important. Beauchamp and Childress (1994:207) support a position that the good consequence must override or outweigh the bad effect.

## **2.6 Critique of the Principle of Double Effect**

The principle of double effect seems very straightforward. However, some prominent ethicists maintain that there is much more than meet the eye in as far as this principle is concerned. Today the discussion of abortion gives attention to and takes into account a different vocabulary of the medical profession and of people who can be convinced more by good reasons and keen discernment than by rigid and mechanical application of the direct or indirect distinction used in the principle of double effect reasoning.

This is not to deny the value of the traditional formulation of the principle of double effect and its application, because this principle does help all of us to see our way through cases that involve a dilemma. However, the principle is of no help when we are confronted with a totally deformed fetus that is lacking the biological substrate for any expression of a true human life. It is clear that we must preserve a biological life, but does this mean even when there is no bodily basis for personhood?

In such cases, the casuistic rule applies, namely that presumption yields to facts. Therefore in my opinion it would be over-scrupulous to attribute personhood and human rights to a defective fetus if it could be established with high degree of scientific probability that it is so radically defective genetically. Or in the course of development has suffered so severe a

trauma, that it lacks the active potentiality to develop the brain structures necessary for at least some minimal activity of human thought and freedom. In my opinion, it is this potentiality that constitutes the human person and makes the normal embryo or fetus actually a human person. Given this, it follows that more research is needed on the minimal structures necessary for the constitution of the human person.

Glover (1990:87-90) observes three limitations concerning the principle of double effect and they are as follows:

1. Where does one draw the line in problematic cases between an intended means and a merely foreseeable effect?
2. How can a person identify the class of bad acts, which cannot be justified through appeals to consequences?
3. Where is the limit between an act and its effects or consequences?

Beauchamp and Childress agree with Glover. As far as they are concerned, it is impossible to make a clear distinction between what is a direct intention and what are only anticipated or foreseen consequences. They furthermore argue that the unintended but foreseen bad effects cannot be removed without losing side of the intended good effects (Beauchamp & Childress 1994:207).

As a point of departure, Beauchamp and Childress (ibid. p.208), maintain that the reading about the intended acts is in itself highly disputable. Beauchamp and Childress go on to argue that the preferred alternative is to eliminate the language of desiring and wanting. They propose that we rather replace that by saying that these effects are "*tolerated*." Nagel (1979:61) argues that the principle of double effect is only a matter of *casuistry*, which he rejects for the primary unanalysed distinction between what one does to people and what only occur to them as a consequence of what one does. Insofar as the moral relevance of the distinction between deliberate and non-deliberate killing is concerned, Nagel comments as follows:

“Deliberate killing of an innocent is impermissible unless it is the only way to prevent some very large evil.”

## 2.7 The Principle of Double Effect and the Question of Abortion

According to Beauchamp and Childress (1994:207), the principle of double effect only applies to an ectopic pregnancy and to a woman who has cancer of the cervix. However, Luker (1984:229) holds the following view:

“Presumably the case where a pregnancy threatens the life of a woman, presents the simplest moral dilemma, in as much as the woman and the embryo claim the right to continue life instead of different ones, (right to life and right to control one’s body) that would have to be given different weights.”

Broadly speaking, this implies that according to the principle of double effect, both the mother and the fetus claim equal right to life but their particular claims are given distinct importance or significance. The mother’s rights override those of a fetus. This represents an inconsistency in applying the principle of double effect. Against this background there are those who advocate for the principle of double effect as having purely a *prima facie* moral impetus that can be outweighed by other competing moral deliberations, (Beauchamp and Childress 1994:252 see note 40).

Regarding the relation of cervical cancer and pregnancy, important distinctions ought to be made. Cervix cancer is a disease with gradual stages of severity; starting with what is technically known as a pre-invasive stage and ending in locally advanced and disseminated disease. In these stages the therapeutic choices would harm the fetus or mother. An alternative choice would be a hysterectomy, that is, the removal of the uterus and the loss of the fetus. To put all stages of cervix cancer in pregnancy in the same basket is a classification mistake.

The point I am driving home is that the principle of double effect erroneously puts on par two opposite medical conditions and concludes that the indirect killing of the foetus is justifiable in both cases for the same reasons. Well this cannot be, it is a fallacy. At the same time, the principle of double effect maintains that a maternal disease that becomes a serious

danger to the woman's health or even to her life does not fulfil the essential conditions under which procuring an abortion is admissible.

## 2.8 The Slippery Slope Argument

The slippery slope argument<sup>5</sup> can readily be applied to any situation of any controversy, more especially in matters relating to bioethics, where the argument is customarily practised. Beauchamp and Childress (1994:229), note that many philosophers dismiss the *slippery slope* or *wedge* arguments because of their widespread abuse in biomedical ethics. They furthermore, note that it is because the slippery slope arguments lack experimental or empirical, that is, scientific evidence to verify their claim.

Nevertheless, Beauchamp and Childress also maintain that the slippery slope must be taken seriously. However, the slippery slope argument is normally utilised to object to any proposed change in moral reasoning or legislation, (Kuhse & Singer 1998:280). An example (somewhat related to the topic of this assignment) cited by Kuhse and Singer (*ibid.*), goes something like this:

“Prenatal diagnosis is wrong in principle. If abortion is the only thing we can do when a genetic defect is found. First, a suspicion of Huntington's disease or cystic fibrosis will be counted as a good reason for abortion. Then it will be diabetes, sickle cell anaemia, Down's syndrome, [...]. It will be argued that it is in the interest of the future child itself not to be born. But how can we decide that someone's life is not worth living? People have no right to decide that the life of a handicapped person has no value. To do so is a violation of the basic principle of equality. [...].”

Having cited this example, these two authors furthermore argue that since the term '*slippery slope argument*' is frequently utilised unrestrictedly, it is in some instances used as an appeal to dangerous precedent. Chenyang<sup>6</sup> also supports this view in his article (1992). Basically,

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<sup>5</sup> Beauchamp and Childress refers to slippery slope arguments as 'wedge arguments.'

<sup>6</sup> Chenyang Li (when he wrote this article) was an associate professor of Philosophy at the University of Alaska.

Chenyang Li attacks William Cooney and argues that the *acorn-oak tree* argument against the slippery slope on the personhood of the foetus is convincing and concludes that Cooney's criticism of this theory falls short.

I will briefly focus on what Chenyang is reacting against regarding Cooney's position. Cooney has two objections to the *acorn-oak tree* analogy. His first objection is that the *foetus-person* and the *acorn-oak tree* analogy are not an adequate analogy. In short, Cooney maintained that all person-denying<sup>7</sup> arguments are fallacious. Furthermore, he holds that the *acorn-oak tree* challenge of the abortionist slippery slope does not work.

In my understanding, Cooney maintains that it is a granted assertion that an acorn is a potential oak, but it does not follow that a fetus is potentially a person. Because right from the moment of conception what we have in a fertilised ovum is a human person in its initial stages. In other words, where one speaks of separate sperms and female ova we can therefore refer to these as a potential human person. In addition, scientifically people do donate sperms and ova, which are scientifically not human persons, but only have the ability to be artificially fertilised (i.e. insemination) and become human person(s).

An egg is not a chicken, but only has a potential to become one. According to Cooney, this argument cannot be equated with a notion that an unborn child or fetus will only become a human being at a certain stage of its gestational age or at birth. His reasoning is simple, he argues that at conception we already have a distinct human person growing inside a pregnant woman. It is for this reason that he holds "that an *acorn-oak tree* argument is fallacious and does not work."

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<sup>7</sup> The term 'person-denying' refers to all those who deny the personhood of the foetus, irrespective of its gestational age. Contrarily, the position that affirms the human status of the foetus from its early developmental stage is in this article called 'personhood-affirming' position.

## **CHAPTER 3**

### **SOME BIOLOGICAL FACTS**

The purpose of this section is to argue for the continuity, albeit a living and developing one, in the whole process of gestation and pregnancy, from conception to actual birth. At the moment of ejaculation, anything up to a million male sperm cells enter the woman's vagina. These sperms do not act biologically longer than a day. At ovulation time, a woman emits one ovum or egg. It too does not remain biologically active for more than one day. Should one sperm be exposed to that ovum while both are biologically active, the process of fertilisation takes place, (i.e. conception occurs). This important moment usually takes place in the upper part of the fallopian tube or the oviduct. Within a few moments a very powerful release of energies from both the sperm and the ovum in their collision, give rise to a totally new genetic package known as a zygote.

Both the sperm and the ovum contain a certain amount of chromosomes (i.e. twenty-three in each), genes and DNA molecules. Some maintain that it takes a few hours before the full chromosomal conjunction takes place. Nevertheless, when the zygote does emerge genetically it is absolutely unique in the universe and is biologically alive; it is unicellular, that is, a unique new cell, a genotype in which is all the genes for the individual human being. In other words, the zygote contains genetically and potentially all that the adult will become.

This microscopic speck contains a multitude of inherited characteristics. It is already equipped with the entire programme of its future physical characteristics, right down to the miniature detail (including unique fingerprints). Therefore, it is unique, individual and unrepeatable.

As soon as the zygote becomes a reality, it continues its journey down the fallopian tube towards the uterus, a trip that can last up to six days. En route to the uterus the zygote is very active, it begins to split up into two, four, eight, sixteen cells etc., and each divided cell is called a blastomere. After about four or five days all of these cells form a new cluster or morula. It is about this time the morula enters the uterus or womb and begins to attach itself at one of its poles to the wall of the uterus, this is called the blastocyst. Then the result is

implantation. Once completed, one has technically an embryo of about one sixteenth of a centimetre (i.e. 1:10 inches).

By the third or fourth week the heart pumps. By the sixth week the rudimentary organs are already shaped; in the seventh week reflex movements are discernible and in the eighth week brain activity begins; toes and fingers are discernible and a technical name for all these is called the fetus.

