Moral Rights conferred onto foetus to protect the notion of potential life. Is there need to amend and develop legislation in South Africa to accord legal protection to a viable foetus?

By

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ABSTRACT

The aim of this dissertation is to assess the legal status of the foetus within the legislative parameters of South Africa. I will look at the fundamental reproductive rights of a women as envisaged in the Constitution of the Republic of South Africa versus the unborn and whether or not there are foetal interests conferred to the unborn be it legal or moral.

One of the main concepts that is of importance is the issue of “viability” and how the concept of foetal viability is interpreted, this will be examined from both a medical and legal context with regard of how the concept of “viability is interpreted by the world. I will compare the United States of America (USA) and India in terms of their legal and medical assessments of foetal viability and termination of pregnancy.

This dissertation is to present the current debate on the issue of recognition of foetal rights. In South Africa, does not have any specific legislation that confers rights to a foetus. This is largely due to the recognition of maternal autonomy in the South African Constitution which is silent on foetal interests. Several states in the USA has developed legislation that accords rights to a foetus to protect the notion of potential rights in certain instances such as criminal cases. I believe that South Africa needs to develop legislation to that effect so as to accord a form of protection to a viable foetus. In according such protection there must be limitations established so that we do not impose on a women’s constitutional rights. The age of viability (where the foetus is able to survive outside the mother’s womb, usually at 24 weeks of pregnancy) of a foetus is of paramount importance to determine when there can be a limitation of rights.¹

¹ T.S. Collet ‘Pre-viability Abortion and the Pain of the Unborn’ Washington and Lee Law Review 2014 Vol 71 1211-1231
CHAPTER 1 - INTRODUCTION

1.1 Background

Over the decades that have passed it has always been stigma against terminating a pregnancy as a foetus was considered to have life as early as the stage of conception. A deontological worldview is the theory, that something will only be ethical if the act is good for example the act of not lying. If an act is bad it will violate one of the perfect duties “do not do unto other what you yourself will not do”, this is referred to as the golden rule. This theory does not focus on the consequence of the person, only focus is the act.

Naturalist who follow a deontological viewpoint have always followed this theory as they believe that termination of pregnancy is tantamount to murder as “life begins at conception”. Therefore; termination of pregnancy was considered to them to be a crime. As time developed it became less frowned upon and women’s reproductive rights became more recognised due to the past discrimination against women. Women who are seen as a vulnerable group in society and therefore need for their rights to autonomy to be protected. Since the enactment of the Choice of Termination of Pregnancy Act (hereinafter referred to as the Choice Act), women are vested with autonomy to make decisions regarding their reproductive rights such as terminating a pregnancy on demand prior to thirteen weeks of her pregnancy, this decision can be made on demand and only requires the consent of the pregnant women. However the state has imposed a limitation to the pregnant women’s right to choose, as they have limited a pregnant women to terminate her pregnancy after thirteen weeks. The government thus controls the two competing interests.

The purpose of this study to critically examine whether it is time to enact legislation to protect the foetus interest versus women’s rights to autonomy. The study will look at foetal

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2 The Belmont Report ‘Ethical Principles and Guidelines for the Protection of Human Subjects of research Appendix’ (Vol ii) DHEW Publication No (OS) 78-0014
4 See - https://naturalistphilosophy.wordpress.com/tag/abortion
6 IBID
viability which is the ability to survive independently from the pregnant women and whether in certain circumstances the law needs to step in to protect foetal rights. I will ascertain whether the CHOICE ACT accords sufficient protection in balancing the protection of a potential life and to establish whether such legislation could potentially violate women’s constitutional rights. I will explore the various legal and medical jurisprudence to establish when the point of viability occurs and what evidence supports it if any.

My rationale of the study is based on the fact that, with the advancement of science and technologies to monitor the progress of the foetus in utero and with a potential of new technologies to sustain life outside the uterus I strongly argue for the legal changes to protect and recognise the personhood of the potential life of a foetus, in certain circumstances, in South Africa as a legal entity with rights and privileges until its born.

I will be using a desk-based research methodology in that I will be collecting data from existing resources. The resources that I will examine are the international and domestic statues, an interpretation of the Constitution. Case law will be the primary resource, secondary sources will include textbooks, articles and thesis’s. this is a desktop-based research as such other sources will include the use of internet and internet sites as well as electronic database. A literature study of the Constitution, statutes, and case law as primary sources of law is followed. In addition, textbooks and writings of authors as secondary sources of law are utilised. Other sources include the internet and electronic databases.

This dissertation is to adopt a positivist theoretical approach which is a a theory that theology is based on reasoning and how we interpret knowledge that is presented to the world. It looks at empirical date and scientific methods. The reason why this approach applies to this study is because it allows you to look at the world from a different perspective and take a wider view on the issue. There have been developments in science and technology and many authors have argued that there is a need to use science and technology in developing and or creating new legislation to govern a viable fetus. A few examples of the enhancement of science and technology are, “the prevention of premature labour whereby doctors attend to prevent pregnant women who have cervical insufficiency from going into premature labor, doctors use a needle to stitch or make incisions to place an encircling suture below the surface of the

8 Ibid
cervix to tie it closed, this invasive surgical operation is known as cervical cerclage”⁹. Another example is the use of 3D scans which allows parents to have a three dimensional view of the foetus and also allows doctors to ascertain whether there are any abnormalities to the foetus.

1.2 International recognition of foetal interests

To analyse the legal protection/framework surrounding the unborn one has to consider international as well as national legislation that accords any form of protection to the unborn. In the international context, we must interpret the United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC). “During the drafting of Article 1 CRC (definition of ‘child’ for the purposes of the present Convention, a child means ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’)”¹⁰. It was debated as to whether the unborn child would fall within the scope of the Convention. “Because of strong differences of opinion among the delegates a compromise was reached, according to which the provision’s text would contain no clue as to the beginning point of childhood”.¹¹ It is submitted that “States Parties were left to decide for themselves which prenatal legal protection under national law they would consider appropriate against the background of CRC”.¹²

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa¹³ was developed due to the abuse, violence and discrimination women faced.¹⁴ Article 14 provides for the “protection of women’s reproductive rights, to allow a woman to

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¹¹ IBID
¹³ Protocol to the African Charter on human and peoples’ rights on the rights of women in Africa (2003) adopted by the 2nd Ordinary Session of the Assembly of the Union
choose on issues such as contraception, abortion and the right to control their fertility”\textsuperscript{15}. The protocol does not recognise foetal rights.

1.3 Domestic recognition of foetal interests

In South Africa, specific legislation relating to the unborn has not been developed or enacted and the common law remains that the unborn/foetus is not recognised as a legal entity/personality until such time that the foetus is born alive and is able to survive separately from the mother\textsuperscript{16}. It is only at the stage that the foetus is separated from the mother and able to survive independently, this act then recognised the foetus as a child and it is accorded legal rights and protections. There has been moral recognition of the foetus in South Africa. I use the term moral recognition as the Choice Act goes so far as to limit a women’s right to have an abortion after thirteen weeks, this is what I describe as the foetus having a moral recognition and not a legal one. However, the Constitution does not provide for the rights of the foetus, nor are there any legislation enacted that specifically recognise the foetus or accord any legal protection.

1.4 Domestic recognition of Women’s Rights under the Constitution

In terms of the foetal vs women’s paradigm in South Africa, the Constitution implicitly recognises women’s rights. Section 12(2) of the Constitution, states that “the right to bodily and physical integrity, which includes the right to make decisions concerning reproduction and to security in and control over the body”\textsuperscript{17}.

Section 9 provides for the right to equality, “as everyone is equal before the and is entitled to equal protection of the law”\textsuperscript{18}. This provision read with section 10 the right to human dignity as well as section 14 the right to privacy is the basis upon which one is entitled the right to

\textsuperscript{15} IBID page 15
\textsuperscript{17} The Constitution of South Africa 108 of 1996
\textsuperscript{18} The Constitution of South Africa 108 of 1996 – section 9
“choose”.\textsuperscript{19} The right to privacy is essentially one of the most important rights as the choice to terminate a pregnancy is a private decision which is protected under a constitutional right.

The right to human dignity is inherent as all other rights flow from it. Goolam states that “It is not insignificant that the value of human dignity does not appear either after the values of equality and freedom or between the value of equality and freedom. On the contrary, it is highly significant that human dignity appears before both equality and freedom because essentially, human rights law must serve the purpose of effectively protecting the human dignity of the members of any society”.\textsuperscript{20}

This implies that the supreme law of the land recognises and expressly confers rights to women to make their own choices in respect of decisions related to reproduction and abortion. It is a known fact that woman has the sole right to have an abortion.\textsuperscript{21} In relation to other issues such as reproduction both males and females are vested with that right.

Contextualizing these rights in terms of a women’s choice to terminating a pregnancy has been recognised in South Africa and is codified and governed by the Choice Act. In terms of section 36 of the Constitution every right set out in the Bill of Rights is subject to the limitations clause. Section 36 states that the “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation- (a) shall be permissible only to the extent that it is (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question, and provided further that any limitation to section 36.”\textsuperscript{22}

\textsuperscript{19} IBID 6
\textsuperscript{20} NMI Goolam 1997 SA Public Law 186
\textsuperscript{22} IBID – Section 36
The limitation clause in the context of foetal interest was challenged in the Supreme Court of Appeal in the case of *Christian Lawyers Association of SA v Minister of Health and Others* 23, in this matter the court was posed with the issue of the constitutionality of the Choice Act, being a law of general application, and to determine whether the foetus acquired the status of a legal persona. The court held that “in terms of the common law the status of the foetus still remains uncertain, however in terms of the Constitution the foetus was not considered to have a legal personality”. 24 “The Court contended that due weight had to be attached to the silence in the Constitution on the issue of the protection of the foetus”. 25 The court submitted that “had the drafters intended to protect the foetus, such protection would have been amplified, especially in Section 28, which deals with the rights of the child”. 26 “Furthermore, the court submitted that, if the foetus is a bearer of the Section 11 the right to life, then a termination of a woman’s pregnancy would constitute murder, and not abortion”. 27 The court held that this could not have been the drafters intention. The Court also found that “in terms of section 12(2) of the Constitution gives everyone the right to make decisions concerning reproduction and to security, and control over their bodies”. 28 “These rights are not qualified in the Constitution to protect the foetus, the Court therefore upheld a woman’s right to make decisions about her reproductive functions and to exercise control over her own body”. 29

The court was very clear that the drafters of the Constitution did not envisage constitutional rights to be accorded to the foetus and that there are no provisions in the Constitution that expressly provide for foetal rights, interests or protection. As such the court upheld the legislative principles set out in the Choice Act.

