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Are the restrictive provisions of sections 2(1)(c) and 5(5)(b) of the *Choice on Termination of Pregnancy Act 92 of 1996* unconstitutional?

Summary

Sections 2(1)(c) and 5(5)(b) of the *Choice on Termination of Pregnancy Act 92 of 1996* only allow a termination after the 20th week of gestation on very limited grounds. No provision is made for terminations of pregnancies arising from rape or incest. Therefore women survivors of rape or incest who, for reasons beyond their control, postpone their decisions to terminate until the third trimester will not qualify for a legal abortion unless they fall under the existing grounds in the *Choice Act*. The provisions of the *Choice Act* regarding the third trimester are more restrictive than those in section 3(1) of the *Abortion and Sterilization Act 2 of 1975*. The latter did not adopt a trimester approach and allowed a termination on the grounds of rape or incest at any stage of the pregnancy — subject to certain conditions concerning the verification of the cause of the pregnancy. By excluding rape and incest as grounds for termination of pregnancy in the third trimester the *Choice Act* imposes an “undue burden” on women who are survivors of rape or incest and their exclusion is unconstitutional.

Opsomming

Is die beperkende bepalinge van artikels 2(1)(c) en 5(5)(b) van die *Wet op die Keuse vir die Beeïndiging van Swangerskap 92 van 1996* onkonstitusioneel?

Artikels 2(1)(c) en 5(5)(b) van die *Wet op die Keuse vir die Beeïndiging van Swangerskap 92 van 1996* laat in beperkte gevalle beeïndiging van swangerskap na die 20ste week van die swangerskap toe. Geen voorsiening word gemaak vir die beeïndiging van 'n swangerskap wat ontstaan as gevolg van verkragting of bloedskanie nie. Vrouens wat slagoffers van verkragting of bloedskanie is en wat, vir redes buite hul beheer, die besluit om die swangerskap te beeïndiging uitstel tot die derde trimester sal dus nie kwalifiseer vir 'n wettige beeïndiging van die swangerskap nie tensy haar geval gedek word deur die bestaande gronde waarvoor voorsiening gemaak word in die *Wet op die Keuse vir die Beeïndiging van Swangerskap*. Die bepalinge van die *Wet op die Keuse vir die Beeïndiging van Swangerskap* wat handel oor die derde trimester is baie meer beperkend as die bepalinge van artikel 3(1) van die *Aborsie en Sterilisatie Wet 2 van 1975*. Laasgenoemde wet het nie 'n trimester benadering gevolg nie, maar het wel op enige stadium van die swangerskap beeïndiging van swangerskap, wat ontstaan het as gevolg van verkragting of bloedskanie, toegelaat. Die beeïndiging van swangerskap in terme van die bepalinge van 3(1) van die *Aborsie en Sterilisatie Wet 2 van 1975* was wel onderworpe aan die voorwaarde dat die oorsaak van die swangerskap bewys moes word. Die uitsluiting van

die beeïndiging van swangerskap gedurende die derde trimester waar die swangerskap deur verkragting of bloedskanie veroorsaak is plaas 'n "onnodige las" op slagoffers van verkragting of bloedskanie en die uitsluiting is onkonstitusioneel.

1. Introduction

The *Choice on Termination of Pregnancy Act*,¹ *inter alia*,

repeals the restrictive and inaccessible provisions of the *Abortion and Sterilization Act*² ... promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.³

Two questions need to be asked in this regard: The first is whether the provisions of the *Choice Act* are less restrictive than those in the *Abortion Act* and make terminations of pregnancy more accessible than they were under the repealed *Abortion Act*. The second is whether the provisions of the *Choice Act* that exclude women who have been subjected to rape or incest from having an abortion after the 20th week of gestation⁴ are unconstitutional.

It is not intended to debate whether the foetus should be accorded rights under the Constitution.⁵ The assumption is that irrespective of the status of the foetus in law, the state has an interest in "protecting potential life and regulating abortion, particularly in the late stages of pregnancy".⁶ This is the approach adopted in most countries where the foetus is not regarded as having enforceable legal rights until it is born.⁷

1 92 of 1996 (hereafter referred to as the *Choice Act*).

2 2 of 1975 (hereafter referred to as the *Abortion Act*).