In the sixteenth week or the fifth month the mother actually feels the new life moving in her. This is commonly called the perception of fetal movement. Viability can be divided into two groups:

- ❖ Independent viability, which means the ability of the fetus to survive on its own. This occurs after twenty-eight weeks of pregnancy (presuming both the mother and the fetus are healthy).
- ❖ Artificial viability which means that the fetus can only survive apart from the maternal womb only with the support of technology, such as in an incubator, for instance, after twenty weeks of gestation.

Ethically speaking, the induction of labour before viability is unjustified. Insofar as the induction of delivery after viability, that is, to bring on a premature birth, certain things ought to be taken into consideration:

- (a) All aspects of the situation (i.e. medical and ethical), and
- (b) The interests of both the mother and child

Strictly speaking, medical reasons are grounds for inducing labour; non-medical reasons ought to be discouraged (for instance, personal convenience). This goes in particular for caesarean section, especially for a primary section and that is ethical. The taking of drugs (i.e. on prescription) is not wrong as long as it is done for a proportionate reason, for example, a relief of pain, and without running too great a risk either to the mother or child.

## CHAPTER 4

### CATHOLIC POSITION ON TERMINATION OF PREGNANCY

The Judeo tradition has influenced Christian attitudes toward abortion hence, the concept Judeo-Christian tradition. However, it is strange that there is only one text in the Old Testament that deals explicitly with abortion, and that is, Exodus 21: 22-25. According to the Jewish tradition, abortion is wrong more especially when done by the third party. Later the Jewish text considered the formed fetus to be a full human being and a person guilty of aborting was punished by the death penalty.

Christianity began and grew in a world in which both abortion and infanticide were common practice. In the practical moral exhortation of the New Testament, abortion is never explicitly mentioned, but in the Didache, a manual of Church discipline written around the same period, abortion is explicitly condemned. Therefore, this position to direct abortion has remained what Noonan (1970) calls “**an almost absolute value**” throughout the history of the Christian Church. However, both the Old and New Testament lay heavy emphasis on each basic value as dignity of the human person made in the image of God.

The early Fathers of the Church were unanimous in their condemnation of infanticide and abortion. The earliest testimony is that of the Didache, which states:

“You shall not kill the fetus by abortion, or destroy the infant already born.”

Their arguments against it derived from charity; the uses of it as a cover-up for illicit sexual misbehaviour and licentiousness, a violation of the creative design of God. An early council of the Church at Elvira in Spain (c.305 AD.) legislated rather harshly against abortionists and later councils were to take similar canonical action, especially with regard to public penitential discipline. At the same time, much philosophical-theological thought was given to the question of ensoulment, which in turn led to the theory of animated and unanimated fetus.

All of these problems were taken up with a renewal of interest by the scholastics, the only addition being in the realm of intentionality. The real casuistry around abortion began with Bishop St. Antoninus of Florence (around the 15<sup>th</sup> century, +1459). Antoninus differentiated between a formed and an unformed foetus. The male fetus was formed after forty days of gestation, and the female one, after eighty days. Citing the teaching of an early Dominican priest, John of Naples, he accepted the possibility of a therapeutic abortion. He maintained that for the sake of the mother a non-animated fetus could be aborted.

This theory was later adopted and added to by a Jesuit theologian by the name of Sanchez (+1610). Sanchez argued in favour of aborting non-animated fetus in the case of a girl raped and in danger of death from her family fiancée, similarly in the case of an adulterous wife in dread of her husband. Another famous Jesuit theologian, Raynaude (+1663) went further to permit abortion of even the animated foetus in order to save the mother's life. Consequently, Pope Innocent XI in the year 1679 condemned even the opinion favouring the abortion of an unanimated foetus (Lotstra 1983:146).

The problem of abortion continued to be a hotly debated one among the moralists right through the present century. Much of the debate around the turn of the 19<sup>th</sup> century centred on the subject of craniotomy, that is, crushing the infant's skull while still in the womb in order to save the mother; the fetus being considered an unjust aggressor. Between 1886 and 1895, that debate was also closed with the condemnation of all direct medical abortion.

Therefore, a decision that resulted in the Code of Canon Law of 1917 excommunicated all that procured or helped in an abortion and reserved the sin for absolution for the local ordinary or bishop (cf. Canons 985 article 4 & 2350 article 1.). Within the Roman Catholic circles, abortion has recently been re-condemned by Vatican II, Gaudium et Spes, article 27 and 51, Pope Paul VI Encyclical Humanae Vitae (1968) and finally the Declaration on Procured Abortion of the Sacred Congregation for the Doctrine of Faith in 1974.

#### **4.1 The Second Vatican Council**

As affirmed already, since the first centuries of the Church's existence, abortion has been considered the destruction of human life. The Second Vatican Council maintained the status

quo. *The Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)*, numbers 51 and 27 declares:

“For God, the Lord of life has conferred on men [and women] the surpassing ministry of safeguarding life, a ministry that must be fulfilled in a manner worthy of [humankind]. Therefore, from the moment of conception, life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes,” (*Gaudium et Spes*, Number 51).

“Whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia or wilful self-destruction, [that is, suicide]. They poison human society, but they do more harm to those who practice them than those who suffer from the injury. Moreover, they are a supreme dishonour to the Creator” (ibid. number 27).

The general conclusion to this brief history of the Roman Catholic Church approach toward abortion is that the Christian tradition from the earliest days reveals a firm anti-abortion attitude (Connery 1977).

Therefore, the teaching of the Roman Catholic Church is that the life of the fetus from the moment of conception is regarded as inviolable so that any direct attack on it as a means or an end is rejected as immoral. This opinion is not merely a Catholic one. Many other denominations, religions and humanists support this position.

## **4.2 Pope John Paul II's Position on Abortion**

Relevant to our position on abortion is the present Pope's position regarding the same, especially during his pastoral visit to South Africa in 1995. During this pastoral visit, Pope John Paul II made the most comprehensive statement on the right to life at Gosforthpark. His statement showed a greater understanding and awareness of the situation facing pro-lifers in South Africa than is generally displayed by parliament and politicians. In his sermon the Pope strongly condemned the mentality so prevalent in the pro-abortion lobby (and held by

many lawmakers in different countries), which assesses the right to life of the handicapped and the unwanted in economic terms. Prior to his visit, the Southern African Catholic Bishops' Conference sent him a full document on developments in South Africa, which included the ongoing discussions on the proposed new Termination of Pregnancy Bill.

The Pope maintained that the right to life should be defended by the attentive care of the medical and nursing professions and by the protection of the law. He furthermore added that no state has the right to contradict moral values, which are rooted in the nature of humankind. According to the Pope, if society begins to deny the worth of any individual or to subordinate the human person to pragmatic or utilitarian considerations, it begins to destroy the defences that safeguard its own fundamental values.

In his homily the Pope referred to the "*cultural onslaught against the family*" by those who attack married life as "*irrelevant*" and "*outdated*." All of this he said was a serious challenge to society and to the Church. In referring to the negative phenomena of family life today, he condemned the growing number of divorces, the scourge of abortion, and the spread of a contraceptive and anti-life mentality. The Pope's sermon made it abundantly clear that the teaching of the Roman Catholic Church on ethical issues such as abortion, divorce and contraception remains unchanged.

The Christian tradition and in particular the Catholic one, provides the most considerable body of thought on the subject of abortion. The volume of writing on the topic has increased enormously since the passing of the Abortion Bill in the United Kingdom in 1967. Since then, the actual dimensions of the problem have broadened considerably. It is presently a social, medical, legal and ethical problem. However, the present day debate on the abortion issue tends mainly to concentrate on all its energies and arguments around two major fundamental moral questions namely:

- (i) When does the individual human life begin?
- (ii) How does one go about solving conflict situations?

## **CHAPTER 5**

### **THE STATUS AND VALUE OF FETAL LIFE**

We live in a pluralistic society where laws ostensibly are made on the basis of scientific data and philosophical “truths”. A scientific truth touches abortion in many ways. Therefore, we must be willing to use it in an educational effort. The basic question that we must ask, ponder and discuss, as South African society is obvious: What is at stake here is the question: Is the fetus a human being? At what stage of gestation does a human person emerge? When is the soul infused into the new conglomerate? Put differently, when does a distinct human life begin? At what point does hominisation occur?

Philosophy, theology (religion) and science have different opinions as to when exactly does human life begin. As a matter of fact, the problem of when does human life begins is much deeper than many think. Even scientific literature differs widely about the beginning of human life. Some hold a view that scientific positions depend on what aspect of life does one mean in particular. Nonetheless, the entire story rests on the answers.

Obviously, there are vehemently opposing views concerning this issue. To illustrate how opposing these opinions are, I now wish to look at some of the theories put forward by contemporary authors. The preceding problem that needs clearing up is what does one mean by the concept ‘person.’

#### **5.1 Genetic Approach**

Within this school of thought, by far the most generally accepted opinion is that human life begins with the process of the formation of the zygote or genotype. In simple language, life according to this school of thought begins at fertilisation. This cannot be calculated as a mathematical moment. However, it is a process that begins with fertilisation. Conception is a process over time rather than a punctual event. When complete the zygote is a new member of the species human being; it is only morphology that changes afterwards. The human zygote is a new living reality, different from the living cells of the parents who have produced it, independent of them in its being, even though for the period of gestation it will live and develop by drawing oxygen and nourishment from the mother. For most medical

professionals, it is an absolute biological certitude that the human being begins at conception.

There is one main objection to this theory though, and that is the peculiar phenomenon of segmentation. Before actual implantation on the walls of the maternal womb, it is possible that the pre-embryo can split up once, twice or more. For this reason a Catholic moralist, Charles Curran argues that human life is not present until the 14<sup>th</sup> day after conception.

