

A Critique of Selective Abortion in Lesotho

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Abstract

Under the Penal Code Act of 2010 in Lesotho, abortion is considered as an offense against a person. This article normatively argues that the two clauses in the Penal Code that allow selective abortion to take place in Lesotho commit the fallacy of inconsistency because it treats the fetus which is regarded as a person differently from a born baby. In that Penal Code, it is allowed to terminate the life of a healthy person (fetus) if it poses harm to the life of the mother or to terminate its life if it is severely mentally disabled or physically deformed. As a matter of fact, this law allows the worse treatment of a disabled unborn person than the already born disabled person for whom when killed is regarded as murder. It is concluded that if the fetus and the born baby are regarded as persons, then they are both the bearers of moral status and they should be treated equally with dignity.

Keywords

Abortion, Moral Status, Offence, Person, Severely Mentally Disabled

1. Introduction

The practice of abortion raises very complex debate because some scholars argue that women should be free to control their bodies and abort whenever they do not want to keep the child. Others find this view to be against the sanctity of human life. “Abortion is the spontaneous or medically induced termination of a pregnancy” (McQuoid-Mason & Dada, 2011: p. 2). In South Africa, the medically induced termination of a pregnancy is governed by the Choice on Termination of Pregnancy Act, 1996 (Act 92 Of 1996). This article is in two parts, the first part discusses the two clauses in the Penal Code of Lesotho that allows selective abortion to be performed. The second part critically discusses the need for informed consent from the pregnant parent before abortion can be performed because as the Penal Code is concerned, there is no concurrence of the parent.

A maternal foetal conflict is a vexing issue in medicine because there are hard times situations where two

lives cannot be saved. As a matter of fact, there are countries that have legalized abortion, while other countries allow only the practice of selective abortion under extra ordinary cases. In Lesotho for instance, abortion is allowed if pregnancy occurs out of rape, if the fetus is severely mentally disabled, or if the fetus poses harm to the life of the mother. In these cases, the right of a woman to exercise her autonomy and choose to terminate pregnancy overrides the right to life of a fetus.

Moreover, in this article, it is argued that the Penal Code of Lesotho clause that allows selective abortion is logically inconsistent because it considers a fetus as a person but at the same time it allows the same person (fetus) to be killed if it poses harm to the mother's life even if the person (fetus) is not abnormal. It is argued that the fetus as a person in Lesotho Penal Code Act of 2010 is not treated equally with the born persons. The other controversial part regarding this Penal Code of Lesotho is that it does not stipulate the gestational period which allows abortion to be performed. This leaves a vacuum that abortion can be performed at any gestational period as long as it poses harm to the life of the mother or if the fetus is severely mental and physically disabled. Thus, it is concluded that all persons should be treated equally because they all possess moral status, and no persons should be discriminated because of their disability.

2. The Penal Code of Lesotho on Abortion

In Lesotho, the moral permissibility of selective abortion is regarded as an exception to the general rule of moral impermissibility on abortion. In particular, this article considers whether justifications for this practice amount to, or perpetuate discrimination on the basis of the characteristics of disability, as selective abortion entails choosing against a particular fetus because of its characteristics. In the Penal Code Act, 2010, s45 (2), it is stated clearly that it shall be a defense to a charge under this section that the act intended to terminate pregnancy was performed by a registered medical practitioner:

a) In order to prevent significant harm to the health of the pregnant female person, and the person performing the act has obtained a written opinion from another registered medical practitioner to the effect that the termination of pregnancy is necessary to avoid significant harm to the health of the pregnant female person.

b) In order to prevent the birth of a child who will be seriously physically or mentally handicapped and the person performing the act has obtained in advance from another registered medical practitioner a certificate to the effect that the termination of the pregnancy is necessary to avoid the birth of a seriously physically or mentally handicapped child (Lesotho Penal Code Act, 2010, s45 (2)).