3 Preamble to *Choice Act*. For a description of some of the background to the *Choice Act* and the role of the *ad hoc* Select Committee on Abortion and Sterilization, see Ngwena 1998: 43-46.

4 Sections 2(1)(c) and 5(5)(b) of the *Choice Act*. The terms "20th week" and "third trimester" are used interchangeably in this article.

5 *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) 1123, held that a foetus does not hold rights under the Constitution. For detailed criticisms of this approach see Naude 1999: 546; de Freitas 2005: 118. See also Meyerson 1999: 50. For the position under the *Abortion Act*, see du Plessis 1990: 44-59.

6 O'Sullivan and Bailey 1996: 16-6A, where they state that "[e]ven if the foetus itself does not have a right to life, the state nevertheless has a "detached interest" in protecting the sanctity of human life by protecting potential life and regulating abortion, particularly in the last stages of pregnancy".

7 This is the common law approach adopted in South Africa (*Pinchim and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254; see also *Christian League of Southern Africa v Rall* 1981(2) SA 821 (O); *G v Superintendent, Groote Schuur Hospital and Others* 1993 (2) SA 255 (C); *Friedman v Glickman* 1996 (1) SA 1134 (W) 1140; *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T)). A similar position exists in the United Kingdom (*Paton v Trustees of BPAS and Another* [1978] 2 All ER 987 (QB); *C and Another v S and Another* [1987] 1 All ER 1241 (CA); *Re F (in utero)* [1988] 2 All ER 193 (CA)); the

The Constitution provides that “everyone has the right to bodily and psychological integrity, which includes the right ... to make decisions concerning reproduction”.⁸ The Constitution also provides that “everyone has the right of access to health care services, including reproductive health care services”.⁹ The recognition of reproductive rights in the Constitution¹⁰ implies the recognition of other rights relevant to reproductive choices such as respect for a person’s equality;¹¹ dignity;¹² life;¹³ freedom and security of the person;¹⁴ privacy;¹⁵ and freedom of religion, belief and opinion.¹⁶ It is trite that these rights apply to pregnant mothers.¹⁷ However, even pro-choice proponents are likely to recognize that the state has an interest in restricting abortion after viability of the foetus or the beginning of the third trimester.¹⁸ In this context the question arises as to how the restrictions in the *Choice Act* compare with those in the repealed *Abortion Act*.

2. The *Choice on Termination of Pregnancy Act*

2.1 Grounds for termination of pregnancy

The *Choice Act* provides that terminations during the first 12 weeks of the pregnancy may be done at the request of the mother.¹⁹ Terminations during the period from 13 weeks to 20 weeks may be carried out if a doctor, after consultation with the mother, is of the opinion that as a result of the continued

United States (*Roe v Wade* 410 US 113 (1973) 158 — this aspect of the holding in *Roe’s* case has not been upset in subsequent decisions); and Canada (*Borowski v Attorney-General for Canada* (1987) 39 DLR (4th) 731). The European Court of Human Rights has adopted a similar approach (*Paton v United Kingdom* (1980) 3 EHRR 408). By contrast the German Constitutional Court has granted constitutional protection to the foetus (1975 (39 B Verf GE 1 and 1993 (88 B Verf GE 203)), and the Spanish Constitutional Court has recognized foetal life as a constitutionally protected legal interest — even though it is not regarded as a person or bearer of the right to life (Decision of the Tribunal Constitucional 11 April 1985, 800/83 6-8; cf Naude 1999: 561).

8 Section 12(2)(a).

9 Section 27(1)(a).

10 *Constitution of the Republic of South Africa Act* 108 of 1996.

11 Section 9 of the *Constitution*.

12 Section 10 of the *Constitution*.

13 Section 11 of the *Constitution*.

14 Section 12 of the *Constitution*.

15 Section 14 of the *Constitution*.

16 Section 15 of the *Constitution*.

17 *Christian Lawyers Association* 1123.

18 It is true that the United States Supreme Court has moved away from the trimester approach adopted in *Roe v Wade* 410 US 113 (1973) and applied an “undue burden” standard to abortion legislation (*Planned Parenthood of South Eastern Pennsylvania v Casey* 505 US 833 (1992)), but the South African *Choice Act* has adopted the trimester approach. In any event it would not be anomalous to test whether the *Choice Act* restrictions in the third trimester (in terms of section 2(1)(c)) impose an “undue burden” on women who have been pregnant for more than 20 weeks.