### 1.5 The Choice of Termination of Pregnancy Act

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24 *IBID* 1441

25 *IBID* 1441

26 *IBID* 1441

27 *IBID* 1441

28 *IBID* 1441

29 W. Amien & M. Paleker *‘Women’s Rights’* Vol (13)321- 392
The Choice of Termination of Pregnancy Act\textsuperscript{30} allows women to terminate pregnancy on the following grounds: -

a) “Within the first 12 weeks a woman is allowed to terminate her pregnancy on demand and only she is required to consent for the procedure”\textsuperscript{31};

b) “Between 13 to 20 weeks there are limited grounds for which an abortion may be performed and the consent of one medical practitioner or his/her equivalent is required. In this regard, a woman may only be allowed to terminate her pregnancy on the following grounds: -

i) If there is a risk of mental or physical injury to the mother/pregnant women;

ii) There is substantial risk of material abnormality to the foetus;

iii) The pregnancy was caused due to rape or incest;

iv) The pregnancy will affect the mother’s social/economic status.

c) After 20 weeks – an abortion may only be performed if two doctors consent to it and limited the following grounds:

i) The pregnancy may endanger the women’s life;

ii) There may be severe malformation of the foetus;

iii) The pregnancy would result in an injury or risk to the foetus”\textsuperscript{32}.

The aim of the Choice Act “is to uphold the rights of women as equal citizens and to give effect to their rights to healthcare, including right of access to reproductive healthcare.”\textsuperscript{33}

It is apparent that the Choice Act is a law of general application and limits a women’s right to make choices regarding her reproduction health as it places restrictions on when a woman is entitled to terminate her pregnancy and the grounds that she may be permitted to do so\textsuperscript{34}. The
Act restricts women’s rights to choose when to terminate her pregnancy as there are restrictive conditions that need to exist before one can qualify for a termination of pregnancy.

The Choice of Termination of Pregnancy Act limits a women’s choice, the act allows for abortion on demand in the first 12 weeks of pregnancy, it is only the pregnant women’s consent that is required. From 13 to 20 weeks “abortion is only permitted upon certain circumstances such as a substantial risk to the mother of foetus, whether the pregnancy is as a result of rape or incest and whether to it will affect the pregnant women’s economic status.” At this stage the consent of a medical doctor of his/her equivalent permission is required to perform the abortion. After 20 of gestation for an abortion to occur two doctor’s permissions are required and may be permitted on the following grounds, “if the pregnancy will endanger a women’s life, or will cause severe malformation of the foetus or would result in risk or injury to the foetus.”

This limitation is said to be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, however it begs the question as to why is such limitation imposed”. The question then posed is whether the limitation is imposed to regulate abortion or merely place restrictions on aborting a viable foetus? It would lead one to believe that their rationale is based on the moral right that has been conferred onto the foetus. It is questionable as to why parliament specifically imposed a limitation on women’s rights by only allowing lawful termination of pregnancy on medical grounds.

One must understand the reasoning of the drafter of the Choice Act to be able to interpret the provisions of the Act. Dworkin argues “that the argument is not if we object to the termination on pregnancies because we believe that a foetus is a bearer of constitutional rights, but if we attach some intrinsic value to life and the potential for human life”.

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35 The Choice of Termination of Pregnancy Act 92 of 1996 – section 2(1)(c)
36 IBID
37 IBID
38 IBID 29
39 Dworkin Life's Dominion 11; Kruuse 2009 THRHR 135.
As a result, the drafters of the Act impose such limitation in an attempt to enhance potential life which is “derived from the governments inherent interests in protecting the ‘sanctity of human life’, therefore justifying the regulation of termination laws on grounds that are independent of the rights-bearing capacity of the foetus itself”. Public policy requires prenatal life to be protected as it is an important value in society.

By interpreting the Act, Pickle submits that “it would seem that the states interest become compelling at the stage of which the foetus becomes viable, by interpreting the provisions of the Choice Act it could be assumed that viability may be at 20 weeks of gestation”. The stage of which a foetus is presumed viable differs across jurisdictions.

To confer a legal right onto a foetus by enacting legislation similar to that of the USA would mean that there would be conflict with the current Choice Act. The Act provides that a woman is entitled to have an abortion of demand. Should such a proposed legislation come into effect, a woman who chooses to consume alcohol, smoke or take drugs could be prosecuted, however in terms of the Choice Act she would still be allowed to choose to terminate pregnancy up until 12 weeks on demand with only her consent being required.

This is a potential problem that South Africa would face.

A solution to that problem would be the stage of viability that needs to be adopted and developed as technology and medicine is now at an advanced stage. Due to the advancement of technology the world is now combatable with what constitutes viability. With technology constantly developing every day doctors are better equipped to intervene and in many instances, save a foetus and ensure that it is born alive.

We need to compare our current legislation in keeping with International Human Rights instruments such as the CRC, to ascertain whether South Africa has taken the initiative to accord any form of legal protection to the foetus. For example, in the USA The Unborn Victims of Violence Act was passed in 2004 to enforce fetal rights in the instances of violence against a foetus. The only issue that the Act had, was that it was then used against

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40 IBID supra 419
41 IBID supra 419
43 The Choice of Termination of Pregnancy Act 92 of 1996 – section 2
pregnant women from preventing harm to the unborn in the sense that a woman would not be able to consume alcohol or take drugs if she did she would be prosecuted under the Act.  

CHAPTER 2 INTERNATIONAL CONCEPT OF FOETAL VIABILITY

2.1 Stages of development into a foetus

In order to understand the concept of viability we need to first understand the stages of development of a foetus from conception to birth. Once a sperm fertilizes an egg the egg becomes known as a “zygote” which is also referred to as the fusion of the male and female gametes. After the zygote is formed, approximately eight weeks later the embryo starts to form. Two cells are obtained from this process. It is at this stage that successive cleavage divisions take place. The number of cells and the period in which it the divisions occur is known as “morphokinetics”. It is at this stage that the embryo, usually on the fifth day, the embryo is called a “blastocyst”. “It is from this moment on when it acquires a particular shape with different cell types, a cavity forms inside the embryo and a series of cells called trophoblast will be responsible for placental development, the inner cell mass, from which the baby’s body will form, is located within a section of this cavity, when it is at blastocyst stage, the embryo breaks down the membrane that is protecting it to enter the endometrial lining”.  

At approximately ten weeks of pregnancy or eight weeks after fertilization the embryo becomes a foetus and is recognised as a foetus. “During this stage, the structures that have already formed grow and develop. The following are markers during pregnancy:

- By 12 weeks of pregnancy: The foetus fills the entire uterus.
- By about 14 weeks: The sex can be identified.

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45 See https://www.invitra.com/differences-between-a-zygote-an-embryo-and-a-fetus/
46 IBID
47 IBID
48 IBID 161
By about 16 to 20 weeks: Typically, the pregnant woman can feel the foetus moving. Women who have been pregnant before typically feel movements about 2 weeks earlier than women who are pregnant for the first time.

By about 24 weeks: The foetus has a chance of survival outside the uterus”

2.2 Stage of Viability of a foetus

The reason why the age of viability is crucial to understand is that at that stage a foetus organ is developed and fully formed, such as the lungs and kidneys and such a foetus has the potential to life or to sustain life independently of the mother. This reinforces the concept “survivability “where the foetus is able to survive after separation from the mother. There are several other factors that doctors look at in determining the age of viability such as the age, sex, birth weight, head circumference and femur length to assist in determining viability of a foetus.

Glen Cohen and Sadath Sayeed argue that after 20 weeks a viable foetus has developed to the extent that it has physical structures that enable it to feel pain. Authors have argued that South Africa is to implement legislation that defines the age of viability or to incorporate such a definition in an existing legislation. The issue with determining viability is that doctors believe that it is subjective to commit to a definition as each pregnancy may differ from the next and so to the age of viability may defer from foetus to foetus. Medical science is difficult to codify due to its very nature, it is seen as been fluid and dynamic. The alternative is to develop legislation as done in the USA to protect the foetus from violence and other acts in certain instances as set out by the Unborn Victims of Violence Act.

50 IBID
51 Slabbert “The fetus and embryo: legal status and personhood” 1997 TSAR 234-242
54 IBID
55 The Unborn Victims of Violence Act of 2004
Others have argued that “there is no method other than viability which is more definite as to the point at which the state’s interest in persevering foetal life becomes compelling and overrides the mothers interest in getting an abortion”\(^{56}\).

Many authors argue that a viable foetus deserves protection from the law\(^57\). It is the view of many scholars and academics regard “a viable foetus has the potential to live outside the mother’s womb with artificial aid and that science and medicine has developed to such a stage that it is possible to save a potential life because a foetus has increasing moral status with advancing gestation”\(^58\).

Other authors have argued that women’s constitutional rights are of supreme importance and cannot be taken away as “a women’s right to terminate her pregnancy should be free of interference from the state”.\(^59\) The argument favours of the right to autonomy rather than the recognition of a viable foetus to be vested with rights. In certain instances, academics have stated that the Choice of Termination of Pregnancy Act is unconstitutional as it limits a women’s right to choosing an abortion where the pregnancy was through an act of either rape or incest in that the act limits’ that right to 20 weeks, after 20 week a woman cannot who has been raped cannot request an abortion on demand as it does not meet the requirements of the act\(^60\).

The feminist view is that a “foetus acts as a parasite and preys on the mother. The foetus has been linked to a parasite or even a tumour; this makes the foetus look like a villain and

\(^{56}\) IBID 12 – pain is an emotional and psychological experience that requires conscious recognition of a noxious stimulus, which usually occurs at the third trimester of pregnancy.
\(^{57}\) IBID
\(^{58}\) R. Beck ‘Overcoming Barriers to the Protection of viable fetuses’ (2014) 71 WASH. & LEE L. REV - 1263 – 1296 viability varies from one fetus to another based on factors that be legally and morally relevant including the progress and availability of neonatal treatment, the race and gender of the fetus and the mothers attitude during gestation.
\(^{59}\) A. Breslin ‘A wall of Legislative obstacles in the path of a women exercising her right to an abortion: Planned Personhood Arizona Inc. v Betlach (2014) 45 Golden Gate University Law Review 53-68
\(^{60}\) IBID 8
transfers blame or guilt for terminating pregnancy”61. Other would say that this could be argued against terminating a pregnancy in that a foetus can survive independently at the stage of viability as such does not necessary require the womb after the stage of viability thereby requiring greater protection.