It is only the above sections that allow selective abortion to be performed in Lesotho, but unfortunately these clauses do not stipulate any regulation of the gestational period that allows abortion to be performed. This lack of regulation leaves a room for the health care workers to perform abortion at any gestational period if ever they believe the fetus poses harm to the mother. It is, however, argued that it is a lesser evil to abort during the first 3 - 4 weeks of pregnancy because the embryo has not acquired its basic form, but doing abortion after 13 weeks will be immoral because it is exactly similar from murdering a born child because during this period the fetus "is about 6.7 cm long from crown to rump. It weighs about 23 g and is fully formed. The fetus has begun swallowing and kicking, all its organs and muscles have formed and are beginning to function" (Kneisl, Wilson, & Trigoboff, 2004: p. 85). In addition, while abortion is regarded as an offence against a person, the same person (fetus) is allowed to be killed in order to save the life of the mother or to be killed if it is physically or mentally handicapped. To my mind, this act results into an unfair and unequal treatment to all persons because if a severely mentally handicapped child can be killed, that act is classified under murder and it is an offence to end its life. Thus, there seems to be a lack of equal consideration between the fetus and a child whereas they are all called persons under the Penal Code of Lesotho. This inconsistency of equal treatment suggests that the Penal Code Act, 2010 in Lesotho perceive other persons' lives in a hierarchical rank. For example, killing a fetus is seen as a lesser evil than killing a child. Through the lens of the moral principle of categorical imperative, it is stated that: "persons should not be used as the means, but always be treated as ends into themselves" (Rachels, 2007: p. 131). This means that the value of a person is inalienable and it can never be used as mere instruments. If the fetus is regarded as a person under the Penal Code of Lesotho, then it is immoral to treat it differently from other persons.

However, it should be understood that a person's life is sacrosanct regardless of mental or physical state, and their human dignity needs to be respected at all stages of human life. The conservative opponents of abortion

argue that “a human being exists from the time of conception and has the same right to life as any other human” (Glannon, 2005: p. 73). Moreover, the Constitution of Lesotho, 5 (1) states that “every human being has an inherent right to life. No one shall be arbitrarily deprived of his life”. The Constitution of Lesotho 1993, 18 (3) also states as follows:

The expression “discriminatory” means affording different treatment to different persons attributed wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such descriptions are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The two previously discussed clauses that allow selective abortion to be performed in Lesotho on the person (fetus) due to its physical deformation or mentally handicapped, perpetually violate the demands of the Constitution which has clearly stated that every person has an inherent right to life, and no persons due to disability shall be accorded privileges or advantages which are not accorded to persons of another such description. A typical example of discriminatory treatment is whereby a fetus as a person can be killed, whereas an infant cannot under any circumstance be killed even if it severely mentally handicapped and physically deformed. Both of these individuals are regarded as persons under the Penal Code Act of Lesotho, but surprisingly these two persons are treated differently with privileges that do not apply to the other person (fetus).

The South African Constitution on Abortion

The South African position on abortion is completely different from that of Lesotho. In South Africa, unborn fetus does not have any constitutional or legal rights until it is born alive. So a court action cannot be instituted on behalf of a fetus to prevent it from being aborted (*Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (t)). This statement can be understood clearly in the *Mshumpa* case of the Eastern Cape Division of the High Court that had to deal with the topic of third-party fetus violence that terminates prenatal life. The two accused, *Mshumpa and Best*, plotted to have Best’s pregnant girlfriend, Shelver, shot on the stomach under the guise of a hijacker’s deed (*S v Mshumpa* 2008 1 SACR 126 (E) 134E). In accordance with the plan, *Mshumpa* shot Shelver on the stomach twice, causing the stillbirth of her thirty-eight-week-old fetus. Both accused were charged with the murder of the fetus and the attempted murder of Shelver (*S v Mshumpa* 2008 1 SACR 126 (E) 134B). The state argued that the court should give effect to medical reality and community convictions and extend the crime of murder to include a fetus (*S v Mshumpa* 2008 1 SACR 126 (E) 149A).

The court found that the intentional killing of a fetus does not fall within the scope of the definition of murder, as the person being killed has to have been born alive (*S v Mshumpa* 2008 1 SACR 126 (E) 149A). The principles of legality found in section 35 (3) (1) of the Constitution of South Africa prevented the court from extending the definition of murder to include the killing of a fetus, and the court was not prepared to make a prospective declaration of a new or extended crime, as this task was best suited to the legislature (*S v Mshumpa* 2008 1 SACR 126 (E) 152E).

In addition, as Cronje and Heaton put it; a natural person’s legal personality begins at birth. The birth must be fully completed, that is, there must be a complete separation between the body of the mother and the fetus... The child must be alive after the separation even if only for a short period. Legal personality is not obtained by a stillborn fetus or a fetus which dies during birth (Cronje & Bernard, *The South African Law on Persons and Family Law*, 1994). This view of the unborn child’s total lack of legal personhood was fully supported by the Appellate Division in the *van Heerden v Joubert* case (*Van Heerden v Joubert* (1994) ZASCA 101 (4) SA 793 (AD)). It was ruled that an inquest could not be used to investigate the death of a stillborn child, since that child was not a legal person, and inquests could only be conducted after the death of legal persons.