19 Section 2(1)(a) of the *Choice Act*.

pregnancy (a) there is a risk of physical or mental injury to the mother; (b) there is a substantial risk of physical or mental abnormality to the foetus; (c) the pregnancy is due to rape or incest; or (d) the pregnancy will affect the mother's social or economic circumstances.²⁰ It has been pointed out that these provisions practically amount to a decriminalization of abortion by allowing termination of pregnancy on demand.²¹

Terminations of pregnancy after 20 weeks may only be performed if a doctor, after consultation with another doctor, (or a registered midwife who has completed the prescribed training course),²² is of the opinion that the continued pregnancy (a) would endanger the woman's life; (b) would result in severe malformation of the foetus; or (c) would result in a risk of injury to the foetus.²³ Thus after 20 weeks terminations of pregnancy may no longer be done on grounds that amount to abortion on demand.

In terms of the *Choice Act*, the grounds for terminating the pregnancy of a severely mentally disabled woman or a woman in a state of continuous unconsciousness are the same as the above²⁴ — except for the consent provisions. In terms of the latter the two medical practitioners, (or a medical practitioner and a registered midwife who has completed the prescribed training course),²⁵ may consent to the termination of pregnancy of such a woman after consulting her natural guardian, spouse, legal guardian or *curator personae*.²⁶ However, the termination of pregnancy may not be denied if the persons consulted refuse consent.²⁷

2.2 The effect of the *Choice Act*

The effect of the provisions of the *Choice Act* is that after 20 weeks of pregnancy terminations of pregnancy may not be done on grounds such as: (a) the risk of injury to the woman's mental or physical health — unless it endangers her life; (b) rape or incest — unless the latter may result in severe malformation of the foetus; or (c) for social or economic circumstances.

The question to be answered is whether, after the 20th week, the specified grounds for termination of pregnancy in the *Choice Act* are more restrictive than the grounds that existed under the *Abortion Act*.

20 Section 2(1)(b) of the *Choice Act*.

21 Van Oosten 1999: 76.

22 Section 2(2) of the *Choice Act*.

23 Section 2(1)(c) of the *Choice Act*.

24 Section 5(5)(b) read with s 5(4)(a) and (b) of the *Choice Act*.

25 Section 2(2) of the *Choice Act*.

26 Section 5(5)(b) of the *Choice Act*.

27 Proviso to s 5(5)(b) of the *Choice Act*.

3. *The Abortion and Sterilization Act*

3.1 Grounds for abortion

In terms of the repealed *Abortion Act*, in all instances, two doctors other than the doctor procuring the abortion had to certify that: (a) the continued pregnancy endangered the woman's life;²⁸ (b) the continued pregnancy was a serious threat to the woman's physical or mental health and will cause permanent damage;²⁹ (c) there was a serious risk that the child to be born will suffer a physical or mental defect of such a nature that it will be irreparably seriously handicapped;³⁰ (d) the foetus has allegedly been conceived as a result of rape or incest;³¹ or (e) the foetus was conceived in illegitimate carnal intercourse with a woman who was, due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of the coitus.³²

Where the pregnancy was alleged to have been as a result of rape or incest a certificate had to be issued by the local magistrate who had to investigate the matter and satisfy him- or herself, on a balance of probabilities, that such an offence had indeed been committed.³³ Furthermore, the woman had to submit an *affidavit* stating that the pregnancy was due to the alleged rape or incest.³⁴

3.2 The effect of the *Abortion Act*

Abortions could not be procured outside the grounds listed in the *Abortion Act*. However, unlike in the *Choice Act*, there were no time limits for when abortions on the listed grounds could be procured — there was no recognition of a trimester system. An abortion could be procured at any time — provided the grounds for justifying the termination of pregnancy were satisfied. This means that during the first 20 weeks of the pregnancy the grounds for termination of pregnancy in terms of the *Abortion Act* were much stricter than those under the *Choice Act*. However, after the 20th week the reverse is true — because some of the grounds that existed under the *Abortion Act* are not available to pregnant women under the *Choice Act* once the 20th week of pregnancy begins.