A scenario of an HIV positive mother who refuses to do a caesarean section, in such a scenario should a mother’s autonomy be allowed to override the foetus right to be born HIV negative? If a new-born baby is born HIV positive and develops AIDS it will die untreated62. In the USA, pregnant woman who is tested positive for HIV is obliged to take ARV and undergo a caesarean section if she refuses she will be prosecuted. In this regard, the state has afforded protection to a foetus.

In this regard the legislature will be interpreted to have breached a women’s right to autonomy but this begs the question whether such a right is being limited to protect a viable foetus? Is the legislation thereby recognising a foetus and according it rights which seem to weight more than women’s rights to autonomy? This is a gap in South African law that needs to be addressed. Our law cannot contradict itself.

2.3 Legal definition/interpretation of viability

The term viability is used to determine whether the foetus was born, had the foetus reached viability and died at birth it would now be considered as a stillbirth which requires by law to be recorded.63 This imparts legal personality onto the foetus in a legal sense as such all rights and interest will accrue to the child. However, should the foetus not have reached the stage of development that would be considered to be viable then should the foetus not survive it would be considered to be a miscarriage and no rights or interest will accrue as birth in the legal sense would not have occurred nor would the foetus be considered to be a legal personality.64

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62 IBID “Assigning full rights to the fetus might infringe a mother’s autonomy and is likely to lead to a coercive and punitive approach to pregnant women. It seems unjust for society to imprison a woman for accidentally killing her fetus through cocaine addiction, while permitting another woman to abort her viable fetus because it has Down syndrome”.
63 Birth and Death Registration Act 51 of 1992
64 M. Swanepoel ‘Embryonic stem cell research and cloning: a proposed legislative framework in context of legal status and personhood’ June 2006
2.4 Medical definition of viability

Swanepoel submits that “As medicine progresses, the stage of viability will move closer and closer to the time of conception, until it coincides with conception, especially if one considers the development of an artificial placenta”.\textsuperscript{65} This argument goes as far as to state that even at the stage of conception a foetus would be considered to be viable. However, at the stage of conception none or the organs of the foetus have formed, nor would a foetus at that stage be able to survive independently. Should an artificial placenta be developed there is still no guarantee that the foetus would be born alive, as such to prematurely interpret an embryo to be a viable foetus would be flawed.

In \textit{Roe v Wade}, involved an infant who weighed 395 grams and was less than 20 weeks old, was able to survive independently.\textsuperscript{66} “At present, the viability of a foetus, in essence, depends on whether its lungs are inflatable, thereby allowing it to breathe”.\textsuperscript{67} It is important to note that breathing is not the only essential element to the infant to be considered as having been born alive.

Robourix and Niekerk\textsuperscript{68} have formulated an argument of ‘separation-viability’ which they believe “to be the elusive moral cut-off point that will justify a claim to a ‘right to life’”. They argue that “it is the only realistic and justifiable moral cut-off point; conception, or individuation, and sentience are insufficient, and psychological personhood appears too late to be useful”.\textsuperscript{69} Since viability indicates an ability of the foetus to have potential life, such “potential life” requires protection to be given the opportunity to attain birth, as such should abortions beyond this point not be allowed unless there are compelling reasons for termination of pregnancy.\textsuperscript{70}

The authors conclude that “Technological advances increasingly factor in the survival of premature neonates. We should not confuse moral significance with the availability of

\textsuperscript{65} IBID 123 supra
\textsuperscript{66} Roe v Wade 410 U.S. 113 (1973)
\textsuperscript{67} Roe v Wade 410 U.S. 113 (1973)
\textsuperscript{68} IBID 35 supra
\textsuperscript{69} IBID 35 supra - Viability as a moral cut-off point provides firm argumentative ground in the abortion standoff.
\textsuperscript{70} IBID 35 supra
sophisticated treatment. This is not a plea for the aggressive treatment of 25-week neonates, only that since they are (at least theoretically) viable, this precludes their termination while still in utero”.

CHAPTER 3 – THE SOUTH AFRICAN CONTEXT

3.1 Background

Many have argued that there is a greater public interest in having the “right to life” as set out in terms of section 11 of the Constitution extended to “include a foetus and there could a change in the convictions of the community since promulgation of the Constitution some 20 years ago based on the fact that law is fluid and dynamic”.

3.2 Recognition implied by legislation

A viable foetus has been a contentious issue over many years as in South Africa law does not extend to legal recognition of a foetus. Authors have defined “a viable foetus as the point of development at which a foetus can survive independently of the pregnant women in some cases with the assistance of artificial care.” Viability is subjective based on the pregnancy but doctors usually recognise 24 weeks of gestation has been the age of viability (second trimester of pregnancy). However, in terms of the Birth and Death Registration Act section 24 provides for the Notice of stillbirth “A notice of stillbirth must be given within 72 hours” this act states that “a stillborn in relation to a child, means that it has at least 26

71 IBID 35 supra ‘Moderate’ here means a position that is neither absolutely pro-choice, nor absolutely pro-life, but somewhere in between.
72 VT Smit ‘Everyone has the Right to life – Fact of nasciturus fiction?’ March 2015 De Rebus 42
73 C. Pickles ‘Personhood: proving the significance of the born – alive rule with reference to medical knowledge of fetal viability’ (2013) STELL LR 146 – 164 “If it were medical knowledge informing the legal definition of foetal viability, there would only be one definition applied in law, because foetal viability is a biological occurrence that is not influenced (suspended or advanced) by the application of a particular provision of law”.
74 IBID
75 Birth and Death Registration Act 51 of 1992
76 IBID – Section 24
weeks of intra-uterine existence but showed no sign of life after complete birth weeks and over is stillborn that the still birth must be registered”.\(^{77}\)

According to PJ Lehohla “the reduction of perinatal deaths is an essential step towards reducing infant and child mortality as well as improving maternal health status, a significant proportion of perinatal deaths are preventable because they occur as a result of the type of place of delivery and the quality of care received during delivery. Accordingly, the prevention of these perinatal deaths is largely reliant on ascertaining the underlying causes. In order to monitor and evaluate progress towards achieving national goals of reducing child mortality and improving maternal health, information on the magnitude of perinatal mortality is required”\(^{78}\)

This is done to improve maternal health as well as to reduce infant deaths, as such reemphasising the underlined principal of protecting potential life.

### 3.3 Separation – survivability argument

Some authors have extended their research by focusing on embryos and reproductive health and how those rights are protected. Scientific studies have shown that an embryo contains all human components.\(^{79}\)

Roubaix and Niekerk have developed a concept of “sentience” which refers to “a living entities ability to feel and in particular to experience pain”.\(^{80}\) The author scientifically examines the cut off point for an abortion. He argues that once the central nervous system is developed, it is at this point that an abortion is no longer permissible.\(^{81}\) His basis for this is that the developments of the central nervous systems allows the foetus to feel pain, and it morally wrong to then inflict pain onto a foetus. \(^{82}\) The central nervous system is formed as

\(^{77}\) IBID

\(^{78}\) PJ Lehohla ‘Perinatal deaths in South Africa, 2011–2013’ Statistics South Africa P0309.4 - P0309.4

\(^{79}\) MN Slabbert ‘Are the embryo and foetus extra uteru m sufficiently protected in South African Law? (2001) TSAR 495


\(^{81}\) Ibid

\(^{82}\) IBID 38 page 207
early as six (6) weeks of pregnancy as such if one has to rely on this argument it would mean that abortions that are performed after six weeks would not be permissible.\(^{83}\)

They further argue that “at about 25 weeks gestational age, the gradual development of the pre-natal human being reaches the stage where it can survive separation from its mother, should it be born alive at that point.”\(^{84}\) Their core argument is that “this radically alters pre-personal moral significance: since there is no justifiable moral basis for differentiation between a specific (normal) neonate and a specific (normal) viable foetus in the last weeks of pregnancy, these entities, the same human being in different phases of development, are entitled to equal treatment”.\(^{85}\)

The authors are implying that there should be no discrimination between a pre-viable foetus and a foetus that is considered to be viable as both should be protected and treated equally. This would result in a “separation – survivable pre-person to be entitled to the same protection as that of infants”.\(^{86}\) This is to ensure that the foetus develops into a neonate with all moral capacities. Simply put a viable foetus should be treated in the same manner as a new-born child and they should both be able to acquire equal protection.\(^{87}\) When performing a termination of pregnancy foetuses must be given anaesthetic before the termination where their cognitive development can perceive pain.

3.4 The Nasciturus fiction Rule

“The Nasciturus fiction rule refers to the legal principle in which a foetus if subsequently born alive will acquire all rights of born children whenever this is to its advantage”.\(^{88}\) “A natural person’s legal personality begins at birth, before birth a foetus is not a legal subject and therefore not the bearer of rights, duties and capacities”.\(^{89}\) “Legal personality begins if the following requirements are complied with:

(i) The birth must be fully completed. There must be a complete separation between the body of the mother and the foetus.

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\(^{83}\) IBID 38 page 207
\(^{84}\) IBID 38 – page 209
\(^{85}\) IBID 38 – page 210
\(^{86}\) IBID 38 – page 210 the point is that once viable, they indeed have developed a distinct possibility to develop other relations, and will do so if delivered at that point. We submit that this substantially changes their moral status.
\(^{87}\) IBID 38 – page 216
\(^{88}\) IBID 38
\(^{89}\) DSP Cronje and J Heaton The South African Law of Persons 2ed (2003) at 7
(ii) II. The child must have lived after such separation, even if is for a short period.”

This principal was applied in *Pinchin v Santam Insurance Co Ltd* 91 this matter the facts of the case were that a woman who was pregnant at the time met an accident in which she sustained serious injuries, her child was born alive however was later diagnosed with cerebral palsy. The application was launched by the child’s biological father for injuries sustained while still in the mother’s womb. The court was posed with the question as to “whether an action lies for a child for injuries suffered prenatally”. 92 The court stated “that by application of the Roman law Nasciturus fiction, the child has an action in delict”. 93

In another case of *Chisholm v East Rand Proprietary Mines Ltd* 94 in this matter a man who was employed at a mining company was killed as a result of negligence by another. His wife was pregnant at the time and she claimed damages for loss of support.

Judge Manson held that “the child was entitled to claim loss of support even though it had not been born at the time of the delict “One of the first questions which arises is whether the compensation to be awarded must include such a provision for the child as the father would have made for it. That depends, again, on the further question whether the child has an independent right of action apart from the mother against a person responsible for the death of the father. The answer was affirmative and as a result fiction will be to its advantage and places this infant in the same position as other children.”