The Choice Act promotes a woman’s right to freedom and security of her body by affording her the right to choose to terminate her pregnancy safely, and that the woman concerned is in the best position to make that decision; hence only her consent is needed (O’Sullivan “Reproductive Rights” 37 - 18). The position of the law is that any woman above 12 years can effectively terminate her pregnancy without the consent of the parents and no health professional can bar that resolution. The Lesotho Penal Code of 2010 is very clear regarding the prohibition of abortion except in selective cases. The remaining problem regarding this Penal Code is its inconsistency in treating all persons equally. This failure seems to consider other persons’ lives like the fetus to be less prior to other persons’ lives like those of infants whose lives can never be ended even if it be severely mentally

handicapped or physically deformed.

3. The Principle of Double Effect in Abortion

The principle of double effect is one of the controversial principles in medical ethics, but many ethicists and healthcare professionals use it to justify the effects of their actions. This principle draws a line of distinction between an intended effects and foreseen effects. “An intention is a commitment to bring about an event in a certain way. Motives help to explain why one has an intention” (Sulmasy, 1996: p. 88). The principle of double effect allows one, in conflict situations to violate one moral rule in order not to violate another. There are conditions set to limit the evil that may justifiably be done in quest of the good. They may be expressed as follows:

- 1) *The act done must be ethically good or at least ethically indifferent in itself, that is, it must not be evil from its object.*
- 2) *The bad effect must not be intended as an end in itself.*
- 3) *The good effect must not come about by means of the bad effect. Otherwise one would be using a bad means to a good end, which is never lawful (Beauchamp & Childress, 2001: p. 128).*

According to Beauchamp & Childress (2001: p. 128) there must be a proportionate reason for causing the harm, that is, the good effect must be equal to or predominate over the bad effect. Since abortion refers to the medically induced termination of a pregnancy, this however connotes that there must be somebody doing the action with the intention of ending the life of the other person (fetus). The first clause in the Penal Code of Lesotho that allows selective abortion to be performed in Lesotho violates conditions 1 and 2 of the principle of double effect. This clause states that:

- a) *In order to prevent significant harm to the health of the pregnant female person, and the person performing the act has obtained a written opinion from another registered medical practitioner to the effect that the termination of pregnancy is necessary to avoid significant harm to the health of the pregnant female person (Lesotho Penal Code, 2010 s45 (2)).*

The above clause is very vague because the prevention to significant harm is not well explained, that is, any disease can be regarded as a significant harm to the pregnant woman. This lack of clarity leaves room for abortion to be an option for the healthcare professionals to do abortion on pregnant women deemed to be at risk from of a potentially fatal condition, for example, heart disease, which would be lessened by the termination of the pregnancy. It is argued in this article that this example and the above clause that allows selective abortion to be performed are not morally justifiable because in such cases the death of the fetus as a person is directly intended precisely as the means of saving the mother’s life. It is morally bad to do evil in order that good may result from it. The action of killing the fetus (person) because one says it poses risk to the life of the mother has nothing to do with the concept of foreseen effects but it is an action that is intended directly to end the life of the fetus with the aim of saving the life of the mother. Thus, if ever the Penal Code of Lesotho is adamant to call the fetus a person, but at the same time allows the fetus as a person to be used as the means for the sake of saving the life of the mother, then this implies that in Lesotho the personhood of the fetus is less prior to the personhood of a born person. Therefore, calling the fetus a person is actually a mask that conceals this hierarchy of personhood.

It is, however, acknowledged in this article that there are other extra ordinary cases where abortion can be done as a foreseen effect. Such a case may be where a pregnant woman has an ectopic pregnancy which will result into the operation that will end up affecting the fetus indirectly because ectopic pregnancies implant in one of the fallopian tubes. On the other hand, this article rejects abortion that is done intentionally in order to save the life of the mother because this action fails to accord equal consideration between the fetus as a person and a born person. For instance, a severely mentally disabled and physically deformed born baby will never be killed, but the fetus even though it is called a person in Lesotho can be killed if it poses harm to the mother even if it is normal.

4. The Need for Informed Consent for Pregnant Women during Abortion

The second part of this article discusses the importance of the notion of informed consent which is not completely entailed in the clauses of the Penal Code of Lesotho that allow the practice of selective abortion in Lesotho. Patient’s autonomy is cardinal for decision making in modern medical practice, because in medicine, ethics

and law, it has been established that a competent patient has the right to choose or refuse medical treatment. It is often not problematic when the patients' request coincides with the clinical prescriptions, but this becomes problematic and reaches a boiling point when a patient's requests comes into direct conflict with the medical opinion's expertise. The rights of patients to neither refuse nor accept treatment are often stipulated or defined in many Constitutions and Patients' Rights Charter.