Thus under the *Abortion Act* after the 20th week, abortions could be procured on the following grounds that are not available to a woman wishing to terminate a pregnancy after 20 weeks in terms of the *Choice Act*.

- (a) there was a serious threat to the woman's physical or mental health that would cause permanent damage;³⁵

28 Section 3(1)(a) of the *Abortion Act*.

29 Section 3(1)(b) of the *Abortion Act*.

30 Section 3(1)(c) of the *Abortion Act*.

31 Section 3(1)(d) of the *Abortion Act*.

32 Section 3(1)(e) of the *Abortion Act*.

33 Section 6(4) of the *Abortion Act*.

34 Section 6(4)(b) of the *Abortion Act*.

35 Section 3(1)(b) of the *Abortion Act*.

- (b) the foetus had been conceived as a result of rape or incest;³⁶ or
- (c) the foetus was conceived in illegitimate carnal intercourse with a woman who was, due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of the coitus.³⁷

3.3 The difference between the *Choice* and *Abortion Acts*

The following scenarios illustrate the difference between the *Choice* and *Abortion Acts*:

3.3.1 Rape

A very overweight single woman with irregular *menses* discovers that she is 22 weeks pregnant after she was raped at a party where she had been given a drink “spiked” with a drug. She wishes to terminate the pregnancy.

Even though the woman only discovered that she was pregnant in the third trimester, under the *Abortion Act* she could have terminated her pregnancy if she had obtained the necessary certificate from a magistrate and made an *affidavit* concerning the incident of rape.³⁸ Under the *Choice Act* it would be illegal to terminate the pregnancy in these circumstances as it is most unlikely that any of the restrictive grounds listed as conditions for a termination of pregnancy after the 20th week in the *Choice Act* would apply to her.

3.3.2 Incest

A 17-year old girl from a rural area is impregnated by her father. In order to protect the reputation of the family and to prevent her father being prosecuted she is preventing from leaving home to report the matter to the police. Six months later she manages to escape from the family home in the country to the city, reports the case to the police, and wishes to terminate her pregnancy.

Even though 24 weeks have elapsed since she was impregnated, under the *Abortion Act* she could have terminated her pregnancy if she had obtained the necessary certificate from a magistrate and made an affidavit concerning the circumstances of the incest.³⁹ Under the *Choice Act* it would be illegal to terminate the pregnancy unless, for example, two doctors (one of whom may be replaced by a midwife who has completed the prescribed training course),⁴⁰ are satisfied that the pregnancy may result in severe malformation of the foetus.⁴¹

36 Section 3(1)(d): Provided a certificate was obtained from a magistrate verifying the complaint in terms of section 6(4) of the *Abortion Act*. The placing of such a burden on women would probably be unconstitutional under the present *Constitution* (cf Sarkin 1995: 236).

37 Section 3(1)(e) of the *Abortion Act*.

38 Section 6(4) of the *Abortion Act*.

39 Section 6(4) of the *Abortion Act*.

40 Section 2(2) of the *Choice Act*.

41 Section 2(1)(c)(ii) of the *Choice Act*.

3.3.3 Mental defect

A 23 year old mentally defective woman is raped and impregnated by a male nurse in a mental institution. By the time that it is discovered that she is pregnant 20 weeks have passed.

In terms of the *Abortion Act* the woman could have her pregnancy terminated if two doctors certify that due to a permanent mental handicap or defect she does not understand the consequences of coitus and lacks the ability to bring up a child.⁴² She could not terminate the pregnancy on the grounds of rape as she would not have been able to explain the circumstances to a magistrate or to make an *affidavit* concerning the incident.⁴³ In terms of the *Choice Act* she could not terminate her pregnancy unless, for example, two doctors, (or a one doctor and a registered midwife who has completed the prescribed training course),⁴⁴ are satisfied that the pregnancy may result in severe malformation of the foetus.⁴⁵

The above scenarios illustrate that by excluding rape and incest as reasons for termination of pregnancy after 20 weeks, the grounds for abortion in the third trimester in the *Choice Act* are stricter than the grounds that existed under the repealed *Abortion Act*.