“Since the unborn child can acquire subjective rights as a foetus, the law should thereby regard the foetus as a legal person”. 96 In this regard introducing personhood at the point of viability would “equalize the power unequal power relationship shared by the foetus and the pregnant women in the context of termination of pregnancy” 97. “The common law born-alive

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91 *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W)
92 MB Mankga ‘Nasciturus fiction and the principles of the law of delict considered in the light of a recent judgment’ *Codicillus* Volume 48 No 2 2007 pp 11-30
93 IBID 49 supra
94 Chisholm v East Rand Proprietary Mines Ltd 94 (1909 TH 297)
95 A Mukheibir ‘The nasciturus fiction and delictual claims RAF v M obo M [2005] 3 All SA 340 (SCA)’ OBITER 2006 p189-196
96 IBID
97 IBID
rule was developed as a result of a lack of advanced medical technology and because of a primitive understanding of the female body during pregnancy”.  

The legal concept of ‘personhood’ means “to be a person is to be assigned rights, duties, obligations and respect, the metaphysical facet is evident because the only entities recognized by law as having capacity for natural personhood are those that conform to a certain description”.  

Pillay states that our law is outdated and needs to be developed to consider medical and technological advancements. The born alive rule was developed in the seventieth century and the medical knowledge was insignificant and not as advanced. Our common law does not consider the length of time the child survived or the extent or nature of any medical problems or disabilities. All it considered was two requirements, the first being the issue of separateness (born) and the second being th independent existence (alive), once these requirements were met it constituted the "born alive" or "live birth" rule.  

The advancements of technology and medical science can now determine whether the foetus was born alive and can go as far as determining whether there was any injury inflicted on the foetus prior to being born alive.  

“Laws can be enacted to prescribe murder of and or assault of the foetus and wrongful death claims based on negligently causing a stillborn, theses contentious issues can be addressed by means of enacting legislation”. This would mean that specific legislation is to be enacted to address the issue of foetal interests and go further by according rights to a foetus in certain instances. 

The Road Accident Fund Act 19 of 2005 provides for “compensation for the loss of foetus as a result of a motor vehicle collision”. Even though the foetus is not considered to be a person, the mother is still entitled to monetary compensation for the loss of a foetus from the Road Accident Fund, as a result of a motor vehicle collision. The regulations submit that

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98 Pillay (2010) Stell LR 231
101 IBID 47
102 IBID – page 147
103 The Road Accident Fund Act 19 of 2005
“Regulation 3(1)(a)(i) The Minister may publish in the Gazette, after consultation with the
Minister of Health, a list of injuries which are for purposes of Section 17, not to be regarded
as serious injuries and no injury shall be assessed as serious if that injury meets the
description of an injury that appears on the list”.105

Regulation 3(1)(b)(iii)\textsuperscript{106} states that “An injury which does not result in 30 per cent or more
impairment of the Whole-body person may be assessed as serious if that injury:

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long term mental or severe long term behavioural disturbance or
disorder; or

(dd) resulted in loss of a foetus”.107

As such should a pregnant woman be involved in a motor vehicle collision which results in
the loss of a foetus that women would be entitled to “compensation from the Road Accident
Fund for the loss of a foetus despite that stage of pregnancy”.108

3.5 South African case law on foetal interest

In terms of criminal law in South African, the Criminal Procedure Act 51 of 1997 provides
that “a child is deemed to have been born alive only when the requirement of it having being
born alive and is able to survive after separation.” 109

In the matter of S v Neshuku\textsuperscript{110} the issue of concealment of an abortion under the Abortion
and Sterilization Act 2 of 1975 was deliberated. The court found “that there was no evidence
that foetus was alive at the time of abortion or that is was the accused's efforts which caused
the abortion as such the conviction changed to one of attempting to procure an abortion”.111

In S v Mshumpa\textsuperscript{112} the state argued that the accused should be charged with murder of the
foetus, and argued that the foetus must be considered to be born alive for the charge to apply.

\begin{itemize}
\item[105] Van Heerden v Road Accident Fund (6644/2011) [2014] ZAGPPHC 958 (8 December 2014)
\item[106] Road Accident Fund Act 19 of 2005 Regulation 3 (1)(b)(iii)
\item[107] IBID
\item[108] IBID
\item[109] Criminal Procedure Act 51 of 1977 – section 239(1)
\item[110] S v Neshuku Case No: 958/93 18-5-1993 NmHC Levy J and Frank J SCD 16/1993
\item[111] IBID
\item[112] S v Mshumpa 2008 (1) SACR 126 (E)
\end{itemize}
The court was not willing to extend the “born alive principal to extend the definition of murder to include the unborn.” The court further held that “it was the duty of the legislature to enact specific legislation to create for a separate crime of feticide.”

In an unreported judgement of *S v Mentoor* the court considered whether an assault on a woman who was pregnant which caused damage to the unborn, would this action constitute murder? In this matter, a pregnant woman had been assaulted which resulted in her giving birth prematurely, and the foetus did not survive. The court *a quo* held that the accused conduct/assault had occurred prior to the child being born and was therefore still a foetus. The common law did not recognise the foetus as a person and therefore would not meet the requirement for the charge of murder.

The High Court, however, said “that this was incorrect since murder is a 'consequence crime': the accused's assault on the woman caused the child to be born prematurely and *caused* the child’s death shortly thereafter”.

In the case of *S v Molefe* the court had to consider section 113(1) of the General Law Amendment Act 46 of 1975 which states that “any person who without a lawful burial order, disposes of the body of any newly born child with the intention to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence”. Section 113(2) placed an onerous burden on the prosecutor to prove that the at the time of disposal the child was born alive. Secondly the court determined “the meaning of the word 'child' in the Act which meant that the foetus must have 'arrived at the stage of maturity at the time of the birth that it might have been born a living child' and accepted that this occurred at 28 weeks' gestation”. took a breath and was subsequently born alive, such as the “hydrostatic test” which is a breathing test to ascertain whether the foetus must have breathed. The problem with this test is that breathing is not the only means to determine if a child was born alive. “Studies show that respiration may be the result of the central nervous system reacting

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113 IBID
114 IBID
115 *S v Mentoor* A300/2012, 27 February 2013
116 IBID
117 IBID 54 supra
118 *S v Molefe* 2012 (2) SACR 574 (GNP).
119 General Law Amendment Act 46 of 1975 section 113(1)
120 IBID 57 supra
121 IBID – 57 supra (at 578G–H),
to sudden pressure, temperature change and/or external stimuli’ moreover, many children are born alive and yet do not breathe for some time afterwards. Some pathologists argue that ‘only complete respiration involving the greater part of both lungs is positive proof of live birth in a legal sense’”.¹²³

The second test that can be used to establish if a foetus was “born alive” is where there was independent circulation which is used in addition to the breathing test. “The difficulty here is that medical science has not yet developed a test to determine whether a foetus has independent circulation, and the courts have not yet articulated a legal meaning for that notion, and it is certainly easier to determine whether a child has breathed than whether it has an independent circulation”.¹²⁴

In other cases, such as S v Jasi¹²⁵ which was a Zimbabwean decision that examined the issue of gestational age, the court was of the view that regardless of the stage of development of the foetus or the duration of the pregnancy, a child who is separated from its mother and is capable of been born alive.¹²⁶ In S v Madombwe¹²⁷ the court held “that foetus less than 28 weeks of gestation should be regarded as a child in terms of the Concealment of Birth Act.”¹²⁸

The above case reflects on the courts decisions made when faced with the issue of determining circumstances reading a foetus, in many instances the court had to consider with whether the foetus at the stage of viability could be considered to be the same as an infant or a child who was born alive. The courts have not answered the question of when a child is considered to be “born alive” and they have failed to develop common law and as such the issue remains undetermined in South African jurisprudence.¹²⁹ The judiciary has passed the responsibility onto the legislature to develop legislation that is to deal with issues concerning the foetus. That has yet to occur in South Africa. “The anxiety of judges arguably stems from the awareness that their judgments not only have legal implications but extra-legal implications also, as is evident in the law's hermeneutic role of shaping social norms and beliefs”.¹³⁰ It may also stem from judges' that “appreciation that the concept of human

¹²³ IBID 283-284
¹²⁴ IBID
¹²⁵ S v Jasi 1994 (1) SACR 568 (ZH)
¹²⁶ IBID
¹²⁷ S v Madombwe 1977 (3) SA 1008 (R)
¹²⁸ IBID
¹²⁹ IBID 93
¹³⁰ IBID
personhood cannot be defined and developed without making some kind of statement about, or implying, what it means to "count" for the purposes of law.\textsuperscript{131}

\section*{CHAPTER 4: THE AMERICAN LEGAL CONTEXT}

\subsection*{4.1 Background}

In cases of homicide or murder that involves a pregnant woman there would only be one victim to the crime committed.\textsuperscript{132} The accused would be charged with one count, rather than two despite the women being pregnant or the stage of her pregnancy.\textsuperscript{133}

This called for a move towards providing legal protection to the foetus to be seen as a victim of violence despite not being born alive. As a result, federal legislation, the Unborn Victims of Violence Act (UVVA), was enacted to protect the foetus.

In terms of the Act a crime against the pregnant women, for example a woman who was shot dead, the charge against the perpetrator would now constitute two counts of murder one for the pregnant women and the other for the unborn foetus. Federal law did not provide for an additional charge for the killing of the unborn which is now encompassed in UVVA\textsuperscript{134}.

The main reason behind enacting such legislation was to reduce the effects of violence and abuse against woman who are seen as a vulnerable group in society and to ensure extra protection to pregnant women who may be faced with violent situations such as been in an abusive relationship thereby facing the risk to miscarry due to the infliction of violence on her person. The UVVA therefore accords an additional protection in criminalising acts of violence against pregnant women. The use of criminal sanctions tends to reduce impact of such violence in that the perpetrator would now be charged with two crimes one against the women and the other against the unborn. The UVVA was necessitated by a need to address domestic violence against women and it had a specific objective if addressing foetal interest.

\begin{thebibliography}{99}
\bibitem{131} Fagundes 2001 \textit{Harvard LR} 1759-1764
\bibitem{132} Murder is defined in South Africa as the “unlawful, intentional killing of one human being” whereas culpable homicide is the negligent killing of a human being there it requires the element of negligence rather than intention. The UVVA allows for a conviction of both homicide as well as murder.
\bibitem{133} J.H.H.M. Dorscheidt ‘Developments in Legal and Medical Practice Regarding the Unborn Child and the Need to Expand Prenatal Legal Protection’ \textit{European Journal of Health Law} 17 (2010) 433-454
\end{thebibliography}
It is so that the law will recognise her foetus as a victim and the psychological consequences of that.

