

Unpacking the legality of termination of pregnancy based on 'social grounds' under South African law

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The topic of abortion was in the limelight again in *Dobbs v Jackson*, where the US Supreme Court overturned the decision of *Roe v Wade*, 'which guaranteed women and pregnant people a constitutional right to abortion'. While not bound by the judgment, this gives us an opportunity to reflect on the current law in South Africa which regulates the termination of pregnancy. The primary piece of legislation which governs abortion is the Choice on Termination of Pregnancy Act. Section 2 of the Act lists the grounds under which one may lawfully terminate a pregnancy. One of those grounds relates to the period of the 13th up until the 20th week of the gestation period, and states that if a medical practitioner, after consultation with the pregnant woman, is of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the woman, then the pregnancy may be lawfully terminated. The question is: What exactly is meant by 'social grounds'? This article considers this aspect from a legal perspective and attempts to provide clarity on the issue, in the hope that this will be of assistance to medical practitioners who are concerned about the outcome of their actions, when assisting persons in this position.

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Termination of pregnancy is a complex and sensitive issue.^[1] South African (SA) law clearly affords women the right to terminate their pregnancy provided it is done in accordance with the provisions of the Choice on Termination of Pregnancy Act (hereafter referred to as the Choice Act).^[2] The Choice Act gives effect to the rights contained in the Constitution of the Republic of South Africa^[3] (hereafter referred to as the Constitution) which states that: 'everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction.'^[4] Despite challenges to the constitutionality of the legislation, it is clear that this right is expressly provided for and protected accordingly.^[5] The topic of abortion was brought to the fore again in *Dobbs v Jackson*, where the US Supreme Court overturned the decision of *Roe v Wade*, 'which guaranteed women and pregnant people a constitutional right to abortion'.^[6] While SA law is not bound (or necessarily influenced) by decisions of foreign courts, it presents an opportunity to reflect on our legislation. With that said, the Constitution does make provision for considering foreign law, promoting values which are based on based on 'human dignity, equality and freedom'.^[7] This article does not attempt to reopen the debate of whether termination of pregnancy is legal or not in SA, the above legislation and case law conclusively demonstrates that it is. Using this as a point of departure, certain sections of the Choice Act will be examined in order to fully understand under what circumstances a termination of pregnancy is allowed. Most of the provisions of the Choice Act are relatively straightforward and extensively documented.^[8] The focus will be on one particular provision of the Choice Act, namely the decision to terminate a pregnancy based on 'social grounds'.^[9] The article will look at the

broad framework in SA with regard to termination of pregnancy in general; thereafter it will focus on the provisions of the Choice Act, specifically the provisions of Section 2 of the Choice Act, particularly the one which states that a pregnancy may be terminated if the continued pregnancy would significantly affect the woman's social or economic circumstances. This will primarily be viewed through a legal lens making use of the accepted methods of interpreting law, namely the literal rule, golden rule and intentionalism. While the Section makes reference to both economic and social grounds, the focus will be squarely on social grounds as the former is relatively straightforward and does not require further discussion for purposes of this article.

Legal framework regulating termination of pregnancy

The first port of call when dealing with most legal issues is the Constitution. The Constitution is the supreme law of the land and any act or conduct that is inconsistent with the Constitution is unlawful and must be set aside.^[10] There are various rights contained in the Constitution which are applicable in one way or another when dealing with the issue of termination of pregnancy. These include: Section 12 – the right to bodily and psychological integrity, including to make decisions about reproduction; security in and control over the body; and not to be subjected to medical or scientific experiments without informed consent; Section 27 – the right to access to healthcare, including the right not be refused emergency medical treatment; Section 9 – the right to equality (and be free from discrimination); Section 10 – the right to be treated with dignity; and Section 11 which provides for the right to life.