## **5.2 Developmental Theory**

Another school of thought regards human life as a growth or a process. Advocates of this theory see a parallel between the criteria for hominisation and those for clinical death. Therefore, they maintain that there is no human life until there is discernible brain activity or else a recognisable heartbeat (both moments occurring roughly after a month or three months of gestation).

According to this argument, there is no human person until the brain is sufficiently formed to be a substratum of rational life. Other proponents of developmental theory go so far as maintaining that there is no human life until viability. Still others argue that human life begins with the physical birth (even the New Constitution of the Republic of South Africa seems to hold this view, since the constitution does not outline the fetus' constitutional rights). Perhaps stating the following could sum up these theories better: A fetus is not a *person* since it lacks freedom, self-determination, rationality, the ability to choose either means or ends, and knowledge of its circumstances.

However, such arguments could just as well be used to advocate the quiet removal of all imbeciles and incurables as nuisances from society.

## **5.3 Ecological Theory**

The ecological theory (sometimes called technological approach) is a view that holds that human life begins when the fetus can live apart from its mother. They furthermore, hold a position that the natural limit of viability occurs when the lungs mature. However,

technological advances can now capacitate a premature infant to survive at about 20 to 25 weeks after gestation. This is the view that is generally prevailing in many countries. Insofar as this approach is concerned, once a fetus is or can be inherently independent, abortion is no longer permitted (see *Roe versus Wade*).

#### **5.4 Socialisation Approach**

In this case, everything depends very much on one's world-view. According to this school of thought an individual is a person and fully human only in inter-personal relationships. Hence, the power to relate becomes the criteria for judging when there is a human person. Moving along this direction, those advocating for this position argue in favour of birth when the child enters human society, or even later. However, what this approach fails to realise is that there is a very intimate relationship already existing between the mother and her unborn fetus in the womb.

#### **5.5 The Embryological School of Thought**

The embryological view maintains that in humans, identical twinning can occur as late as the Twelfth Day. However, this view also emphasises that identical twins and even "*Siamese*" twins, that is, those born conjoined still have different personalities. This view says that to be a *person* there must be a single established individual. Since before day 12-14 individuality is not yet established there is no personhood. Theologically, the two individuals have different souls. Among scientists who support this position are Renfree (1982), Shannon and Wolter (1990) and McCormick (1991). Nevertheless critiques of this view maintain that this view would allow for a morning after pill contraception and in as far as their opinions are concerned, any time before twelve days abortion is permitted.

#### **5.6 Neurological Approach**

As a point of departure, this school of thought argues that society at large and the medical profession in general have advocated for a view that death is the loss of the cerebral electroencephalogram (EEG) pattern. Therefore, another significant feature at the stage of development is that there is demonstrable human brain function as measured on the

electroencephalogram (EEG). Years ago, it was said that death occurred when the patient or a person stopped breathing. However, with the advent of respirators on the scene life was prolonged because respirators breathed for the patient. Thereafter, the medical profession believed that death came when the heart stopped.

Then the argument goes further to state that if throughout the world the scientific community universally accepts the cessation of human brain function as measured by the electroencephalogram as the end of human life, then many logically would agree that the onset of that same human brain as measured by that same EEG should be considered the onset of human life. If that criterion is used for the definite onset of human life, then human life is present at forty-three (43) days. On the contrary, other scientists hold a position that the acquisition of the human electroencephalogram at about twenty-seven weeks of pregnancy is defined as a period when human life begins. (This view allows mid-trimester abortions).

## **5.7 The Metabolic Approach**

Interestingly enough, this school of thought simply maintains that there is no point in time when life begins. This implies that the sperm and egg cell are both alive as any other living organism.

## **5.8 Hylomorphism**

This is a return to the theory held by St. Thomas Aquinas, who maintained that animation came only when the body was sufficiently prepared to receive the human soul. The problem with this theory is that it gives no definite indication as to when exactly this does happen. Besides, it is also a too mechanical view of the human soul. A person does not possess the human soul as an extra entity; he or she is a living soul. The last three approaches (i.e. developmental, socialisation and hylomorphism<sup>8</sup>) all advocate for a delayed or mediate hominisation.

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<sup>8</sup> The term hylomorphism goes back to Aristotle. For Aristotle psyche-animo simply meant an 'animating' principle that allows a living entity to move.

## 5.9 Advocacy of Personhood

Doubts concerning the legal personhood of the unborn have led philosophers to argue that '*personhood*' as the subject of rights cannot be determined merely by biological criteria, but must be defined by social consensus. They contend that while such consensus should rest on merely arbitrary criteria like those proposed by racists, it could never be absolute, because only adults are capable of actually functioning, as free citizens are unequivocally persons.

The legal arguments assume a legal positivism according to which human rights are the result of law, rather than the basis against which the justice of the laws is to be measured. Even those who appeal to the venerable Jewish tradition must ask whether the tradition is the final word or whether, in the light of modern science and modern views of human dignity and equality. A stricter view on the origin of human personhood conforms more to the fundamental ethical principles of Judaism. According to Noonan (1970) the definition of personhood should be broad and should be extended to the unborn.

## 5.10 Concluding Remark

Nobody can say for sure or with certainty at what precise moment human life begins, when there is a human person or when the soul is infused. But if we were to say that at one stage of development this is not a human life but at another stage it is, then we must draw a line in time and say: "When exactly life begins," can we really draw that line?

Measurements of the onset of human life by concepts such as socialisation, conscience of the self, humanisation, exchange of love, etc can be opposed as being vague. Furthermore insofar as they qualify a human person, these yardsticks open the door to infanticide and euthanasia.

Nevertheless, the medical indications and the current technology in embryology seem to weigh heavily in favour of the genetic theory discussed earlier. Therefore, human life is undoubtedly a '*mystery*' and '*mystery*' still surrounds its beginnings.

However, there is a strong argument in favour of human life from the formation of the zygote. Presuming this to be true then, we have before us a new human life that must be protected, defended, promoted and allowed to develop its full potentiality. Herein the basis for the inalienable and inviolable right of the unborn to life. From the moment that new life begins to develop, it indicates that it is there, that it has the right to life and grow within the protective, nourishing shelter of its mother's body.

## **CHAPTER 6**

### **LAW AND THE TERMINATION OF PREGNANCY**

Those who give a large place to intellect in the determination of morality usually hold that right reason expresses itself in the form of law. Because there is question of intellect directing moral action, the judgement of right reason assumes the form of a command prescribing as moral or forbidding as immoral a certain kind of conduct, and this is what is commonly understood as a law. Therefore law is closely related to a norm or standard, the main difference being that a norm appeals to the intellect, enabling it to distinguish one thing from another, whereas a law imposes an enforceable obligation on the will to conform to the standard.

Law is a highly controversial topic in ethics today. Some would not even want to hear the word. It is bad enough, they say, to have to endure laws in the state, as a necessary evil needed to restrain the refractory and uncooperative elements in society, but let us hear nothing about laws governing our moral life. Surely a good life should appeal to us without any form of coercion. In addition, how is it possible to coerce a moral life, whose dwelling place is in the interior of each person's soul?

#### **6.1 The Meaning of Law**

When we spoke of the word law, what immediately comes to mind first of all is human law, that is, the law of the state. Perhaps this is what St. Thomas seems to have in mind when he gives us his classical definition of law, though this definition is also applicable to law in a wider sense. According to St. Thomas law is defined thus:

“Law is nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community” (St. Thomas, *Summa Theologiae*, I-II, Q. 90, a 4.)

There are five very important points that come out of this definition of law, and they can be outlined as follows:

1. Law is an '*ordinance*' because it is no mere advice, counsel or suggestion but an order, a command, a mandate imposing the legislator's will on the citizens and binding with moral necessity.
2. According to St. Thomas, a law is said to be of *reason* because it must be no arbitrary whim but intelligent direction, imposed by the superior's will but planned and *formulated by reason*. To be *reasonable*, a law must be consistent with other laws and rights, just in distributing benefits and burdens, observable as not being too harsh or difficult, enforceable so that proper observation is actually secured, and useful in that the good it aims at is worth the price.
3. A law is for the *common good*, for the *welfare of the community as a whole*, and not for the benefits of individuals as such.
4. A law must be *promulgated*, or made known to those whom it binds. It must be published in such a manner that it can be known readily, although each subject needs to be given notice thereof.
5. Finally, a law must come from *one who has the care of community*, from a legislator having authority or jurisdiction, who may be a single individual or a body passing law by joint action (*ibid.*).

Therefore, a law must be mandatory, reasonable, community serving, promulgated, and authoritative. Without these characteristics (at least in St. Thomas' opinion) it is not a genuine law and has no binding force. Law in this primary and strict sense directs free beings by imposing on their freedom the restraint of obligation, duty, or oughtness, the type of necessity, which does not consist of physical compulsion.

## 6.2 Legalisation of Abortion

Legal regulation of abortion raises particularly controversial and sensitive issues and is continually a battleground for ideologues. People's views vary, ranging from those who support a woman's right to choose without impediments to those who argue for the right to life of the fetus, irrespective of the risks to a pregnant woman.

In South Africa, the current "**Termination of Pregnancy Bill**" maintains that abortion is not illegal where a medical practitioner and where two doctors have formed an opinion that to

continue the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman, perform it. The only specification is that abortion must be timed before the pregnancy has exceeded its 13<sup>th</sup> to 20<sup>th</sup> weeks. There are no gestational restrictions in the remaining justifications for an abortion, namely, where there is a risk of permanent injury to the health of the pregnant woman or where there is a substantial risk that, if the child were born, it would be severely handicapped. Furthermore, in this case only the decision of the pregnant woman and one doctor's opinion is required.