In the Penal Code, Act of 2010, s45 (2), the previously discussed clauses a) and b) that allow selective abortion to be performed in Lesotho, only discuss the concurrence from another registered medical practitioner and do not say anything about the consent of the pregnant woman. This section states that:

It shall be a defense to a charge under this section that the act intended to terminate pregnancy was performed by a registered medical practitioner, and the person performing the act has obtained a written opinion from another registered medical practitioner to the effect that the termination of pregnancy is necessary to avoid significant harm to the pregnant female person or to the fetus (Penal Code of Lesotho, Act of 2010, s45 (2)).

Here, the text provides no room for informed consent from the pregnant mother, but all the responsibility is based on the health care professionals. This section denies mentally capacitated pregnant women a chance to exercise their informed consent and autonomy. The focus is only on the decision by health care professionals as if all pregnant women are mentally incapacitated. It is a clear case that during emergency, no one would be denied a treatment, and such people may be helped without any consent because any further delay may pose more harm to such patients. On the other hand, it's a different case altogether to deny a mentally competent patient the right to exercise her consent before abortion can be performed. Informed consent is "an individual's autonomous authorization of a medical intervention or of participation in research" (Beauchamp & Childress, 2001: p. 78). In addition, Glannon argues that the doctrine of informed consent consists of two components:

- *The first component is the doctor's disclosure of medical information to the patient. This includes diagnosis, prognosis, available and alternative treatments, and the risks, benefits, and consequences of having or refusing treatment.*
- *The second component is the competent patient, who decides whether to accept or forego treatment on the basis of this information. A competent patient is one who understands the nature of his or her condition and the consequences of accepting or refusing an intervention for it (Glannon, 2005: p. 24).*

The lack of informed consent by pregnant women during selective abortion in Lesotho violates both the demands of the Constitution and the Patients' Right Charter. The Constitution of Lesotho provides that:

Every person shall be entitled to, and (without with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (The Constitution of Lesotho 1993, section 14, s(1)).

In the light of the above, the Lesotho Patients' Rights Charter also states that "patients have a right to give informed consent" (Lesotho Patients' Rights Charter); and it is clear that this Penal Code is acting contrary to what is expected to be done during the performance of any medical operation/treatment; namely by granting everyone the capacity to act and reflect intentionally with understanding and without controlling influences that would contradict against a free and voluntary act. This means that, to respect an autonomous agent is to recognize that person's right to make autonomous choices and take deeds that are based on that person's own principles and values and belief system. Currie & Waal argue that "the legal requirement of explicit consent before specific treatment protects the legal right of patients to control what is done to their own bodies. Bodily intrusions without consent constitute an illegal battery" (Currie & Waal, 2005: p. 275). Besides, patients' preferences are legally significant because all persons have a fundamental right to control their own body and the right to be protected from unwanted intrusions or unconsented touching. Therefore, failure to provide patients with an opportunity to informed consent simultaneously fails to treat them with respect as persons and fails to accord them their dignity.

5. Concluding Remarks

There is a dire need for the Parliament of Lesotho to revisit its Penal Code sections on abortion. The committed

fallacy of inconsistency of calling the fetus a person and the failure to treat it equally with other persons shows that there is a hierarchical ranking of persons. This boils down to the fact that other persons' lives (fetus) are perceived as less valuable than other persons to such an extent that their lives can be terminated in order to save the life of the mother even in cases where the fetus' health is normal. In the contemporary world, medical practice has moved from paternalistic approaches to the point whereby patients are given enough time and conducive environment to make their medical preferences. Buchanan & Brock argue that "informed consent in medicine requires free and informed consent of a competent patient to medical procedures that are to be performed" (Buchanan & Brock, 1986: p. 26). This entails the idea of shared decision-making where patients decide in collaboration with the health-care professionals about health-care in ways that satisfy the patient's aims and needs. It should be taken into consideration here that, even though the patient decides in collaboration with the health-care workers, but at the end of the day, the preferences that are going to be carried out or implemented are the ones made by the patients. These choices should be made by patients based on the information that has been provided by healthcare professionals, as well as by the patient's own experience, beliefs and values. It is safe for me to argue that when there are medical indications for treatment, health-care workers are duty-bound to propose a treatment plan that patients may accept or refuse. Hence, the clauses on abortion in the Penal Code of Lesotho should be revised in such a way that they can allow pregnant women to have a chance for informed consent.

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