It is also important to consider the National Health Act^[11] which states that one of the objectives of the Act is to protect, respect, promote and fulfil the rights of the people of the country such that progressive realisation of the right of access to health care services as provided for in the Constitution, including reproductive health care is achieved.^[12]

The current piece of legislation which expressly governs abortions is the Choice Act.^[2] Prior to this abortion was allowed under SA law but regulated in terms of the Abortion and Sterilisation Act^[13] (hereafter referred to as the Abortion Act). The Abortion Act was repealed by the Choice Act. There is a school of thought that suggests that the Abortion Act was better than the Choice Act in some respects; however, it is outside the ambit of this article to consider this aspect.^[14]

Choice on Termination of Pregnancy Act^[2]

The Choice Act came into effect in 1996 and its preamble talks about various aspects including 'recognising the values of human dignity, equality, 'security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa.' It also recognises that the Constitution protects the rights to make decisions about reproduction, including security in and control over one's body. It goes on to say that persons have the 'right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and that women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth'. The preamble also states that that the decision to have children is integral to women's physical health and that they should have access to reproductive healthcare services including termination of pregnancy. It is important to note that the State is also responsible for providing reproductive health to all, and also 'to provide safe conditions under which the right of choice can be exercised without fear or harm'.

This provides the context in terms of which the Choice Act is to be read, and must be borne in mind at all times. We then need to consider the circumstances when a termination of pregnancy may be performed. For this we look at Section 2 which reads as follows:

- '(1) A pregnancy may be terminated -
- (a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
 - (b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that -
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
 - (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy -
 - (i) would endanger the woman's life;
 - (ii) would result in a severe malformation of the fetus; or
 - (iii) would pose a risk of injury to the fetus.'

Conditions for the first 12 weeks are clear. A female of any age may for any reason request a termination of pregnancy. From the 13th up to and including the 20th week, the following must be present: (i) risk of injury to the woman's physical or mental health – this is relatively straightforward and can be assessed by a medical practitioner; (ii) substantial risk that the fetus would suffer from a severe mental abnormality – again this can be assessed by a medical practitioner; (iii) the pregnancy resulted from rape or incest – this information can be obtained from the person who wishes to undergo a termination of pregnancy; and (iv) the woman's social or economic circumstances would be significantly affected. This aspect requires further exploration to fully understand its meaning. After the 20th week, the factors are relatively straightforward and the determination will be made by two medical practitioners after consultation with each other, or a medical practitioner after consultation with a registered midwife.

What is meant by 'social circumstances' of the woman?

In order to answer the question of what is meant by 'the continued pregnancy would significantly affect the social or economic circumstances of the woman' we need to make use of the methods of interpreting law. As mentioned above, the focus will be exclusively on 'social grounds' even though the section makes reference to economic grounds as well. There are several theories that can be utilised in this regard. It is outside the scope of this article to consider every mechanism related to interpreting law; therefore, the main theories will be considered, namely literalism,^[15] the golden rule^[16] and intentionalism.^[17]

Literalism is perhaps the most straight forward of the theories, it holds that 'the meaning of a statutory provision can (and must) be retrieved from the "*ipsissima verba*" in which it is couched, regardless of manifestly unjust or even absurd consequences.'^[18] *Ipsissima verba* means the precise words used.

The golden rule states that there should be adherence to the 'plain words' of an Act lest this result in an absurdity or a situation which the legislature did not intend.^[15] Therefore, if the interpretation results in an absurdity or something contrary to the will of the legislature, a court may, in order to give 'true effect to the intention of the legislature', depart from the literal meaning.^[19] The discussion on the mechanisms employed when utilising the golden rule can be quite lengthy. For the purposes of this paper, with the primary audience envisaged to be medical practitioners tasked with making a determination regarding abortion, I will be succinct and conclude the point making reference to a judgment that Du Plessis^[20] refers to, namely *Powsa v Member of the Executive Council for Economic Affairs, Environmentalism and Tourism, Eastern Cape*,^[21] where it was held that: 'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as whole a court of law is satisfied that the legislature could not have intended.'