4.2 Categories of the application of the Unborn Victims of Violence Act

There are various different categories to protection of the fetal rights, which shall be explored. Courts have been faced with protecting the unborn in various different scenarios and in each case the court had to strike a balance between a woman established constitutional rights and the need to protect potential life. The courts have in many instances recognised the foetus and accorded protection in lieu of protecting potential life.

4.2.1 Protecting the unborn from violent acts

In the United States of America (USA) the common law as well as federal legislation did not recognise the foetus as a separate legal personality to the pregnant women.

The Act only applies to foetus who are injured by acts of violence which are already defined in terms of federal crime\(^\text{135}\). However, the act prohibits any punishment against a woman who undergoes an abortion to which she has consented to, as such a woman who has a legal abortion cannot be criminalised in terms of this Act.

Over the years women and children have been seen as a vulnerable group in society which requires additional protection. “A distinction must be made between international and unintentional actions, when a deliberate assault on a pregnant woman leads to the destruction of the foetus, there is no reason why this should not be a criminal offence”.\(^\text{136}\) Where there is an act of a violent nature that is committed upon a pregnant woman, in such a scenario to establish whether the act of violence was intentional, you will need to establish whether the accused was aware that the women was pregnant. If the accused was aware then the action of violence committed will be deliberate and such acquire the charge of murder should the foetus not survive. Whereas, an unintentional act would be an act where the accused was not aware that the women was pregnant yet still inflicted harm onto the women thereby the act

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135 IBID
would then acquire the charge of culpable homicide. These cases require an enquiry into the *mens rea* of the perpetrator.  

4.2.2 Protecting the unborn from harm due to substance abuse

There is risk that stems from the Act, if interpreted it could mean that a pregnant woman could also be punished in terms of the Act if she consumes alcohol during her pregnancy, or takes drugs all of which will be harmful to the unborn/foetus. This would constitute a form of violence and would result in the state intervening and holding the women in a rehabilitation facility against her will for a duration of her pregnancy or possibly till the end of her pregnancy.

For example, a woman from Wisconsin who had a history of drug abuse, stopped taking drugs once she became aware that she was pregnant. When she visited the doctor, he had prescribed certain drugs to which the women refused to take in fear of becoming an addict again. The doctor then informed the social worker of the situation who later took the women into custody and she was forced to stay in a treatment facility during her pregnancy. Despite the women giving up her addiction during pregnancy she was still forced against her will to stay in in the facility. As a result, she lost her jobs as well as all the benefits that would have acquired during her pregnancy.

Many authors have opposed the Act as they believe that the limitation of a women’s rights in terms of the Act is merely a patriarchal notion to ensure that women’s rights are supressed. “Traditional resistance to fetal personhood stemmed from the concern that the foetus right would eclipse the mother’s fundamental rights”. This is a feminist viewpoint to promote women’s reproductive rights and to ensure that the only person responsible for making decisions regarding a women’s body would be the women herself. However, the UVVA

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137 *Mens Rea* – “is an element of criminal responsibility, a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfulness. A fundamental principle of Criminal Law is that a crime consists of both a mental and a physical element.”


139 IBD


141 William & Mary ‘Increasing victimization through fetal abuse redefinition’ 2014 Vol (20) 685

142 IBD This argument highlights the growing trend in legislation regarding the larger social conception of the role of women, essentially codifying patriarchal mentality and establishing a woman's body as belonging to almost everyone except herself.
imposes a certain amount of restriction to a woman being the sole decision maker in terms of her reproductive choices.

There have been suggestions to criminalise women who drink during pregnancy.\textsuperscript{143} The argument is based on the notion that there is no cure for foetal alcohol syndrome, this criminalisation will prevent women from drinking during pregnancy thereby preventing the foetus from been harmed during pregnancy.\textsuperscript{144} By interpreting the UVVA and the principles them stem from it, “it would be highly likely that a pregnant woman could be charged criminally for drinking during pregnancy despite the term of pregnant or the stage of viability of the foetus.”\textsuperscript{145}

It was suggested by James Denison that “instead of enacting fetal protection laws, a better solution to the problem would be creating new programs designed to provide pregnant women with positive incentives to seek prenatal care and substance abuse counselling. Such programs are likely to be as effective, if not more effective, than the current statutory schemes of forced rehabilitation, and would avoid compromising the health or constitutional rights of women. These programs should incorporate two main components: education and positive incentives for seeking voluntary prenatal care”.\textsuperscript{146}

Such a move to rehabilitation rather than a criminal imposition on a woman may work more effectively. Educating women on the effects of alcohol consumption or substance abuse may result in women taking the initiative on their own to stop their habit/addiction. This will result in greater protection to potential life. By imposing criminal sanctions to these acts may result in women going into hiding and not receiving adequate medical treatment during her pregnancy.

“In addition to education, states should also offer several forms of positive incentives for women to seek voluntary prenatal care. First, simply increasing the number of outpatient treatment programs available to pregnant women would likely increase the number of women that utilize such programs. Currently, only a minority of drug treatment programs accepts

\textsuperscript{143} JB Gardner ‘Should Drinking during pregnancy be criminalised to prevent fetal alcohol spectrum disorder?’ \textit{SAJBL} (2016) Vol 9 No 1 26-30
\textsuperscript{144} JB Gardner ‘Should Drinking during pregnancy be criminalised to prevent fetal alcohol spectrum disorder?’ \textit{SAJBL} (2016) Vol 9 No 1 26-30
\textsuperscript{145} IBID
pregnant women.” By providing adequate prenatal care and an incentive programme would encourage women to ensure that the unborn is protected, thereby enforcing the view of protecting potential life.

### 4.2.3 Protecting the unborn from termination of pregnancy

In the landmark case in the United States regarding abortion is the case of *Roe v Wade* the Supreme Court had struck down Texas abortion laws as been unconstitutional and limiting a women’s rights. The court however did not comment on the very controversial question that is still to be answered of when life begins. “The court found that a state’s interest in protecting the health of a mother does not become compelling until after the first trimester of pregnancy and therefore the state could not impose or infringe a woman’s right to an abortion at this stage.” The court further held “that the interest of the state becomes compelling at the point of viability.”

Some authors see the UVVA as strengthening the decision in *Roe v Wade* “in that it reinforces women’s rights to choose by punishing those who take it away from her.” It is of vital importance to protect and enhance women’s rights which is one of the reasons why the Act was enforced due to violence against women who are seen as vulnerable in society and requiring further protection.

The court in *Roe v Wade* the court held “that a woman has a constitutional right to privacy that is broad enough to encompass her decision whether or not to terminate her pregnancy and that the states interest in protecting a women’s health’s becomes compelling at the point where the risk of death from an abortion is not less than the risk of death from a normal childbirth roughly the end of the first trimester of pregnancy.”

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147 The Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 473: Substance*
149 IBID
150 M. Fitzpatric ‘Fetal Personhood after the Unborn Victims of Violence Act’ *RUTGERS LAW REVIEW* (2006) 553
151 IBID
152 M. Fitzpatric ‘Fetal Personhood after the Unborn Victims of Violence Act’ *RUTGERS LAW REVIEW* (2006) 553
the right to privacy accords her such a right. The state should not intervene or disrupt a woman’s right to privacy.

On the other hand, some authors have interpreted the UVVA to be an imposition of women’s rights. Donovan’s stance is that “the legal system in the USA focuses on the unborn child and does not consider the impact on a pregnant women’s suffering or even recognition of her existence as person who has been harmed”\textsuperscript{154}. This submission provides that there is so much protection that is accorded to the unborn that it may topple the scales to favouring the unborn child over the women. The court held in \textit{Roe v Wade} that “the state’s interest arises at the stage of viability (which is when the foetus can survive independently outside the womb of the pregnant women), however in terms of the UVVA, protection is accorded to the foetus at conception”.\textsuperscript{155} The legislation is therefore open to challenge in a court of law, and to date this has not occurred.

The issue that the court will look at when posed with this dilemma is the state’s duty to override a women’s decision and her right to bodily integrity. The courts will need to “balance the states interest in the preservation of life as well as protection from third parties against the patients’ rights to bodily integrity and freedom”\textsuperscript{156}.

In the supreme court in \textit{Planned Personhood of South Eastern Pennsylvania v Casey}\textsuperscript{157}, in this case the court reaffirmed the main ruling as the \textit{Roe vs Wade} case but the court “rejected the trimester approach and held “that the State’s interest can occur at any stage of the pregnancy even before the stage of viability unless the regulation inflicts an undue burden on a women’s ability to obtain an abortion.”\textsuperscript{158} “Involuntary termination of a pregnancy against the wishes of the mother is a wrong to her. The law should take seriously the views of mothers in determining how to respond”\textsuperscript{159}. The states should take into cognisance the views of a women when it comes to abortion.

“For many (if not most) individual’s life is regarded as precious, something of great intrinsic value which is something that is said to be of great value to oneself. We also hold high

\begin{itemize}
\item \textsuperscript{154} IBID 31
\item \textsuperscript{155} IBID 66
\item \textsuperscript{156} JA Filkins ‘A pregnant mothers right to refuse treatment beneficial to her foetus, refusing blood transfusions’ Depaul Journal of Health Care Law Vol (1998) (12) 362
\item \textsuperscript{157} Planned Parenthood of South-eastern Pa. v. Casey, 505 U.S. 833 (1992).
\item \textsuperscript{158} Ibid 34
\item \textsuperscript{159} K. O Donovan ‘Taking a Natural Stance on the legal protection of the fetus Vo v France’ \textit{Medical Law Review} (2006) Vol 14 115-123
\end{itemize}
regard to instrumental value which is to strive to achieve a goal. This value comes with obligations and responsibilities that we as humans strive to achieve. Most individuals do not regard a foetus as an expendable body part, like hair that is cut off and thrown away. Thus, abortion is morally problematic.160

In some circumstances allowing the pregnancy to continue may be far more detrimental than an abortion. It could either effect the mother in that the pregnancy may be life threatening or it could impact on the foetus who may be born with major disabilities. These circumstances may allow abortions to be performed and will be deemed as morally permissible. Individuals are diverse as such you will need to consider their belief and value systems as well as their life structure.

may be worse than abortion – for the mother, the foetus, or both. The circumstances under which abortion might be regarded as morally permissible will depend, for the individual, on the belief or value system on which her life is structured”.161