Legislative action in the 20<sup>th</sup> century has been aimed at permitting the termination of unwanted pregnancies for medical, social or private reasons. In the late 1960s liberalised abortion regulations became widespread. The impetus for this change was threefold:

1. Infanticide (although infanticide is theoretically another issue) and the high maternal death rate associated with illegal abortions.
2. A rapid expanding world population, and
3. The growing feminist movement

Another question arises on the control of abortion by the civil law. It is one thing to hold an action immoral and another thing to forbid and punish it by civil legislation. Some argue that it is not the business of the State to regulate the private life of its citizens, and many immoral practices must be tolerated by the civil law as being outside its scope. Given this, can we truly say that abortion belongs entirely to the moral sphere and that civil law should not attempt to deal with it?

Abortion insofar as pro-lifers are concerned is the invasion of the fetus's right to life. Therefore, pro-lifers argue that no state can overlook the killing(s) of its citizens. It is the State duty to protect its citizens. They further argue that even if the State does not define the unborn as a citizen does, the question remains whether the State can get rid of its obligation merely by defining it away.

Looked at critically, abortion does not only concern the consenting adults, (i.e. mother, father and the doctor or medical staff), but it also concerns the non-consenting non-adult, the unborn child (or the fetus as the medical terminology refers to it), whose stake in the matter

is crucial but whose interest is absolutely overlooked. Pro-lifers ask: “Is it not the State’s duty to protect the life of the defenceless fetus?” This is a very strong argument for rigorous abortion laws.

One of the arguments in support of legalisation of abortion is that legalisation will cut down a number of illegal abortions. Well, these arguments allow for abortion advertisements that say; “We do abortion, it is cheap, quick and safe,” or “For affordable abortion phone us,” etc. Therefore, there is a problem with the Choice for Termination of Pregnancy Bill in South Africa. First, abortion is supposed to answer or relieve the woman of her socio-economic burdens. If this were the case, the law would also regulate the price for medical practitioners for termination of pregnancy, but that is not the case. Nine out of ten times, it is the rich who choose abortion, because as one advert suggests it is *affordable*.

Obviously the clinics and surgeries where abortions are performed, place a price tag for abortions. One woman tells me that around the North-West areas the cheapest abortion costs R800-00. Surely it is not a poor person who can afford that much just to procure abortion. Obviously this is illegal since only institutions authorised by the National Department of Health can procure abortions.

Secondly, to legalise abortion in order to make it safe for a woman who requires one suggests that legal abortion does not harm. This is also seen in abortion adverts, which also emphasises *safety*. One may ask then: Is a legalised abortion without harm? Or will the legal abortion in South Africa be without risks or even deaths? Medical practitioners are again divided in their answers toward these questions. On the other hand, we can ask is pregnancy and normal delivery always safe? Maternal mortality in hospitals remains major problem.

The function of law is to support and protect the rights of every person. The civil rights of the unborn child, although a debatable and controversial issue, have been recognised by the United Nations Declaration for Human Rights. Therefore, strictly speaking, law ought to defend the right of the unborn to life, especially since the foetus is unable to defend itself. The United Nations Declaration of Rights of the Child (1959) declared:

“The child, because of its physical and mental immaturity, needs special care and safeguards, including legal safeguards, before and as well as after birth.”

Therefore, respect for human life is called for right from the time the process of gestation begins. Article 12 of the United Nation Declaration of 1974 states the following:

“From the time that the ovum is fertilised, a life is begun which is neither that of the father or of the mother; it is rather the life of a new human being with its own growth. It would never be made human if it were not human already.”

Given this, all Termination of Pregnancy Bills, including South Africa’s ignore this most fundamental human right. On January 22, 1973 in the notable cases of *Roe versus Wade* and *Doe versus Bolton*, the Supreme Court of the USA instituted the right of every woman to procure an abortion legally plus specifications by trimester of pregnancy. *Roe versus Wade* struck down the Texas statute restricting abortion to instances necessary to save a woman’s life (Beauchamp & Childress 1994:432). On the other hand, the *Doe versus Bolton* case struck down a Georgia statute permitting abortions only if necessary to the woman’s health, to prevent the birth of a malformed child, or to terminate pregnancy from rape (Ashley & O’Rourke 1982:253). The Court’s judgement nullified laws in other US states that restricted abortions.

On the other hand, there is the nature of the state itself and what its laws can accomplish. A state, especially the pluralistic state of today, must operate within a framework of popular consensus. The argument for the immorality of abortion, the theory of rights on which it is based or founded, and the philosophy of the person underlying the ethics of rights are not admitted by a massive component of the society. There is a general feeling of agreement or consensus on the wrongness of murder, theft, and other similar crimes; the defence is never that the act was not wrong but that the accused did not do it. Abortions, however, are readily admitted, and the defence is that it is not a wrong act but one within the rights of the mother. It is also a woman’s right to carry the pregnancy if she so wishes.

There are still some in our society who maintain that there should be no laws on abortion. Some do not want abortion to be legalised, because that may be interpreted as approving of it, but rather decriminalised. Without approval simply means that the state does not punish abortion but leaves it to the individual conscience of its citizens. If this were to be the case, some may ask, would not the state then, have failed in its obligation to protect the rights of the innocent? Every anti-abortionist would definitely answer *yes*.

However, such failure is inherent in the limited function and power of the state. The state cannot force its entire citizenry to adopt the same philosophy of rights, the same respect for human rights, and the same judgement on the personhood of the human fetus. To even attempt this would be a grave violation of the freedom of its citizens. On the other hand, no doctor should be obliged to perform abortion, no nurse to assist at one and no hospital board to allow one to be done with the hospital facilities. Therefore, the medical or health care staff should not be coerced or pressured to act against their consciences.

Current documentation in the abortion debate makes it quite clear that arguments about the precise moment of animation of the fetus do not alter the fact that there is a human being in development. Article 13 of the Vatican document (1974) makes this point clearer and further adds:

“Even if a doubt existed concerning whether the fruit of conception is already a human being or person, it is objectively a grave sin to dare to risk murder.”

For those who argue against abortion, the dignity and rights of the unborn child are neither conferred nor taken away by any man or woman or any government or society. They are rooted in the objective individuality that inherently tends toward the openness and transcendence we commonly call personhood. They furthermore argue that once human life exists, we are morally bound to respect its right to life, to development and to human dignity.

Guidelines have been issued and some restrictions adopted, but very few adhere to them. Debates still go on in some segments of our society, but one thing is certain: the country is divided on the issue of abortion. No matter what everyone says, no matter what everyone's position and attitude is toward abortion, ethicists, theologians, scientists, biologists and

politicians everybody must be determined to seek solution to problems that lead to some women who consider and undergo abortion.

### 6.2.1 Will Legalising Abortion make it Safer for Women?

Although '**abortion on demand**' is approximately four years old in South Africa, abortions were permitted in South African hospitals but the law was quite restrictive. In spite of the fact that abortion is now legal and recommended before the third trimester, doctors and gynaecologists still perform abortions long after a period of 13 to 20 weeks even in six or seven months of pregnancy, for reasons other than what is legislated, that is, the health of the mother. Despite educational programmes to educate the youth on the importance of birth control, (especially a condom in the advent of HIV/AIDS) there are still thousands of women who resort to abortion as a means of contraception. Although it is every woman's democratic right (as some would argue) to choose a safe and legal abortion in South Africa, it was discovered that many women still risk their lives by going the '*back street job or route.*' May be because their legal right is often denied.

Shirley Locke (pseudonym) did not know she was pregnant until she consulted a doctor about her swollen feet. She was shattered to hear from the doctor that she was pregnant. She could not believe that she was pregnant again because it was not long since she had an abortion at the same clinic. Things got even worse, her pregnancy was not well received by her partner, a married man. Therefore, Shirley once again decided to terminate her pregnancy. However, this time she was too embarrassed to return to the same clinic where her first abortion was performed. She had no other alternative but to go for a *back street route*, and less embarrassing but with no guarantees.

Although the Termination of Pregnancy Act was passed almost four years ago, Shirley and many other women in South Africa still believe that *back street abortions* are better services, not because they are *safe* but because their *anonymity* and *privacy* is guaranteed. Many of the unwilling mothers-to-be are desperate to have abortion, but do not or cannot make use of the correct and legal channels, which are at their disposal. Those who prefer these so-called safe and legal facilities, travel as far as possible from their places of residence as they can. Even then they give false names and identity details. Despite every effort to educate young women

about the importance and necessity of contraceptives, there is still a remarkable high incidence of unwanted pregnancies. The additional factor toward this is some men's attitude against contraception.

Shirley underwent a legal termination of pregnancy not long ago, as I have explained; she now undergoes back street abortion. Shirley has survived the ordeal, but still she does not take precautions to prevent falling pregnant a third time (at least as far as we can tell). Statistics reveal that most abortions still occur outside hospitals and clinics. In abortions that are performed illegally (**i.e. back street job**), there is no medication given, and nobody knows whether instruments used are sterilised or not, nobody even knows what kind of instruments are used to induce these abortions. Even if the government for all abortions guaranteed sterile conditions, this would simply assure *sanitary conditions* for what others consider as murder. In other words, knowing that abortion was clean is not a consolation for the victim.

This is supported by the headline on the first page in the Sunday Times (June 4, 2000) where it says: "Medics refuse to perform abortions: Back street operations rife as 166 clinics take moral stand." The headline of this article also supports Dr. Larsen that health workers are reluctant for different reasons to perform or assist in induced abortions. Laurice Taitz in the above article maintains that about two out of every three public facilities designated to provide legal abortions are not functioning. She maintains that the reason for this is because medical practitioners and nurses *refuse* to perform and assist in abortions on moral grounds.