The last of the selected theories to be explored is that of intentionalism. In essence, one is trying to ascertain what the real intention of the legislature is, and once this is identified, it must be

followed.^[21] Du Plessis, in unpacking what is meant by the intention of the legislature highlights three aspects, namely: (i) the express instruction of the law maker; (ii) the thoughts or ideas giving rise to the text; and (iii) 'the effect-directedness or operational efficacy of enacted law'.^[22]

Applying the literalism criteria, we are to give the words used by the legislature their ordinary grammatical meaning. For this purpose we look at the dictionary meaning^[23] of 'social', which according to the *Oxford Dictionary* is 'activities with others'.^[24] This is of course a very broad description and could cover anything from an inability to work, or access places of education or even attend specific events.

When applying the literal rule, any of the circumstances mentioned above and any other activities falling under the ambit of 'activities with others' will suffice as social grounds.

With regard to the golden rule, we use the definition outlined above and consider whether this results in an absurdity or if it is contrary to what was intended by the legislature. Let us consider two examples here. Firstly, a 15-year-old girl from a rural area who is unable to attend school as a result of her pregnancy, and secondly, a wealthy woman will not be able to participate in a ski event in Switzerland and fears being ostracised by her friends for failure to attend. It can be argued that either of these situations significantly affects the woman's social circumstances. One may argue that the former situation falls within the ambit of what is acceptable, and that the latter is perhaps absurd. But is it really absurd? The language of the legislature specifically says 'affects a woman's social circumstances'. Would it not be a violation of the latter's right to equality as provided for in terms of the Constitution^[25] if the school-going girl was allowed to legally terminate her pregnancy and the wealthy woman was denied this? Applying the golden rule does not necessarily provide a clear-cut answer, and we would perhaps require the assistance of the judiciary to set a precedent outlining a way forward.

The last theory that could assist with the issue is that of intentionalism. Here we strive to determine what the intention of the legislature was. Before proceeding, we have to bear in mind that all methods of interpretation are subject to the Constitution. Section 27 of the Constitution is clear – everyone has the right to have access to healthcare services, including reproductive healthcare. The preamble of the Choice Act states that it recognises that the Constitution protects the rights of persons to make decisions concerning reproduction and to security in and control over their bodies; that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and termination of pregnancy; and that the State has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm. It is clear that the reason that the Choice Act was promulgated was to give effect to the right to reproductive healthcare as provided for in terms of the Constitution. This can be seen as a means of empowering women to make decisions concerning their bodies rather than a restrictive approach. Based on this, it would seem that the intention was to provide women with an option to terminate based on any reason (during the 13th up until the 20th week of the gestation period) that would significantly affect their social circumstances. In light of this, a more generous interpretation, which caters for all instances which fall under the ambit of affecting activities with others, seems to be the preferred approach.

Conclusion

Termination of pregnancy is a controversial and complex topic. The right to terminate a pregnancy is specifically provided for in terms of SA law. It has its roots in the Constitution and is regulated by the Choice Act. Most of the provisions of Section 2 of the Choice Act (which contain the conditions under which a termination may be legally performed) are relatively straightforward and are well documented. However, one of the grounds listed in the section, namely the ability to terminate a pregnancy if it would significantly affect a woman's social status (from the 13th up until the 20th week of the gestation period) has not been explored in much detail. A medical practitioner might be placed in a difficult situation when attempting to make a decision to terminate a pregnancy based on such grounds. This article attempts to provide some guidance in these situations by highlighting the methods used to interpret law in SA, namely literalism, the golden rule and intentionalism. When applying both literalism and intentionalism it would seem that any reason that would significantly affect a woman's social circumstances, including the example provided earlier in the article, would suffice, if it would affect her activities with others. Application of the golden rule, depending on the particular factual matrix, in relation to the section could potentially give rise to a problematic scenario in terms of what one would consider to be an absurdity. Ultimately our courts will be tasked with making such determination should litigation regarding the matter arise.

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