4.2.4 Protecting the life of the unborn through medical intervention (Fetal and Maternal Conflict)

There are various cases in which the courts have dealt with similar instances. In the Matter of Jamaica Hospital,162 a woman was diagnosed with a life-threatening condition whereby her veins in the oesophagus were at risk of rupturing. This result could be fatal. The doctors advised the patient that she required a blood transfusion to which the patient refused, the women were pregnant and the doctors approached the court to intervene. The judge ordered the blood transfusion, submitting that the State had “a highly significant interest in protecting the life of a mid-term foetus, an interest which outweighed the mother's right to refuse a blood transfusion on religious grounds”.163

In the case of Mercy Hospital v. Jackson164 in this matter the pregnant woman was 26 weeks of gestation when she had gone into labour. She had serious complications with the pregnancy and the doctors advised that she would require a caesarean section. The woman was a Jehovah witness and she refused a blood transfusion. The doctors petitioned the court for assistance and the court held “that the women pregnant adult had the right to refuse a

160 IBID 144
161 Conscientious objection by South African healthcare providers to involvement in the process of abortion.
163 IBID
blood transfusion for religious reasons, when her decision posed no risk to her unborn child”\textsuperscript{165}

In the case of \textit{In Re Fetus Brown}\textsuperscript{166} a thirty-four-week pregnant woman was admitted to hospital and being a Jehovah witness she refused a blood transfusion. The hospital approached the court and argued that “interest in the well-being of a viable foetus outweighed the minimal invasion imposed by the blood transfusion whereas the pregnant women argued that she had the right to refuse medical treatment”\textsuperscript{167}. The court held that the blood transfusion was necessary to protecting the viable foetus in the basis that a catheter was already inserted and as a result there would be minimal bodily invasion\textsuperscript{168}.

The interpretation of these cases suggested that the courts have recognised that the state has a compelling interest in preserving life.\textsuperscript{169} To interpret the above case scenarios with the present UVVA, were a pregnant woman refuses a blood transfusion on the basis of religious rights despite the potential harm to the foetus could be punished as per the provisions of the Act. This is yet another right of a women that is subject to limitation in terms of the Act, that being the right to freedom of religion.

The advancement in medical technology together with doctors increased skill and knowledge have now resulted in doctors been able to provide treatment to a foetus in utero and ensure that the foetus is healthy and safe. This advancement in medical technology has led to the court ordering medical procedures that ensure and promote fetal health in utero even if it may be against the mothers wishes to secure potential life.\textsuperscript{170}

The courts have also made decisions in cases where doctors have advised women who were pregnant and there was a risk to the foetus, the women had to undergo a caesarean section, however women’s personal preferences have created a conflict in this relationship of a fetal-maternal relationship resulting in doctors approaching the court to grant an order compelling the women to undergo a caesarean section\textsuperscript{171}. American courts are conflicted regarding the

\begin{flushright}
\textsuperscript{165} Ibid
\textsuperscript{166} \textit{In re Fetus Brown}, 689 N.E.2d 397 (Ill. App. CL 1997).
\textsuperscript{167} Ibid
\textsuperscript{168} Ibid the court asserted the State maintains a "substantial interest" in potential life throughout pregnancy. In regard to abortion, the State's interest becomes compelling at viability. In addition, although viable fetuses may be considered persons in regard to injuries inflicted upon them by third parties, this principle does not apply to the mother.
\textsuperscript{169} IBID
\textsuperscript{170} IBID 38
\textsuperscript{171} IBID 38
\end{flushright}
justiciability of subjecting a pregnant woman to treatment against her will, for the benefits of the foetus.

4.3 Shortcomings of the Unborn Victims of Violence Act

Even though the UVVA criminalises certain crimes against the unborn there are many shortcomings with the Act that the legislature has not considered and may be very well challenged in court.

In state of Tennessee, the Supreme Court ruled in an embryo disposition case that: “The foetus is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.”

The UVVA fails to consider this concept, as it applies to any stage of pregnancy and fails to ascertain whether the foetus has developed to the stage at which it is fully formed and would be able to obtain ‘potential life’ status.

4.3.1 Drug Abuse/Alcohol Abuse

A woman who chooses to use drugs or consume alcohol during pregnancy can be arrested and or detained in a facility till the end of her pregnant and until she gives birth. This conflicts with the current abortion legislation that allows a woman to seek an abortion within the requisite time frames accorded. Thus, a pregnant woman who is six weeks pregnant still has the right to terminate the pregnancy however the state under the UVVA can arrest her for consuming alcohol or taking drugs. This is very contradictory and the interpretation and application of the UVVA falls short in this regard. Further, this is a

violation of the constitutional substantive due process right to bodily integrity under the American Constitution.\textsuperscript{173}

In \textit{Whitner v. State of South Carolina}\textsuperscript{174}, a woman who had ingested crack cocaine during the third trimester of her pregnancy was convicted of criminal child neglect. Her case proceeded to the state Supreme Court, which found in 1997 that viable foetuses are “persons” under the state’s criminal child endangerment statute, the court concluded that pregnant women who use illegal drugs or engage in behaviour that might endanger the foetus can be charged for child abuse and receive penalties up to 10 years in jail.\textsuperscript{175}

In other cases, a woman from Indiana in 2011 had attempted suicide by ingesting rat poison was rescued, and resulted in her giving birth to a premature infant who died, and was then charged with murder.\textsuperscript{176}

These criminal implications imposed under the Act would result in pregnant women refraining from seeking prenatal care during their pregnancies in fear of persecution.\textsuperscript{177} They would deliberately avoid seeking treatment for their substance abuse problem during their pregnancies which would ultimately harm the foetus.

\textbf{4.3.2 Reduction of violence inflicted on women}

Many authors have argued that the UVVA is not the best method of eradicating violence against women. Judy Fulcher, the Public Policy Director of the Coalition, testifying before Congress, noted that “the "UVVA" is not designed to protect women. The goal of the Act was to create a new cause of action on behalf of the unborn. The result is that the crime committed against a pregnant woman is no longer about the woman victimized by violence”.\textsuperscript{178} Others argue that the UVVA was enacted so as to overturn the decision in \textit{Roe v Wade}, and to take away a women’s right to choose so that to control a women’s

\begin{footnotesize}
\begin{enumerate}
\item United States of America: Constitution [United States of America], 17 September 1787, available at: http://www.refworld.org/docid/3ae6b54d1c.html [accessed 29 November 2017]
\item Whitner v. State of South Carolina, 492 S.E.2d 777-788
\item IBID
\item M. Goldberg, “Policing pregnancy,” \textit{The Nation} (May 9, 2011). Available at http://www.thenation.com/article/160092/polic-ing-pregnancy
\item D. Uberoi \& M de Bruyn ‘Human rights versus legal control over women’s reproductive self-determination’ \textit{Health \& Human Right} (2013) Vol 15 (1) 161 -174
\item Juley Fulcher \textit{House Hearings on UVVA}, (testimony of). Public Policy Director of the National Coalition Against Domestic Violence.
\end{enumerate}
\end{footnotesize}
decision and enforce the peritracheal notion that women are incapable to deciding for themselves.\textsuperscript{179}

The UVVA does not recognise a stage of pregnancy such as viability but just indicates protection to the unborn, as such this right confers onto the foetus from conception which is deemed problematic as a person could be charged under the Act and the pregnant women could still at a later stage choose to terminate the pregnancy. For example, a pregnant woman to spite her partner/spouse could lay a charge against him for a crime specified under the UVVA. She could then at a later stage to choose to terminate her pregnancy. The questions then beg what becomes of the criminal charge against the husband. Further does the Act discriminates between males and females. The act may be open to abuse by the women seeking to use its provisions as a weapon against their partner/spouse.

\textbf{CHAPTER 5 – INDIA}

\textbf{5.1 Abortion in the Hindu Tradition}

In India, the concept of moral correctness has been around since the beginning of time.\textsuperscript{180} In the Hindu tradition, the words \textit{karma} and \textit{dharma} have a very special meaning. \textit{Karma} refers to actions of our conscious wills for which we are directly responsible whereas \textit{Dharma} is the performance of an obligation towards a religious duty.\textsuperscript{181} In respect of Karma it is believed that every action will have an equal reaction.\textsuperscript{182} Naidoo submits that “abortion is the unplanned expulsion of the living foetus from the womb of the mother, which cannot survive outside it, abortion is more correctly the expulsion of the fertilized ovum or embryo from the womb during the first three months of pregnancy.”\textsuperscript{183} “Termination of pregnancy between the third and sixth months is called miscarriage and expulsion between the sixth and ninth months is premature delivery whether the infant is born alive or not”.\textsuperscript{184}

\textsuperscript{179} Roe v Wade
\textsuperscript{180} T. Naidoo ‘Hindu Ethical Perspectives on Abortion’ \textit{Nidiin} (2003) Vol. 15 69 - 80
\textsuperscript{181} T. Naidoo ‘Hindu Ethical Perspectives on Abortion’ \textit{Nidiin} (2003) Vol. 15 69 - 80
\textsuperscript{182} IBID
\textsuperscript{183} IBID
\textsuperscript{184} IBID
“Abortion is not murder and is not necessarily always evil. It is, as has already been implied, justifiable sometimes as a lesser evil and it may sometimes even be viewed as the most responsible option available”. Ethical law is to create a solution or to provide ethical guidelines to ensure that human beings are able to function as a healthy lifestyle. Abortion is necessary as it directly impacts on human beings thus requiring an ethical guideline to ensure that moral foundations are not breached. As such Indian Law has been enacted to regulate termination of pregnancies.

5.2 Indian Legislation governing Termination of Pregnancy

The Medical Termination of Pregnancy Act 34 of 1971 was promulgated to deal with the issues of termination of pregnancies, the Act stipulates under section 2(a) “that an unwanted pregnancy to be terminated up to twelve (12) weeks of pregnancy by a registered medical practitioner.” Where a pregnancy is over twelve weeks (12) but under twenty (20) weeks the imposes an obligation to have a second medical practitioner’s approval before the pregnancy can be terminated only if certain grounds are met. "The grounds include grave risk to the physical or mental health of the woman in her actual or foreseeable environment, as when pregnancy results from contraceptive failure, or on humanitarian grounds, or if pregnancy results from a sex crime such as rape or intercourse with a mentally-challenged woman, or on eugenic grounds, where there is reason to suspect substantial risk that the child, if born, would suffer from deformity or disease.”