According to a survey conducted by the Reproductive Rights Alliance (a non-governmental organisation), there are two hundred and sixty nine (269) hospitals and clinics assigned to perform free abortions. However, one hundred and sixty six (166) of these are providing no abortions whatsoever. This implies that free abortion services are implemented only in one hundred and three (103) hospitals and clinics throughout the country. The article furthermore notes that in KwaZulu Natal, where forty-nine (49) hospitals were designated by the government to perform abortions, only six hospitals provide abortions<sup>9</sup> (*ibid.*).

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<sup>9</sup> This same point was repeatedly emphasised by Dr. John Larsen a specialist gynaecologist in KwaZulu-Natal with whom I had an interview long before the article referred to on the Sunday Times was published.

Practically, this unfortunately means that the government and the Department of Health did not do their homework properly, the same happened with free maternal and childcare under the age of five, it was imposed without provisions. The Department of Health designated a good number of hospitals to perform free abortions without taking into consideration the position of health workers in those hospitals and clinics. As a result of this, the women's department of the South African Medical Research Council discovered that despite legislation on abortion, hospitals still get cases in which women are admitted for hazards caused by the 'back street abortionists.' This suggests that something is not right and the Department of Health should find out what it is or even to revisit the whole question of implementation of the bill.

According to Adanlawo and Moodily, one third of abortions globally are performed in poor countries, under highly hazardous surroundings, resulting to roughly hundred thousands deaths (The South African Journal of Epidemiology and Infection 1999; 14(14): 99). Therefore, there is also the ethical problem of allowing women to die from unsafe abortions. According to the recent statistics the legalisation of abortion saw back street abortions decrease as well as the mortality rate resulting from abortion.

### **6.3 Critiques of US Supreme Court Decision**

Opponents of the 1973 Supreme Court ruling in the *Roe versus Wade* case argue that a fetus is entitled as a *person* to constitutional protection; they also attacked the decision on variety of fronts. State legislative bodies were lobbied for statutes narrowing the implications of the decision and circumscribing in several ways the mother's ability to obtain an abortion. A nation-wide campaign was instituted to amend the Constitution to prohibit or severely restrict abortion (Olen & Barry 1998:173).

The '*right-to-life*' groups also rallied in grass roots political activity designed to defeat abortion proponents and elect abortion opponents. Abortion became, rather than simply a legal and constitutional issue, a major political and social controversy. Some critiques of the US Supreme Court's decision and legislatures were opposed as undermining the respect for human life (Beauchamp & Childress 1994:432). To recapitulate, the court decreed the following:

- ❖ That in the first three months of pregnancy an abortion decision must be left entirely to the woman's desire and her doctor's medical judgement. No state law may intervene.
- ❖ In the second three-months US states may legislate to ensure medically safe abortion procedures but may not stop abortions, and
- ❖ In the final three months of pregnancy the state may act to protect the rights of the unborn child, but still may not halt an abortion judged medically necessary to preserve the "life or health"<sup>10</sup> of the mother.

Insofar as most pro-life advocates were concerned, the court's guidelines constituted an exercise of raw judicial power. And in the view of others it was the unconstitutional invasion of the legislative function and spells dictatorship by the tribunal. Generally anti-abortionists maintain that the critical point of whether the developing fetus has human life was treated very casually in the court decision.

The critics of the court decision maintain that the court in fact not only speculated, but also decreed the answer. It ruled in effect that no life is present in the developing fetus until it reaches the seventh month. But however tragic the decision, it stands until it is changed. Meanwhile like many liberal countries, South Africa must cope with consequences of legalising termination of pregnancy.

## 6.4 Conflict Situations in Pregnancy

How does one cope with certain problematic circumstances in regard to pregnancy? Legally speaking, induced abortion may be either criminal or therapeutic. For instance, criminal abortion would be in a case where one violates the law of the country in carrying out an abortion illegally as in "*back street*" job. Technically, a therapeutic abortion is the artificial termination of pregnancy in the interest of the mother's life and health. What then are the arguments and indications used to justify therapeutic abortions? I propose to deal with this matter later on in this work.

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<sup>10</sup> The concept "health" must be understood as referring to both physical and mental health.

## CHAPTER 7

### DISTINCTIONS AND ARGUMENTS (PROS AND CONS)

How free is the human person in the exercise of his or her ethical life? How free is the pro-lifer to impose his or her views on the pro-choicer? Hard questions must be faced: How free is the pregnant woman or mother in her decision making, that is to abort or not, to keep her child or give it for adoption? *Pro Abortion Arguments* as indicated earlier are mostly supported by liberalism and some feminism ideologies. According to these groups, abortion is always permissible. The problem arises only insofar as the defenders of absolute pro-life position, soft positions and for those that advocate for the gradual position are concerned.

Some of the *pro-choice* arguments according to Olen and Barry (1998:181-182) include the following:

- ❖ To talk about abortion as murder is nonsense, since the fetus is not a human being. Either it is part of the mother, to be treated as any other appendage, or it is a separate living thing within the mother but has not yet arrived at the human status. Therefore, it can be removed from the mother as an undesirable excrescence. In addition, it may be taken out of the way according to the woman's wishes.
- ❖ To say that the fetus is inviolable from the moment of conception is to fly in the face of certain phenomena in the pre-implantation period, namely the twinning process, spontaneous abortion (i.e. miscarriage), and the rare process of recombination of two fertilised ova into one. We have no solid evidence as to the moment when the fetus receives a human soul. Therefore, since certainty is not possible, we must have recourse to probabilities. We can thus act on the probability that the fetus is not a human person and therefore terminate pregnancy.
- ❖ Even if the fetus, because of biological continuity and chromosomal inheritance, is regarded not merely as a *potential* but as an *actual* human being, it has not yet become a human person. Only a person has rights, including the right to life. Therefore, the fetus's life may be terminated if and when the mother so desires without any breach of good morals.
- ❖ Even if the fetus is granted a right to life, in any conflict of rights (i.e. mother-fetus conflict), the fetus's right yields to that of the mother. In other words, where a maternal-

fetus conflict exists, the mother's rights override those of a fetus. Put differently, on all possible counts the mother's right takes preference.

- ❖ In some cases, the fetus can be considered an unjust aggressor against the physical or mental health of the mother. The danger to the mother's health is sometimes put forward as a reason for procuring a therapeutic abortion. The argument goes on, to make the rest of the mother's life an intolerable torture, is too much of a price to ask. Therefore the mother is morally allowed an adequate defence against such prospects, and the only defence is the elimination of the fetus.
- ❖ At least, in those cases, in which both the mother and child will certainly die unless the fetus is aborted, only a benighted legalism could oblige the obstetrician to let both die rather than save one. No fine distinction between direct and indirect actions, principal and incidental effects, wanted and permitted consequences, and similar rules should be adored as obsession while a life is at stake. This argument is supported by an English expression, which says: "*Necessity knows no law.*"
- ❖ No unwanted child should be allowed to live. A child needs love and cannot live a normal life without it. The unwanted child is an unloved child.
- ❖ An '*uninvited*' fetus must be aborted. This argument is based on a case of unlawful carnal intercourse in which pregnancy results, such as rape and incest. Generally speaking, there is an agreement that rape is not an acceptable act, it is an act of aggression and if a woman becomes pregnant as a result of rape, abortion is permissible, and so it is with incest.
- ❖ No pregnant woman who wants an abortion should be denied one. The continued presence of the fetus within the womb is completely dependent on the discretion of the pregnant woman, because the woman has the right to determine her own life. Since no one knows for sure when human life does begin, the decision should be left to the pregnant woman. Very few men concern themselves with the consequences of sexual intercourse or determine their sexual behaviour in the light of possible undesirable after-effects. The prejudice against abortion has been created by men and must be removed by women. The woman has the right to control her sexual activity, including procreation and, because of the callousness of most men, needs the freedom to choose an abortion as the final means of preventing unwanted children.
- ❖ The population must be controlled. So urgent is this need that some individual rights will probably have to be submerged for the greater good, that is, the very survival of the human race. Contraception and sterilisation would be better methods than abortion, but

human beings are too unpredictable and uncontrollable to eliminate the need for abortion completely. Rather than forbid abortions, we should promote them and should be gratified that they are being done voluntarily, thus putting off the time when we may make them compulsory (Olen & Barry 1998:181).

It is however, important to note that not all these arguments supporting abortion look on it in the same light, since some favour abortion on demand and others would allow it under some conditions. These arguments are influenced and characterised by the ideology of feminism and materialism. On the other hand, the pro-life arguments are characterised by conservatism, Catholicism or Christianity ideologies. Opponents of abortion find these arguments not convincing they also maintain that the arguments do not provide for the interests of the fetus. Olen and Barry (1999:179) summarise the counter arguments for the above arguments as follows:

- ❖ Biological evidence confirms the fact that the human fetus is nothing else but human. The fertilised ovum has the human chromosome pattern containing all the inheritable factors and it can never grow into anything but a human being. Also, biologists are unanimous in testifying that fetal life is distinct from the mother's life, even though the two are connected during the period of gestation. Therefore, any analogue with the surgical removal of tumours is inapplicable to the case of abortion.
- ❖ If we could prove that the fetus, even if human in some sense, is not yet a person, it would have no right to life and could be killed like an animal. Then what criterion will we take for personhood? If we take the actual use of intelligence and freedom, we could kill children some years after birth. Whether the child is inside or outside the mother is only a physical and local difference that can hardly constitute the essence of personhood. The only way to deal with this issue is to consider the fetus as a human person with all the rights, including the most fundamental human right, (i.e. the right to life) that goes with being a person. In this consideration, the child is not a potential person but an actual person, though full use of its personality will have to wait on the gradual attainment of maturity.
- ❖ All human beings are equal in their right to life, and age gives no priority. If there is question only of indirectly permitting the death of one or another, that one should be chosen who has better chances of survival. But a conflict of rights cannot be settled by a direct killing of an innocent person who has done nothing to lose the right to life. In this

case, each one's right yields to each one's duty, and neither may be killed. The mother may not kill any of her born children to be free of her various responsibilities. Then why kill the unborn?

- ❖ If the pregnancy is not developing normally, this is one of those cases, where it is no one's fault, surely no more the fetus's than the mother's has. The abnormally developing foetus is not attacking the mother. The mental health angle is different, in a case, the mother is the one who needs therapy, and the killing of the fetus is not a moral solution, any more than the remedy for paranoia is the slaughter of all the imagined persecutors.
- ❖ No moralist wants doctors to be remiss in their professional duty of saving human life. They must use all legitimate means, but they must not use means that are ethically or morally evil. The fact that an unborn child cannot protect itself does not mean that its right can be invaded at any discretion. Protection of the unborn child's right to life is not legalism but the correct use of the law. That 'necessity knows no law' has little standing as a moral guide.
- ❖ Insofar as the rape and incest cases are concerned, everyone generally agrees that rape is an evil act and indeed, it is also a social problem, which needs to be corrected. Nevertheless, is abortion a way of making this social problem right? Surely not. There must be other ways this problem must be corrected and the situation remedied. The woman is a victim when she is raped; the rapist is the aggressor. Legally a rape victim must report a rape incident within 72 hours after it has occurred. This is so because after the medical profession has certified that indeed rape has occurred, he or she would do what is technically called "douche." However, let us suppose that there is a case of genuine rape that has occurred, and for whatever reason the victim fails to report the incident within the given or specified time. She then discovers that she is a few months pregnant as a result of that particular rape. Is it fair that she takes her revenge on the already formed innocent human life? She may decide okay I became pregnant because I was raped. I did not report the matter to the police, but now I am going to abort. She would by so doing be holding a grudge against an innocent person. She would also be doing something wrong in order to make things right. By so doing, she is herself becoming an aggressor to a defenceless unborn child as well. Do two wrongs make a right? Certainly a rape victim need the community's support and more than that, a raped woman needs a specialist counselling, that is the psychological help she may get to reassure her. Besides, the society (through social workers) must also have adoption

services as an alternative and as a way of helping the victims of incidents such as rape (Olen & Barry 1998:179).

## 7.1 Medical Indications

Earlier arguments in favour of a therapeutic abortion centred on the “*hard case*” of a prolonged pregnancy constituting a serious risk and a threat to the life of the mother from physical illness. In the past, there were cases where the continuation of a pregnancy resulted in the death of either mother or fetus, or indeed of both. Today because of the advanced medical technology, these cases are becoming *increasingly rare*. However, in some developing countries this is still very common. The risks entailed in continuing a pregnancy are rarely so grave that they should require abortion because of the modern methods of treatment even before the child is born. The agonising choice whether to do everything possible to save the life of the mother, or to risk the death of both is fortunately very infrequent today.

As I remarked earlier, the difficult case of conflict arising out of the problem of the prolongation of pregnancy being the danger to the mother, was in a sense the beginning of all the recent casuistry about abortion. If one divided this problem into two different classes perhaps one would begin to see clearer the issue at stake:

“*Danger of death to the mother*”: Certainly, this is the hardest case of them all. What this means in practical terms is that if the pregnancy is permitted to continue, then the mother (and even the foetus) will certainly die. As indicated, this case is fortunately rare today. Nevertheless, let us suppose that it occurs. The traditional approach of the Catholic Church would be that the woman concerned try to bring pregnancy into its full term, in other words, she should do nothing to induce abortion.

However, many ethicists would not go so far in this instance. They argue that in such a case it would be better to save one life if both were about to die. Varga argues that it is better to save one life than to let both human beings die. On the other hand, the Vatican document of 1974 still maintains that even in this case, no one has the right to dispose of another’s life.

All kinds of casuistry are used to justify the counter position. For example, arguments about conflict of values and of duties, justifiable killing, and the lesser of the two evils.

*“Danger to the health of the mother”*: In this instance, there is almost general agreement among proponents of pro-life that such an argument could not justify an abortion. The argument behind this is that the value of human life could never be equally compared to the health of an individual. In other words, human life is more valuable than physical health; abortion in this case may not necessarily restore health. This implies that the life of the fetus is a greater value than the physical health of the mother. Furthermore, they also argue that most often remedies can be supplied to cure the mother’s illness in the place of abortion.

Consequently, the clear conflict of maternal and fetus’s lives is not the controversial issue of the current abortion debate. Most abortions as a matter of fact, are performed not to save the life of the mother but to obtain some other human value that is opposed in some way to pregnancy. Therefore, the truly practical and pressing problem is not the tiny proportion of cases in which the mother’s life is in jeopardy.

Next there is the *‘mental health clause,’* under this condition, abortions are legally permitted when the prolongation of pregnancy only aggravates a mother’s mental condition and could eventually lead to a complete nervous breakdown. Notably, requests for abortion on these psychological grounds are on the increase today. Against this view, advocates of pro-life argue that abortion is by no means a cure for a psychiatric disorder or disease. They further argue that psychoses initiated by pregnancy rarely persist.

Contrarily, there is good medical evidence to suggest that serious mental disorders arise following abortion, especially in women with previous psychiatric problems. Instead of curing them, abortion has worsened their condition. In other words, most pro-life psychiatrists and clinical psychologists maintain that abortion causes more *deep-seated guilt, depression* and *mental illness* than it ever cures. Perhaps it needs to be noted that most pregnant women do suffer a certain amount of emotional stress (*i.e. Anxiety State*) during and sometimes after pregnancy, this is a perfectly natural or normal phenomenon.

Pro-abortion lobbies propose to kill a human being in abortion as a means of solving the mother’s social problem(s). This is absurd to say the least. If terminating pregnancy in order

to solve the woman's social problem(s) is a logical conclusion we can arrive at, then we are faced with another ethical question: What is the value of human life? Can we destroy one human life to solve the social problem of another?

## 7.2 Genetic Facts

The argument used in this instance is that the child to be born will be abnormal. Therefore, termination of pregnancy may be carried out if there is a risk that the child, if born, would suffer serious physical or mental handicap. Besides genetic defects (such as Down syndrome, mongolism etc) drug addiction presents problems for the unborn, for example, drug Thalidomide, alcohol, smoking etc. Other malformation like '*spina bifida*' results from other causes even accidents.

Diagnosis can be made during pregnancy whereby certain abnormalities can be detected. One of these is *amniocentesis* (antenatal diagnosis), which does take some time for full detailed examination. Another is ultrasound scanning and fetoscopy. There are those who argue that in such cases, abortion would be eugenic for the unborn child and for society in general. Despite these abortions the situation has not changed, we are nor nearer a purified race than before. There is neither a reduction in, nor the total elimination of, malformed humans.

Nevertheless, what is significant is that an increasing number of diseases in question can be successfully treated after the child is born and sometimes even in the womb. The proponents of '*Pro-Life*' argue that the medical profession is for the care of the sick and not for their destruction. Pro-Lifers also argue, that there have been tremendous advances in the medical care and education of the handicapped. On the other hand, distaste for deformity may be inadequacy in all of us but it cannot be used as an excuse to get rid of undesirables. Abortion is very often a way of despair, a negative reactionary solution to a problem that can be handled differently, indeed an '*easy way out*.'

There is no way of calculating the amount of consolation that has been brought to parents and medical people in reward for the stress of caring for the handicapped. One of my

classmates in the M. Phil program Dr. Willie Pienaar<sup>11</sup> strongly maintains that if we keep the *handicapped* at the centre of our lives, treasure them and recognise with gratitude how much they mean to us, we will end by realising that they in fact enrich us.

Looked at from another point of view, abortion can be a sign of disappointment and shame, unwillingness to accept suffering and a burden, a denial of truth and love. This type of abortion is not being performed for the sake of the fetus but for adults who are unwilling and unprepared to cope with imperfect human life. This is certainly not therapeutic for the unborn.

### 7.3 Conclusion

In the long run, abortion may create more problems than it is purported to solve. According to the sanctity of life school, the fetus is a human person and has a right to life equal to that of any other human person including that of the mother. To declare some people more or less human than others is to initiate a *policy of discrimination* based on what is important in human life (self-awareness, sociability, rationality) and not on the fact of human life itself. This school of thought also emphasises the obligation of others to protect, defend and develop this right to life.

The disapproval of abortion should go together with the removal of the causes of it; society must work to remedy and remove those circumstances, which make people have recourse to abortion. This obligation lies first, with the parents, the value of motherhood and fatherhood demand this and they have an obligation to protect the life they have propagated. Nevertheless, there would always be people who cannot cope, without society's help. Society may at times have to step in to support certain burdensome circumstances such as housing, schooling and hospitalisation. Included in society, in a very special way, is the entire medical profession.

"*Abortion on demand*" if accepted as a principle by the medical profession, would undermine all that doctors profess concerning the importance of individuals. The moral fibre of a people can be measured by the way they treat the weak and defenceless. Abortion is

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<sup>11</sup> Dr. Willie Pienaar is a Psychiatrist at Tygerberg Hospital and currently doing a M. Phil

very often the way of despair; it is the 'easy way out' and a refusal to accept suffering in an imperfect world. The legalisation of abortion is very often society's easy way and lazy way and sinful way out of its responsibilities. However, abortion does not eliminate suffering, it may even increase it in the lives of some individuals. Some maintain that as a solution to social ills, abortion is a step on the road back to barbarism.

Having said all these things, when faced with a particular case, we ought to be careful to use the maximum prudence. We must counsel people to what is right, but we ought to try and understand their feelings and difficulties. Objectively speaking, abortion is an evil act, but how far any person is subjectively guilty is entirely a different matter.

One cannot afford to neglect the tremendous pressures on some women to procure an abortion; the psychological trauma attached to the whole business, the social climate, and the human moral impossibility. In general, one would advise the continuation of pregnancy and also, if necessary adoption. Nonetheless, one cannot demand more than certain individuals can understand or bear. In the post abortion phase, we may find ourselves in the unenviable position of helping the person to overcome unwarranted guilt complexes; they will have to be helped to accept their guilt but to transcend it in a truly sincere manner.

Much of our current problem in dealing with abortion is because of the normalcy of the fact. We live in an 'abortifacient society'. Abortion is the sign of the times in which we live. It can be demanded from numerous contemporary factors and it is these we ought to tackle:

- (a) Sexual revolution: the erotic age, in which we live tend to irresponsibility in sexual matters, permissiveness is in without any responsibility for its consequences.
- (b) The secularised society and its ideologies of freedom, pleasure, sport, hedonism, consumerism, materialism (i.e. abortion is therefore a big problem), violence.
- (c) Lack of the sense of God and the sacredness of human life.

Therefore, the Catholic Church's stance on abortion becomes credible if all possible efforts are made to eliminate the causes of the problem of abortion. Abortion should not be relied upon to relieve us of the effort of providing the proper remedy.

## **CHAPTER 8**

### **ETHICAL RELATIVISM AND ABORTION**

Ethical relativism means that there is nothing good or bad absolutely, but that all morality is relative to the individual or to the society to which one belongs. Utilitarianism talks about consequences. Consequences for whom? Obviously what may have good consequences to one person may be disastrous to another; perhaps abortion is a typical example of this scenario, what works in one part of the world may not necessarily work in another. What may benefit one society or culture may be harmful to another. It is for this reason that relativists maintain that there is no such a thing as common morality for the whole human race throughout all history, but that we must be content with a morality relative to our time and place.

#### **8.1 Viewing the TOP Bill from Contemporary Ethical Relativism Approaches**

In this section, I will critically look at these approaches with a view of making sense how a person who adopts any of these positions would react when confronted with the abortion issue. These three approaches are Emotivism, subjectivism, and situationism.

A.J. Ayer argues that all ethical statements are emotive. For him statements such as “Thou shall not...” really means, “I feel it is wrong” or “I dislike it.” Therefore, he maintains that ethical proclamations are only an expression of our imaginary feelings but not divine imperative about moral duty. This is obviously a radical relativism because on the basis of this, everything would be relative to the enormous different feelings of different individuals. According to Ayer then, if one for instance, makes a general statement and say, “Direct abortion is wrong,” this statement does not have a factual meaning, which means this statement expresses a proposition that can be either true or false (Geisler & Feinberg 1988:405).

A.J. Ayer (in Geisler & Feinberg 1988:405) argues that another person may disagree with the one who holds that direct or induced abortion is wrong, in the sense that he or she may not have the same feeling about induced abortion as the other have. Insofar as the emotive

theory is concerned therefore, it is not surprising that within the society, there are those who approve of induced abortion and others who perceive it as something evil. Given this theory, to say, “Abortion is ethically wrong,” is an equivalent of saying: “I do not approve of a direct abortion.” It therefore expresses an ethical feeling about abortion, but it is not a statement of fact. What the emotive theory is implying here is that in every case in which one would commonly be said to be making an ethical judgement, the function of the relevant word is “purely emotive” (ibid.).

Another interesting point mentioned by Ayer is that ethical judgements are used to influence the actions of others (Stevenson 1946:33). He maintains that the essential function of moral words is to *redirect* the attitudes of others so that they *accord more with our own*, supports him. Ayer concentrated on one’s expression of his or her own feelings and attitude; Stevenson on the other hand, concentrated on one’s attempt to redirect another’s feelings and attitudes. Two models are offered to help arrive at a rough approximation of what Stevenson understands by the concept “emotive.” The first model elucidates *this is good* as synonymous with *I approve of this, do so as well*, *abortion is wrong* is synonymous with *I disapprove of abortion laws or acts; do so as well*. His second model enables him to attend to ethical judgements by making use of what he calls “*persuasive definitions*.” Such definitions are utilised to redirect others’ attitudes.

### 8.1.1 Criticism of Emotivism

While the emotive theory seems convincing and attractive at first glance, it has its difficulties. First, moral discourse in Stevenson’s view has as its characteristic purpose to influence the attitudes, and not the belief of others. This is held to be the essential characteristic of moral discourse, but this purpose cannot serve to differentiate moral discourse from all other discourses. For example, radio and television commercials, advertising posters, political speeches, etc are also used to control, redirect and modify the attitudes of others. Moral discourse sometimes does have as its purpose the control, redirection, and modification of the attitudes of others. The abortion debate in particular has indicated this to be the case. However, it does not always have such a purpose.

The notion of “*emotive meaning*” is not clear. A range of uses to which meaningful statements can be put is quite distinct from the meaning of the statement; they are related but they are not the same. What makes a statement a guide to action is not some meaning over and above the factual or descriptive meaning it has. It is the assertion of the statement on specific occasion that has special meaning for or relevance to the interests, desires, or needs of the speaker or hearer or both. Emotivism does not pay sufficient attention to this distinction.

Stevenson does not attend to the formation of one’s own moral convictions but insists on influencing others to adopt one’s views. I am in a position to try to convert others to my own moral views only when I have formed views of my own. None of the uses of moral language and discourse necessary to the formation and expression of my own views and looking to my own actions is taken into account by (Stevenson 1946:33).

On the other hand, Ayer maintained that the fundamental ethical concepts like *right* and *wrong*, *good* and *evil* are unanalysable because they are mere pseudo-concepts (Geisler & Feinberg 1988:406). We have no criterion whereby we can test the validity of the judgements in which such concepts occur. The difficulty with Ayer’s argument is that he fails to realise that all basic concepts are unanalysable and indefinable, not only those of ethics. Good and *evil* or *bad*, *moral* and *immoral*, as well as ought itself are all basic concepts. Ayer attacks what he regards as ‘*subjectivism*’ in ethics. Ethical judgements state no empirically verifiable fact, that is, a fact that could be observed.

Given this, both Ayer and Stevenson recognise some connection between emotion and value, but they miss a very significant point. Our basic contact with values like **good** and **bad**, **right** and **wrong** is not first of all by way of intellectual judgement but by way of the perception of something **objective** existing in its own right apart from the observer. The goodness of the act is intrinsic to the act; it is not merely my *subjective* response to the act I observe. It is quite another matter to express one’s approval at seeing such an act done or even in doing such an act.

## 8.1.2 Subjectivism

Moral philosophers since Plato held the view that the highest ethical good is the same for everyone; insofar as one approaches moral perfection, one resembles other morally perfect individuals, (Norman 1998:24).

'*Subjectivism*' is a theory which maintains that in evaluating the morality of a human act, we take into consideration the subjective peculiarity of the agent and look at the act as conditioned by the agent's knowledge and consent, background, prejudices, emotional maturity and stability, value orientation, and other personal traits. This means that we ask whether this particular person did a right thing in this particular situation, and whether this particular act was good or bad for him or her to do in the particular circumstances. Considered this way therefore, morality is *subjective*, that is, the goodness and badness being determined by whether the act agrees with the agent's own judgement of conscience (Geisler & Feinberg 1988:406).

Existentialism is a philosophical movement or tendency, which emphasises individual existence, freedom, and choice. Perhaps the most prominent theme in existentialist writing is that of choice and of individual responsibility. According to this theory, human beings do not have a fixed nature, or essence, as other animals and plants do; each human being makes choices that create his or her own nature. Existentialists insist that personal experience and acting on one's own convictions are essential in arriving at the truth. Thus, the understanding of a situation by someone involved in that situation is superior to that of a detached, objective observer.

For the purpose of this thesis, I wish to focus on '*subjectivism*' as perceived by Jean-Paul Sartre. Sartre's atheistic existentialism involves a form of radical subjectivism in ethics. According to Sartre's formulation, existence precedes essence. For Sartre, not only is man born free, "man is also condemned to freedom" (Geisler & Feinberg 1988:406). Therefore, choice is central to human existence, and it is inescapable; even the refusal to choose is a choice. However, freedom of choice entails commitment and responsibility. For existentialists, since individuals are free to choose their own way, they must also accept the risk and responsibility of following their commitment wherever it leads.

Following this then, one may ask again, how free is the unwed pregnant mother or any pregnant woman for that matter in her decision to abort? Having said all this then, existentialists would argue that in order to determine the rightness or wrongness of abortion, it is important to assess the act in view of the underlying circumstances a particular woman finds herself. Therefore, the agent's own judgement plays an important role, in this case the woman's decision to terminate pregnancy is hers and hers alone, therefore, there must be no big deal about it.

### 8.1.3 Situationism

Situational ethics is a theory, which maintains that everything is relative to the situation, in other words, the situation is all-important. Situationists argue (and rightly so) that every situation is unique. Situational ethics is also known as '*situationism*,' developed by Joseph Fletcher and also cardinal Bernadin. Situationists are distinguished not so much by the affirmation of the situation as by the negation of universals, essences, natures, norms, standards, rules, laws, and absolutes (Geisler & Feinberg 1988:407). Insofar as situationism is concerned, the important question is: "What is the loving thing to do in this situation?"

Insofar as this theory is concerned, no act considered in its totality with all its context of surrounding circumstances can ever be repeated. Although an act may have some resemblance to other acts, it cannot be judged on its resemblance only, we must also take into account the differences that may be very crucial. Situation ethics is proposed as a middle ground between two extremes, *legalism* on the one side and *antinomianism* on the other (ibid.).

Legalism is understood as an abuse of law, making prefabrication rules and abstract prescriptions of the law into absolutes that the real human good is to be sacrificed to them. Antinomianism on the other hand, supposes no principles or maxims let alone rules and laws. It is therefore seen as promoting moral anarchy. Situationism therefore, claims to be at a proper balancing point between these extremes. Situationists' approach every decision armed with maxims and principles, but use them only as guidelines (Geisler & Feinberg 1988:407). They obtain all the goods entailed in maxims and principles but would not be bound by them. In a sense, situationism considers no principle absolute. According to this

theory, the situation alters rules. The only principle that situational ethics considers absolute is *love*. Therefore, according to Fletcher where there is love, *the end justifies the means*.

Following Fletcher's argument, direct abortion is justifiable if and only if the motive is love. If only things were that simple. Despicable crimes have been committed and are being committed in the name of love and sometimes in the name of God. Generally speaking, all abortions are said to be performed out of love. For example, one other point that constantly arises in defence for abortion is the birth of an '*abnormal child*.' From the distance, it seems loving to procure an abortion because it has been scientifically detected that the child to be born would be physically or mentally disabled. Now a question is what criteria do we use to judge the act that flows from absolute love?

## CHAPTER 9

### CASE PRESENTATION

Judith is a Catholic nurse and a pro-life therefore, opposed to direct abortion; she is a midwife at Kalafong Hospital outside Pretoria in Atteridgeville. As a young nurse she had worked in a maternity ward and assisted with abortions. She later on submitted a written document in which she stated her objection in participating or assisting in abortion procedures, stating religious convictions as a reason for refusing further involvement in abortion procedures. However, she is aware that law requires her to at least provide a pre-counselling session to those coming seeking advice, in which she would explain other options such as adoption.

One day while at work, her neighbour's daughter Ruth an eighteen years old Grade 12 pupil came into the wards, she was pregnant and wanted to terminate her pregnancy. She told Judith that she could not bring herself to inform her parents about it, because they will be devastated and was afraid that her father would expel her from home. Judith knew how risky it was for a woman to procure abortion.

She was in a dilemma because Ruth had explicitly stated that she did not want her parents who were well respected in the community to know that she was pregnant and that she had an abortion. She made an informed consent and her decision had to be respected. Judith believed that because of the risks involved Ruth parents should be informed. She also knew that if Ruth's parents can come to hear about it they would feel betrayed not only by their daughter but also by Judith. She did not know what to do, besides she is required by the professional code of ethics to maintain strict confidentiality, no matter her position regarding abortion.

On the day of the appointment, a nurse scheduled to assist at the abortion procedure could not come to work; she had an emergency telephone call to go home to KwaZulu-Natal. Judith was therefore the only nurse present who could assist in the procedure. This added to the already existing dilemma. As stated, she is a *conscientious objector* to abortion because of her religious beliefs. Nevertheless, she had long made up her mind; therefore she does not

see this as her problem. Her rights or choice as a conscientious objector needs to be respected too.

However, things are not as easy as they seem. Ruth could die and Judith will most probably feel guilt or blame herself for refusing to help in the abortion procedure. On the other hand, her nursing obligation requires that she put the interest of the patient first.

Judith maintained that she did not want to have anything to do with abortion, because when she was a newly qualified nurse, was made to work in the labour ward and coerced into assisting in abortion procedures. She maintained that as a young nurse she was never given any choice she just had to obey instructions.

Some questions come to mind. Is she ethically obliged to assist in the work she clearly indicated that it was against her religious conviction, because of the situation? Put differently, must there be exceptions in the application of conscientious objectors if there is a shortage of personnel for whatever reason? Will it be fair for conscientious objectors to be coerced into assisting in the abortion procedures when the situation so requires? Is it ethical for a conscientious objector to stand aside and become a spectator when one's life is at stake? What is the right thing to do in this situation?

Disenchanted with the pressures brought about by the abortion issue, and torn by their own ambivalent feelings some nurses are reacting. They are leaving and seeking jobs in hospitals where abortions are not performed. Abortion is emotionally demanding and draining on all who assist in the procedure, especially on nurses who are planning on having a family of their own. On the other hand, some doctors maintain that the profession has always been deeply ambivalent about being involved in matters of contraception and abortion.

The South African situation is an example. Not long ago, it was reported in the news bulletin that hospitals and clinics performing abortions in Gauteng are overcrowded, since other provinces are not doing their part.

## CHAPTER 10

### CRITIQUE OF THE SOUTH AFRICAN TOP ACT

On a positive note, it may be argued that the Termination of Pregnancy Bill allows the many women who previously were without access to abortion a right to terminate their pregnancy if they so desire under safe and legal conditions. Some women are now allowed to decide for themselves. The Act as it stands also protects women and children who are raped and consequently become pregnant. Included in this list would be the mentally retarded and the disabled women whom some individuals may take advantage of their condition.

However, there are also some negative elements associated with the introduction of the Termination of Pregnancy Act in the country. Although it is a bit too early for one to comment decisively about the implementation of the bill, there are some areas of concern regarding the new Abortion Bill. These could be summarised as follows:

To begin with we may ask whether the country is ready for such a drastic decision. For instance, it was recently reported (Sunday Times, June 4, 2000) that among all state hospitals and clinics appointed for the delivery of the abortion services, only a few are functioning and providing these procedures as expected. This means that a majority of these institutions are not providing abortions as expected by the department of health. Evidently, there is a shortage of personnel from both qualified midwives and medical practitioners who are willing to perform abortion procedures. It is for this reason that people who wish to abort go to other provinces that provide these services and those provinces complain that they are overcrowded and over worked. The Act acknowledges the human rights and the rights of the health workers to refuse participating in the abortion procedures. However, it does not say what must be done where an assigned nurse or midwife cannot assist for whatever reason, and the only available nurse is a conscientious objector.

According to the Termination of Pregnancy Act, a girl under the age of 18 would only present herself for abortion after a written consent of her parents. However, if we look deep into this, realistically abortion is performed on girls under the specified age. Again it is for such reasons that pregnant girls under the age of 18 would initially go to back street job and only go to the hospital because they are experiencing some problems.

The present situation of teenage pregnancies, illegitimate children and sexual transmitted diseases, and most importantly HIV/AIDS that now afflict the youth, unmarried and sexually active persons in the country is a serious problem. Nowadays, in South Africa abortion seem to be equated with contraceptive failure and it is considered as contraception in itself. For instance the use of the Intra uterine contraceptive device and the post coital pill, which may destroys the already fertilised ova. The abortion services in other words, forms part of the so-called Planned Parenthood or birth control in that they are used to provide a 'safety net' for contraceptive failures.

After the new bill was adopted, Van Niekerk (1996) argued that further stipulations in the proposed bill are:

- ❖ That the pregnant woman is under no obligation to seek permission from the father of the fetus for the abortion (that is; the father has no say) (article 6.1). However, that does not mean that the father should not discuss it with the pregnant women. The reality is that many fathers abscond, as soon the woman is pregnant.
- ❖ That in the case of a minor, the doctor has to advise the woman to consult with her parents, family or friends, but that the abortion may not be refused should she choose not to do so (article 6. 2).
- ❖ Furthermore, he argued that the above points would cause this bill to be one of the most liberal abortion bills in the world if accepted by Parliament in its current form.

Van Niekerk (1996) went on to compare the bill with that of Britain where it is still an issue whether doctors should consult with parents before making prophylactics available to minors. Our bill will therefore be more liberal as doctors are not to consult parents before they perform the abortion. The women as being denied access to abortion can take consulting the parents. Doing this, doctors can be found guilty and be given a fine and or up to 10 years imprisonment (article 11b)

## 10.1 Conclusion

The liberal South African Termination of Pregnancy Act was introduced towards the end of 1996 and promulgated in February 1997. On one hand, this was viewed as victory by feminist groups and pro-choice. On the other hand, the government's decision to legalise 'abortion on demand' was criticised by among others some religious groups ranging from the mainline churches, especially the Catholic Church, Moslems and Judaism pro-lifers etc. These groups argued that a pregnant woman's right for choice could not be extended to intentional killing of her unborn child, who also has the right to life that is the fundamental human right. However, objections to the introduction of the law have to a great extent faded, and women now have the choice to have a termination of pregnancy.

Abortion was in this thesis defined as the termination of pregnancy before viability. It was also explained that termination of pregnancy could occur in two different ways namely:

1. Induced abortion and
2. Spontaneous termination of pregnancy or miscarriage.

I went on to explain that induced abortion could either be direct or indirect. A direct abortion is performed with one intention that is the termination of pregnancy with the aim of expelling the fetus before viability for many different reasons ranging from socio-economic, psychological and medical reasons. According to some ethicists, direct abortion cannot be justified. Indirect abortion happens when the intention is not to directly abort the unborn baby, but such incident happens where the intention is to save the mother's life. A good example of such an incident would be the principle of double effect, or the doctrine of double effect, abbreviated DDE. Therefore, the doctrine of double effect does not 'solve' anything.

Different views were shared about what people understand by the concept *personhood*. Much of the arguments on abortion are based on the premise that the foetus is a person and that its moral status carries as much weight as that of an adult. I also explained that there are as different interpretations and opinions as there are schools of thought on when does human life begin. Others hold a view that life begins at conception while other groups maintain that

life begins at birth. I went on to argue that the reasonable conclusion we can arrive at, as to exactly when does human life begins is a mystery, or it is beyond our human grasp.

Arguments for and against abortion were outlined and criticised. I pointed out that the abortion issue is not an easy one it does not have easy answers. Unfortunately, what is going on in the two polarised positions that characterise the abortion debate, is that each side finds the other's reasoning and argument unacceptable. According to the article on the *Demography and social profile of women requesting termination of pregnancy in King Edward Hospital*, access to termination of unwanted pregnancies among all social classes of women in South Africa has improved, thus resulting in less maternal deaths from 'illegal' ones.

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