It is clear that the limitations in terms of section 2(1)(c) of the *Choice Act* that exclude rape and incest as grounds for termination of pregnancy infringe the rights of pregnant women to reproductive choice — apart from their other rights under the *Constitution*.⁴⁶ The question is whether this infringement is saved by the limitation clause of the *Constitution*.⁴⁷

4. The limitation clause of the *Constitution*

The rights in the *Constitution* may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance and purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (d) less restrictive means to achieve the purpose.⁴⁸ Each of these listed criteria need to be examined to determine whether the limitations in sections 2(1)(c) and 5(5)(b) of the *Choice Act* are reasonable and justifiable.⁴⁹

A law of general application means a law that is “sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their

42 Section 3(1)(e) of the *Abortion Act*.

43 As required in terms of section 6(4) of the *Abortion Act*.

44 Section 2(2) of the *Choice Act*.

45 Section 5(5)(b)(ii) of the *Choice Act*.

46 See fn 55.

47 Section 36 of the *Constitution*.

48 *Constitution* section 36(1).

49 See generally, *S v Makwanyane* 1995 (3) 391 (CC) para 102.

rights and obligations”.⁵⁰ It is trite that the *Choice Act* is a law of general application regarding women as it is clear, accessible and precise and allows them to ascertain their rights and obligations. It applies to all women who wish to exercise their constitutional right to make choices about reproduction.⁵¹

The South African *Constitution*, unlike that of other open and democratic societies based on human dignity, equality and freedom, such as United Kingdom and the United States of America, has a specific provision guaranteeing a right “to make decisions regarding reproduction”.⁵² However, as has been mentioned this in itself does not mean that such a right may not be limited as pregnancy progresses into the third trimester. In order to measure the reasonableness and justifiability of the provisions of the *Choice Act* a proportionality approach to the relevant factors mentioned above must be used. This means that there must be “sufficient proportionality between the harm done by the law (the infringement of the fundamental right) and the benefits it is designed to achieve (the purpose of the law)”.⁵³

4.1 The nature of the right

As has been mentioned the proportionality approach requires that the harm done by the law must be weighed against the benefits the law seeks to achieve. The nature of the right in the Constitution that is being infringed is the mother’s right to reproductive choice⁵⁴ — in addition to her other rights under the *Constitution*.⁵⁵

The harm done, namely the restrictions on right of women who have been subjected to rape or incest to terminate their pregnancies after the 20th week of gestation, must be weighed against the benefits of encouraging early termination of pregnancy and preventing abortion on demand in the third trimester.⁵⁶

50 Cf De Waal *et al* 2001: 148, citing *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

51 Section 12(2)(a) of the *Constitution*.

52 Section 12(2)(a) of the *Constitution*.

53 De Waal *et al* 2001: 155.

54 Section 12(2)(a) of the *Constitution*.

55 Such as the rights to equality (section 9); freedom and security of the person (section 12); human dignity (section 10); life (section 11); privacy (section 14); religion, belief and opinion (section 15); and health and care (section 27). See generally, *Christian Lawyers Association* 1123.

56 This is one of the stated aims in the Preamble to the *Choice Act*. In this equation the rights of the foetus appear to be incidental to the mother’s rights and they are not mentioned in the Preamble to the *Choice Act*. In any event, the *Choice Act* does not recognize the right of the foetus to exist before the 20th week as it provides for virtual abortion on demand (cf van Oosten 1999:76). After the 20th week the right of the foetus to exist has limited recognition in that its existence may be terminated if the restrictive grounds for termination of the pregnancy are present (section 2(1)(c) of the *Choice Act*).

4.2 The importance of the purpose of the limitation

Reasonableness requires the limitation of the right to serve some useful purpose, while justifiability requires the purpose to be “worthwhile and important in a constitutional democracy”.⁵⁷ Furthermore, the limitation should be one that “all reasonable citizens” would regard as “compellingly important”.⁵⁸

According to the Preamble to the *Choice Act* the purpose of the limitation is to encourage early and safe terminations of pregnancy and not to encourage termination of pregnancy as a form of contraception or population control. At the same time the *Choice Act* incidentally provides limited protection to the foetus in the third trimester — although this is not articulated as a consideration in the Preamble. The question is whether the purpose of the limitation, (including the limited protection it provides to the foetus after the 20th week), is “compellingly important” enough in the eyes of “reasonable citizens” to limit a pregnant woman’s right to reproductive choice in situations where women who have been subjected to rape or incest are denied the right to terminate their pregnancies in the third trimester?⁵⁹

It may be that in some instances, (albeit on rare occasions), women or girl children who are the survivors of rape or incest may not seek assistance to terminate their pregnancies until after the 20th week of the gestation period. In such instances would “ordinary citizens” regard the interests of a foetus conceived under conditions of rape or incest a “compellingly important” enough to override its mother’s right reproductive choice — not to mention her other rights? Given the obvious psychological consequences to the mother (and the child) of allowing such a foetus to be carried to term by an unwilling mother, the answer would seem to be no. Protecting pregnant women from such consequences would seem to be an important legitimate purpose in an open and democratic society based on human dignity, equality and freedom.

4.3 The nature and extent of the limitation

In considering the nature and extent of the limitation the question is whether the limitation is a “serious or relatively minor infringement” of the right.⁶⁰ Thus in the abortion context, are the restrictions in sections 2(1)(c) and 5(5)(b) of the *Choice Act* serious or minor infringements of the mother’s constitutional rights, including the right to reproductive choice? Do the restrictions do more damage than is reasonable to achieve the purpose of restricting abortions after the 20th week? What will cause more damage? Forcing a survivor of rape or incest to carry the unwanted fruit of sexual violence or exploitation, or to terminate the pregnancy? It is submitted that to deny a legal abortion to women survivors of rape or incest who delay their decisions to terminate the pregnancy to the 20th week is an extensive infringement of their constitutional right to reproductive

57 De Waal *et al* 2001: 157.

58 De Waal *et al* 2001: 157.

59 In terms of section 2(1)(c) of the *Choice Act*.

60 De Waal *et al* 2001: 160.

choice and other rights.⁶¹ Requiring women survivors of rape or incest to continue with their pregnancies, in situations where decisions to terminate are made after the 20th week of gestation, places an “undue burden”⁶² on them that may result in severe damage to their mental and physical health.

4.4 The relationship between the limitation and its purpose

The relationship between the limitation and its purpose means that there must be “proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve”.⁶³ There can be no reasonable limitation of the right if the law does not achieve its purpose.

As has been mentioned the purpose of the limitations after the 20th week is to encourage early and safe terminations of pregnancy and to prevent abortion being used as a form of contraception in the third trimester.⁶⁴ At the same time it provides limited protection to the foetus so that abortion can no longer be done on demand after the 20th week. However, these purposes have to be balanced against the constitutional rights of the pregnant women not to be unduly burdened with restrictions that violate their right to reproductive choice and other rights.

It is clear that the provisions of section 2(1)(c) of the *Choice Act* prevent women who are survivors of rape or incest from exercising their constitutional right to reproductive choice after the 20th week. The result is that such women are burdened with carrying a foetus that may have been conceived under cruel, inhuman and degrading circumstances. As delayed decisions by survivors of rape or incest are likely to be the exception rather than the rule, the purpose of encouraging early terminations of pregnancy and preventing abortion being used as a form of contraception would not be violated by allowing such women to terminate their pregnancies on these grounds after the 20th week of gestation.

4.5 Less restrictive means to achieve the purpose

The limitation of the right must achieve benefits that are in proportion to the harm caused by the limitation. Therefore, the question to be answered is whether “a less restrictive, (but equally effective), alternative method exists to achieve the purpose of the limitation, [if so] then that less restrictive method must be preferred”.⁶⁵

61 Cf Meyerson 1999:56: “Forcing a women to bear a baby against her wishes is a serious threat to her bodily and psychological integrity, undermining the constitutional guarantee of section 12(2)”.

62 The term “undue burden” is used in the sense that it was used in *Planned Parenthood* 2820. There it was held that an “undue burden” is placed on a woman if it has “the purpose or effect of placing a substantial obstacle in the path of women seeking an abortion”.

63 De Waal *et al* 2001: 161.

64 Preamble to the *Abortion Act*.

65 De Waal *et al* 2001: 162.

Can a less restrictive method be used to limit the number of abortions after 20 weeks? It is submitted that a less restrictive means can be used to encourage early terminations of pregnancy and restrict abortion on demand in the third trimester by expanding the grounds for a legal termination of pregnancy to include rape and incest as existed under the repealed Abortion Act — without the restrictive certification procedures that were required under that Act.⁶⁶

Given that the number of women who are likely to delay their abortions on grounds of rape or incest until the third trimester is likely be very small, expanding the grounds for termination of pregnancy after 20 weeks of gestation to rape and incest would still restrict the number of terminations in the third trimester — and so avoid abortion on demand. At the same time it would allow for hard cases to be dealt with and ensure that the *Choice Act* does not make termination of pregnancy more restrictive and inaccessible after the 20th week of gestation than it was under the *Abortion Act*.⁶⁷

5. Are the restrictions in section 2(1)(c) of the *Choice Act* reasonable and justifiable?

The *Choice Act* was meant to give effect to reproductive choice and make termination of pregnancy more accessible than it was under the *Abortion Act*.⁶⁸ The *Choice Act* has achieved this in respect of abortions conducted before the 20th week of gestation.⁶⁹ However, the limitations in section 2(1)(c) of the *Choice Act* are not reasonable and justifiable because the purpose of the Act was to make reproductive choices easier than under the *Abortion Act*, whereas after 20 weeks gestation it has made them more difficult. Expanding the grounds of termination of pregnancy in the third trimester to include rape or incest will not undermine the purpose of the legislation to promote early terminations of pregnancy and to limit abortion on demand, as such cases are likely to be the exception rather than the rule.

The present restrictions in the *Choice Act* do more damage than is reasonable, because after the 20th week women who have been subjected to rape or incest cannot terminate their pregnancies and have to carry to term babies that might have been conceived in hate, violence or as a result of serious sexual abuse. Having to bear such children under duress is likely to impact negatively on the mothers (and their unwanted children) for the rest of their lives. The third trimester limitations do unnecessary damage to the fundamental rights of such women.⁷⁰

66 Section 6(4) of the *Abortion Act*.

67 Cf the Preamble to the *Choice Act* which “repeals the restrictive and inaccessible provisions” of the *Abortion Act*.

68 Cf the Preamble to the *Choice Act*.

69 Van Oosten 1999: 76.

70 Cf De Waal *et al* 2001: 162-163.

6. Is there a need to amend sections 2(1)(c) and 5(5)(b) of the *Choice Act*?

As mentioned above, although the limitations in sections 2(1)(c) and 5(5)(b) of the *Choice Act* discourage terminations after the 20th week of gestation, the addition of rape and incest to the existing grounds would still restrict the number of terminations after 20 weeks, and allow for hard cases. Women, who delay their choice to terminate their pregnancies because they did not know that they were pregnant as a result of rape or incest or for some other reason, should not be unduly burdened by being forced to carry the foetus to term.

Section 2(1)(c) of the *Choice Act* should be amended to allow pregnancies resulting from rape or incest to be terminated after the 20th week of gestation — without the burdensome requirements that existed under the *Abortion Act*. A similar amendment should be made to section 5(5)(b) of the *Choice Act* to cover cases involving severely mentally disabled women or women in a state of continuous unconsciousness.

7. Conclusion

Up to the first 20 weeks of pregnancy the *Choice Act* is more pro-choice than the previous *Abortion Act*. After the 20th week the *Choice Act* is more restrictive than the *Abortion Act* — even with the latter's burdensome procedures regarding rape and incest.⁷¹

Sections 2(1)(c) and 5(5)(b) of the *Choice Act* need to be amended to add rape and incest as additional grounds for abortion after 20 weeks of gestation. The amendments should not include the burdensome verification procedures that existed under the *Abortion Act*.⁷²

The present section 2(1)(c) of the *Choice Act* places an “undue burden” on women who have been subject to rape or incest and who opt for a termination of pregnancy after 20 weeks of gestation. Section 5(5)(b) of the *Choice Act* places the same burden, (even if they are not aware of it), on severely mentally disabled women or women in a state of continuous unconsciousness.

This burden may result in mentally competent women experiencing severe psychological trauma if they are compelled to carry their pregnancies to term. It is also likely to expose children conceived in rape or incest to similar trauma should the circumstances of their conception ever become known.

For the reasons set out above the existing limitations to a termination of pregnancy after the 20th week of gestation in the *Choice Act* that deny abortions women who have been subjected to rape or incest are unconstitutional.

71 Section 6(4) of the *Abortion Act*.

72 Section 6(4) of the *Abortion Act*.

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