5.3 Limitations to Terminating Pregnancy

Any pregnancies beyond twenty weeks of pregnancy is prohibited and the pregnant women would have approach the court for a determination as to whether or not an abortion will be allowed. The Medical Termination of Pregnant Act goes further by stating in section 4(a)” that no pregnancy of a woman, who has not attained the age of majority i.e. eighteen years of

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185 IBID 113
186 Ibid
187 The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)
188 The Medical Termination of Pregnancy Act 34 of 1971 – section 2(a)
189 IBID
190 SS Hirve ‘Abortion Law, Policy and Services in India: A Critical Review’ Reproductive Health Matters 2004 (1) 114-121
age, or a person who does not possess legal capacity such as a mentally ill person, may be
terminated without the consents of her legal guardian.”\textsuperscript{191}

In 2017 in New Delhi in India, the parents of a 10-year-old girl appealed to the Supreme
Court of Appeal to allow an abortion for their ten-year-old daughter who was raped by her
uncle. The girl was at that stage 28 weeks pregnant and her parents only became aware of her
pregnancy after the twenty-week allowance as per the MTP Act. The court refused to grant
the abortion after hearing evidence from a panel of medical experts who confirmed that an
abortion would endanger both the ten-year-old girl as well as the foetus.\textsuperscript{192}

Because of the termination of pregnancy legislation in India, women face the problem of
having to approach the court for permission to have their pregnancies terminated. This is a
lengthy procedure and would result in the increased development of the foetus thereby
making it much more difficult for the court to grant a termination of pregnancy due to the
advanced stage of development of the foetus.

In a separate matter Niketa and Harsh Mehta, had applied to the Bombay High Court to
obtain permission from the high court for a termination of pregnancy of their foetus who was
beyond the twenty-week limitation allowed for in terms of the MTP Act.\textsuperscript{193} The reason for
the couple seeking the termination of pregnancy was that the tests results of the foetus
showed to it having a congenital heart block and transposition of the great arteries.\textsuperscript{194} The
court sought an opinion from a panel of doctors to assess the tests results. The panel found
that the child would not be disabled to the extent that it would not survive.\textsuperscript{195} The court
interpreted the Medical Termination of Pregnancy Act and noted that the legislation provides
for a termination of pregnancy beyond twenty weeks provided that the women’s health would
be at risk as a result the court did not grant permission for the termination of pregnancy.\textsuperscript{196}
The court added that it was the duty of the legislature to amend the law.

The courts have taken a strong approach in refusing a termination of pregnancy beyond 20
weeks of gestation. Despite not according a specific right to a foetus the court in many

\textsuperscript{191} IBID 117 Supra
\textsuperscript{192} See \url{http://www.thehindu.com/news/national/sc-rejects-plea-seeking-nod-for-10-year-old-rape-survivors-abortion/article19377784.ece}
\textsuperscript{193} IBID
\textsuperscript{194} G. Mudur ‘Doctors call for changes to abortion law’ BMJ (2008) Volume 337 p 372
\textsuperscript{195} IBID
\textsuperscript{196} IBID 124
instances as mentioned above has favoured the life of a foetus over a maternal or parental autonomy.

5.4 Shortcomings of the Medical Termination of Pregnancy Act

There is currently a draft Medical Termination of Pregnancy Bill “which has increased the legal limit for abortion from 20 weeks to 24 weeks”.\textsuperscript{197} The bill further provides for “an abortion beyond 24 weeks of the pregnancy but based on specific and defined conditions in the bill”.\textsuperscript{198}

Further the “The Bill amends Section 3 of the 1971 Act to provide that ‘the length of pregnancy shall not apply’ in a decision to abort a foetus diagnosed with ‘substantial foetal abnormalities’ or if it is ‘alleged by the pregnant woman to have been caused by rape’”.\textsuperscript{199}

In term of the Medical Termination of Pregnancy Act, “even pregnant rape victims cannot abort after 20 weeks, compelling them to move court”.\textsuperscript{200} This would create an urgency on women who are aware that they have been raped to take the necessary steps to ascertain whether of not they are pregnant and to take immediate action, however it would pose unreasonable prejudice on those women who are unable to easily access health care facilities and are supressed by family pressure and stigma to ascertain whether they are in fact pregnant.\textsuperscript{201} It allows a woman to make her own decision in respect of the termination of pregnancy. “It also takes into account the reality of a massive shortage of both doctors and trained midwives, and seeks to allow Ayurveda, Unani and Siddha practitioners to carry out abortions.”\textsuperscript{202} This would address a major issue as the MTP Act only allows for doctors to perform termination of pregnancies, by allowing mid-wives and mid-level health professionals to be able to perform first trimester abortions would assist in curbing the problem of having a shortage of doctors.

\textsuperscript{197} IBID 124
\textsuperscript{198} IBID 124
\textsuperscript{200} IBID
\textsuperscript{201} IBID
\textsuperscript{202} IBID
5.5 Failure to allow minor children the right to obtain an abortion without a legal guardian’s consent

The MTP Bill failed to deal with the issue of minor children obtaining an abortion without their legal guardian’s consent. A similar issue was dealt with in the case of Suchita Srivastava & Anr. vs Chandigarh Administration, in this matter a young woman (hereinafter referred to as the patient) who had been abandoned by her parents and living in a mental care facility in Pune. It was discovered that as a result of a rape she was found to be pregnant and said to be between eight to ten weeks pregnant. “The Chandigarh administration approached the Punjab and Haryana High Court to seek permission for a medical termination of the pregnancy, bearing in mind that the patient was mentally retarded, she was abandoned by her parents as such she did not have a legal guardian who could look take care of her and her unborn child”.205

The High Court considered medical evidence and found that nor the unborn or the mother was in any form of medical danger requiring a termination of pregnancy. The patient was aware that she was having a baby and she was happy with the thought of giving birth, however her mental capacity was determined by the court and they found that she did not possess the required mental capacity to take care of a baby beyond birth due to her retardation. “In light of the above factors the High Court allowed the termination of pregnancy and found that it would be in the patient’s best interest for her pregnancy to be terminated”.207 However, the applicant filed an appeal in the Supreme Court, the issue that was before the court was one of ‘consent’. “The court examined the provisions of the Medical Termination of Pregnancy (MTP) Act, 1971 and noted that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any ‘mental illness’”.209

The court found that a women’s right to reproductive decision was one that was protected by the Constitution in terms of Article 21 which set out the right to personal liberty. In

203 Suchita Srivastava & Anr. vs Chandigarh Administration 2009 (11) SCALE 813 This judgment can be viewed accessed at: http://indiankanoon.org/doc/1500783
205 IBID
206 IBID p184
207 IBID p184
208 IBID p184
209 IBID p 185
determining the issue of consent, one had to consider the patients mental ability. The court looked at section 2(b) of the Medical Termination of Pregnancy Act which states that “a person suffering with a mental illness is regarded as a person who is in need of medical treatment by reason of any mental disorder other than mental retardation.”210 The court found a distinction between the terms “mentally ill person” and “mentally retarded person”, which required different treatment to each.211 On this basis the court found that a mentally retarded persons autonomy with regards to termination of pregnancy must be respected. The court held that “disorder. The judgment held that termination of pregnancy without consent would not be in the patients ‘best interests’ and that the courts could not order a termination without consent when the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority”.212

The judgment has a far-reaching implication and by interpretation of the judgment in respect of minor children, one must question, would the court move in the same direction had the women been under the age of 18 years old? The MTP Act specifically prohibits a minor child from obtaining an abortion unless the parent or guardian consents to the termination of pregnancy. If a retarded woman is capable of exercising the right to autonomy, will a sixteen-year-old girl not be able to enjoy such a right. Abortion is frowned upon in India and a young girl who falls pregnant would fear telling her parents about her pregnancy and this could lead to her obtaining an illegal abortion and could risk her life and safety. In this regard, the Indian legalisation on abortion falls short. The World Health Organisation had “estimated that 40-60 million abortions take place throughout the world and half of them perform unauthorized person mostly in developing countries with grave consequences”.213 “Unsafe abortions are performed 15-20 times more often than safe legal abortions in India, at present. Unsafe abortion is mostly performed by untrained village abortionists, chiefly female dais or untrained midwives, village unlicensed doctors called quacks, licensed doctors without any training in midwifery and family planning, as well as trained doctors including gynaecologists who do not wish to disclose these procedures for socio-economic and legal

210 The Medical Termination of Pregnancy Act 1971
211 IBID 128 supra p185 The judgment notes that a similar distinction is found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 where ‘mental illness’ has been defined as any mental disorder other than mental retardation. Under Section 2(r) of the Act ‘mental retardation’ has been defined as ‘a condition of arrested or incomplete development of mind of a person which is specially characterized by subnormality of intelligence’
212 IBID – 186
reasons. In both these cases, the abortions were performed by doctors without any training in midwifery, and family planning.\textsuperscript{214}

### 5.6 Recognition of the foetus in Indian Law

In India, apart from the Medical Termination of Pregnancy Act, there is not specific legislation that deals with the issue of the unborn or protection of the unborn. The debate on foetal protection is to establish the limits of the ‘natural’.

“The natural is no longer self-evident where reproductive practices are concerned—if indeed it ever was: In addition to the so-called "new" reproductive technologies, such as assisted conception and prenatal screening, there are also a number of emergent reproductive service industries, such as surrogacy, through which "traditional" reproductive activities have become both professionalized and commercialized. It is this convergence of professional, technological, and commercial "management" of conception, procreation, and pregnancy that has been the subject of widespread debate. At stake are not only traditional definitions of family, disability, parenting, kin connection, and inheritance, but the conventional understandings of nature, life, humanity, morality, and the future.”\textsuperscript{215}

This continues the argument that with the development of technology and the advancement in medical sciences that all issues mentioned above need to be reconsider and reassessed taking into account the new developments and how these developments would impact on “sustaining life”, “prolonging life” and ensuring the protection of “potential life”.

A comparison between India and the USA shows the different approaches adopted by each country. In the USA there seems to be a balance been struck to ensure that women’s rights are upheld and to accord some form of protection to the foetus. In India the situation is not such, the laws enacted take a strict approach in allowing abortions and even after approaching a court there is no guarantee that the court will allow the abortion as such the sole divisive factor is left in the hands of a judge to make a decision which is case specific.

\textsuperscript{214} IBID
In the USA women protected to end the states regulations that governed abortion whereas in India there was a feminist movement which sought to do away with the state regulation and restriction of abortion.\textsuperscript{216} In the USA the movement to ban abortion was so that there could establish control and social order in that women must be seen in the role as mothers. Ironically in India the move to legalize abortion was so that the state could control the growing population.\textsuperscript{217}

### 5.7 Balancing two competing interests

The balancing test is very complicated because we are not weighing up one right over the next. We are attempting to balance a women’s rights being autonomy, privacy and bodily integrity versus a foetal interest. Lemmens refers to this issue, “we try to balance the interests of the foetus against those of the woman”.\textsuperscript{218} Lemmens submits that “this exercise should not take place. Only the interests of the woman matter (person v. non-person). The focus should instead be on balancing the woman’s rights against the interests of the state”.\textsuperscript{219} In the context of a pregnancy women who refuses treatment that could potentially endanger the foetus, at this stage the foetus is not vested with a right and it merely has an interest. It is the state’s interest in protecting potential life against a competent women’s right to autonomy. In this regard, the balancing test becomes very difficult.\textsuperscript{220}

### 5.8 Justifiability

With regard to the balancing tests in respect of termination of pregnancies, Pickles states that “there are indications that a balancing method is in place, because two extremes are avoided; that is, pregnant women may not terminate late pregnancies on demand or for socio-economic reasons, and the state does not completely prohibit the termination of pregnancies. In housing values and rights, the Constitution ensures that these two extremes are avoided”.\textsuperscript{221}

However, Johnsen states “that the threat to the autonomy of pregnant women posed by the expansion of foetal rights has been largely unintentional, when making laws that involve

\begin{itemize}
\item \textsuperscript{216} H. Tanabe ‘Abortion Politics in India and the United States: Women’s movement and the State’ (2011) Wesleyan University
\item \textsuperscript{217} IBID
\item \textsuperscript{220} IBID
\item \textsuperscript{221} IBID 4 supra p405
\end{itemize}
foetuses and pregnant women, courts (as well as legislatures) have felt constrained by the existing law as developed for born persons and have considered the granting of foetal rights an all-or-nothing proposition”. This is a description of the two extremes that currently exist, both the courts and the legislature consider the foetus as having no legal status rather than adopting an approach that would balance both female autonomy and foetal interest. This issue is so sensitive that we thread with caution, as should legislation be adopted to restrict women’s rights we may be going back in time whereby women are once again discriminated against just on a different ground.

**CHAPTER 6**

It is not sufficient for the government to merely prohibit abortions up to a certain stage of pregnancy, it is mandatory for the government to recognise the foetus as a human being and accord rights and protection to a viable foetus. Moral recognition is insufficient as there are no legal rights available to a foetus. In the USA the moral rights were seen as been insufficient and a move towards legal recognition was established under the UVVA, the Act provides that violent crimes committed against a pregnant woman would result in the foetus been recognised as its own individual therefore attracting a greater penalty in terms of a criminal sanction.

In South Africa legislation has attempted to strike a balance and to accord moral protection to a foetus from the stage of viability. This has been the case in the Choice Act that limits a women’s right to seek and abortion after 12 weeks of gestation. Further we have seen that the Birth and Death Registration Act still require a stillbirth to be recorded so that we can obtain statistical information which could be used to reduce the number of stillbirths. This against shows that governments initiative taken to protection potential life.

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223 IBID p620
6.1 Summary of Chapters

The assessment of the legal status of the foetus within the legislative framework of South Africa, this required a legal analysis of the current legislation that considers the foetus and by implication accorded some form of interest to the foetus in an attempt to protect potential life as I have termed above “moral recognition”. Briefly, chapter one set out the problem, the research methodology and purpose of the research undertaken. Chapter one further explained the current legalisation in South Africa in respect of the Choice Act.

Chapter two went into the discussion of what constitutes viability and focused on the various approaches taken by different countries. It looked at the medical as well as the legal definition of viability after assessing the stages of development of a foetus. Many doctors are reluctant to set in stone the stage of viability as it is circumstance dependant. However, the norm seems to be that the age of viability (where the foetus is able to survive outside the mother’s womb) is usually at about 24 weeks of gestation. This seems to be the stage that is acceptable worldwide however it remains fluid.

In having ascertained the acceptable age of viability chapter three thereafter viewed the South African context of the status of the foetus. In South Africa there is no specific legislation that deals with the rights and interests of the foetus, it is implicitly dealt with under current legislation such as the Choice Act but there is no one specific legislation that governs the interest of foetus. The foetus is not recognised as a living being therefore is not accorded any legal rights. This chapter also has a discussion on the Nasciturus fiction rule to establish whether it can be developed to encompass foetal rights. The current case analysis was that the rule can be used in cases of wrongful birth and it accords the foetus the right to sue under the law of delict. There is no other maxim that accords any legal rights per say to a foetus.

The second issue that the chapter dwells into is that of whether a viable foetus could be granted the same legal status as that of an infant. The courts have declined to take that approach or to develop the common law.

The fourth chapter considers the same potion in the American law context. A discussion into the landmark case of Roe v Wade and its implications for women rights to choose to have an abortion. The Roe v Wade case also comments on viability and notes that the states interest becomes compelling at the stage of viability. Since the Rose v Wade case there has been
significant movement in protecting the foetus from harm. Legislation has been enacted to deal with issues of violence that involves the foetus. The Unborn Victims of Violence Act was enacted to curb the impact of domestic violence and to protect the foetus from violence. This act criminalises a person who causes/inflicts harm onto the foetus. Acts of murder or culpable homicide are set out in the UVVA, any person who is responsible for the death of a pregnant women will be charged for two counts of murder and not one as set out in federal legislation.

The purpose of the Act was to address the main issues of domestic violence and to protect women who were seen as a vulnerable group in society. However, after implementation of the Act it appears that the UVVA has drifted away from its actual purpose. The Act then sets out to penalises or criminalise those that it set out to protect that being pregnant women. Pregnant women to have a drug/substance addition problem have been punished in terms of this Act as well. The Act does however prohibit punishment against a woman who undergoes and abortion to which she has consented to. The punishment aspect that would lead to detaining pregnant women in drug rehabilitation centres is a rather drastic approach and this would prevent women from having their prenatal examinations in fear of persecution. The concern that is raised is that there is so much of protection been accorded to the foetus that it may tip the scales over favouring the unborn over the women. It is very possible that the UVVA would be challenged successfully in court however to date there is no current legal precedent on the issue.

Chapter five looks at the Indian Context, even though India and the USA have very different views on termination of Pregnancy Laws. I chose to compare the two countries to depict the far extremes that the countries have gone to, to ensure foetal protection. In America there is specific legislation to protect the foetus, and in India there is a strict limitation imposed as to the time frames one is allowed to obtain an abortion in. The USA has passed legislation to punish anyone who causes harm to the foetus. However, the common law in the USA does not specify which crimes it would criminalise yet exists in conjunction with the UVVA. In India the approach is very precedent based and the courts are divested with the discretion to govern this issue on a case by case basis. India does not accord any right to the foetus until such time that it is born alive.

Both countries seem to have developed a pro-life movement without even been aware of it. India forces a woman who seeks an abortion after 20 weeks of gestation to approach the court
to grant permission for the abortion. The USA on the other hand is willing to detain a pregnant woman during her course of pregnancy to prevent her from drug and alcohol abuse to ensure that the foetus is born free from any disabilities. These two countries have extremely different cultural diversity yet are willing to compromise women’s right to autonomy to protect potential life.

This study has shown that many countries face the same problem when it comes to reproductive rights and that by placing an undue limitation on a person right may cause serious consequence. As such we need to rather develop alternative programmes deal with these issues. For example, in the UVVA, the Act should be amended to only accord punishment to deliberate acts of violence. Should an act of violence be inflicted onto a pregnant woman by accident there should be no consequence or punishment that should then flow.

The study has further brought to light there is advancements in medical technology that would ensure the protection of the foetus, the laws that are developed must consider the ability of doctors as well as technology in circumstances where there is a maternal/foetal conflict of interest.

6.2 Conclusive Remarks

The South African Constitution more specifically section 11 that provides for the right to life does not recognise a foetus under this section. The rights in section 11 will be accorded to the foetus provided that it is born alive. A balance must be struck between maternal rights and foetal interest to ensure that both interests are harmonised. It is my opinion that South Africa has achieved this balance under the Choice Act. The protection of potential life is the states interest to ensure that the foetus is protected by allowing an abortion on demand up to twelve weeks, this allows the women to exercise her to autonomy. After twelve weeks and beyond the states interest becomes more compelling due to the stage of development of the foetus and its ability to survive independently outside the mother’s womb. Therefore, the restrictions imposed on women to obtain an abortion thereafter is justified.
By adopting or implementing new legislation to govern the right of the foetus would result in South Africa facing the same shortcomings in the USA. The objective of the Act would not be achieved. I suggest that rather than implementing new legislation that our current legislation, the Choice Act be developed to deal with these issues. In order to obtain an abortion after twelve weeks the current legislation should be amended and a more stringent requirement be imposed. The reason to support this stance is that the states interest becomes compelling after twelve weeks of gestation. This is brought about as the foetus is now viable and therefore attracting a greater need for protection. The constitution provides for a nation to be based on a value system that protects human dignity, equality and autonomy. Maternal rights/autonomy is greatly viewed in South Africa and to place an undue restriction on that right would be catastrophic. We risk placing women in a position that would result in grave discrimination and thereby placing women in a pre-apartheid situation where women were not seen as free individuals capable of making their own decisions. Reproductive rights are extremely important and women should be vested with the right to choose. Therefore, striking a balance between the two would endure that these rights and interests are harmonised.

In South Africa maternal rights hold a great stead, cases have been made out to for the current legislation to be developed. The Choice Act when progressed up to the stage of viability becomes more restrictive. This would incorporate greater moral recognition thereby creating protection to the foetus and also respecting a women’s right to autonomy.

Introducing legal recognition to a foetus would impact and conflict with almost all women’s rights. It is my suggestion that comparing South Africa to the USA and India, the Choice Act strikes that balance between moral rights and foetal interest. However, there is room to satisfy the pro-life movement and accord a slightly higher degree of protection to the foetus without infringing maternal rights.

This study examines the position of the foetus in SA, USA and India to determine whether a foetus should be vested with legal recognition, considering the implementation of legal recognition to the foetus is at the costs of women’s autonomy. Foetal interest goes far beyond the issue of abortion. There are various situations whereby a foetus will require protection and that need to incorporated into current legislation. There individuals are vulnerable and require protection but only be done in harmonisation with maternal rights.
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29 June 2017

Ms Malithi Gunas (207506124)
School of Law
Howard College Campus

Dear Ms Gunas,

Protocol reference number: HSS/0929/017M
Project title: Moral Rights conferred on a foetus to protect the notion of potential life. Is there need to amend and develop legislation in South Africa to accord legal protection to a viable foetus?

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted FULL APPROVAL.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of Issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Sheetal Soni
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak