

THE LEGAL AND ETHICAL IMPLICATIONS OF PARTIAL-BIRTH ABORTIONS.

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TABLE OF CONTENT

ACKNOWLEDGMENTS	5
CHAPTER 1	
1.1 INTRODUCTION	6
1.2 BACKGROUND	6-8
1.3 RESEARCH METHODOLOGY	8
CHAPTER 2- THE PBA PROCEDURE, ITS ALTERNATIVES AND INFANTICIDE	
2.1.INTRODUCTION	9-10
2.2. BRIEF DESCRIPTION OF THE PARTIAL-BIRTH ABORTION (PBA) PROCEDURE	10
2.3. THE CONTROVERSY OF THE PROCEDURE	10-12
2.4. PARTIAL-BIRTH ABORTION ALTERNATIVES AND THE ANALYSIS	12-18
2.4.1. Suction Curettage	14
2.4.2. Dilation and Evacuation	14
2.4.3. Dilation and Extraction	15
2.4.4. Induction	15
2.4.5. Hysterotomy and Hysterectomy	15
2.5. ISSUES RELATING TO INFANTICIDE AND PARTIAL-BIRTH ABORTION AT LARGE	18-21
2.6. INFANTICIDE IN SOUTH AFRICA	22-25
2.7. CONCLUSION	25-26

CHAPTER 3- THE LEGAL STANCE OF SOUTH AFRICA ON PARTIAL-BIRTH ABORTION AND RIGHTS OF THE AFFECTED PARTIES.

3.1. INTRODUCTION	27
3.2. ARE PARTIAL-BIRTH ABORTIONS GOVERNED BY ANY LAW IN SOUTH AFRICA?	27-42
3.2.1. The acquisition of a natural person legal status in South Africa	30-34
3.2.2. Constitutional implications and rights at stake	34-42
(a) The nature of the right	38
(b) The importance of the purpose of the limits	39
(c) The nature and extent of the limitation	39-40
(d) The relation between the limitation and the purpose	40
(e) The less restrictive means to achieve the purpose	40
3.2.3. Is PARTIAL-BIRTH ABORTION <i>contra boni mores</i> ?	42-43
3.3. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	43
3.3.1. Convention on the Rights of the Child (CRC)	43-44
3.3.2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	44-45
3.3.3. The International Covenant on Civil and Political Rights (ICCPR)	45
3.3.4. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	45-46
3.4. CONCLUSION	46-47

CHAPTER 4- LEGAL AND MEDICAL STANCES ON PARTIAL-BIRTH ABORTIONS: UNITED KINGDOM, UNITED STATES AND AUSTRALIA

4.1.INTRODUCTION	48
4.2.UNITED KINGDOM	48-50
4.3.UNITED STATES	50-52
4.4.AUSTRALIA	53-55
4.5.CONCLUSION	55

CHAPTER 5- MORAL AND ETHICAL PERSPECTIVES ON PARTIAL-BIRTH ABORTIONS

5.1. INTRODUCTION	56
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5.2. THE MORAL PERSPECTIVE ON PARTIAL- BIRTH ABORTIONS	56-59
5.2.1. THE CHRISTIAN PERSPECTIVE	56-57
5.2.2. THE ISLAMIC PERSPECTIVE	57
5.2.3. THE HINDU PERSPECTIVE	57-58
5.2.4. THE SECULAR MORALITY PERSPECTIVE	58-59
5.2.5. CONCLUSION	59
5.3.ETHICS PERSPECTIVES ON PARTIAL- BIRTH ABORTIONS	59-70
5.3.1. INTRODUCTION	59-60
5.3.2. GENERAL DISCUSSION ON ETHICS	60-61
5.3.3. PRINCIPLES OF BIOMEDICAL ETHICS	61-66
(a) The principle of non-maleficence	62
(b) The principle of beneficence	62-64
(c) The principle of justice	64
(d) The principle of respect for autonomy	64-66
5.3.4. ETHICAL THEORIES AND DISCUSSION	66-68
(a) The deontological theory	66
(b) Utilitarianism	66-67
(c) Reflective equilibrium	67-68
5.3.5. ETHICAL GUIDELINES	68-70
5.3.6. CONCLUSION	70

CHAPTER 6- CONCLUSION AND WAY FORWARD	71
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BIBLIOGRAPHY

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CHAPTER ONE

1.1 INTRODUCTION

Termination of pregnancy is a contentious and controversial issue in many spheres including amongst the general community, specific affected individuals, and even amongst law makers and ethicists, who are faced with, and consider, the issue. In South Africa, abortion is a well addressed and considered issue but only to a certain extent which excludes “partial birth abortion”. This paper discusses the moral, legal and ethical dimensions of partial-birth abortions (PBAs). It attempts to address the research question of whether partial-birth abortions are legal in South Africa and whether they can be considered ethical. Because abortion is quite prevalent, especially internationally, this paper will make use of international jurisprudence in answering this research question. Further, abortion (including partial-birth abortion) is a moral issue and to answer the second part of this paper’s research question of whether partial-birth abortions are ethical requires that the moral perspective of it be tackled. The moral perspective on PBAs will be limited to Christianity, Hinduism and Islamic beliefs. The moral dimensions on PBA from a secular perspective view will also be touched upon.

South Africa is pro-choice in a sense that the pregnant woman’s right of choice and autonomy regarding their reproductive system prevails. This paper is to a large extent an ethical paper. It is based on a pro-life perspective as opposed to pro-choice, which the South African legal jurisprudence promotes. It is acknowledged that this may be a limitation to the dissertation. However the aim and main focus of this paper is intended to be articulated through a pro-life perspective. It is further acknowledged that more international legal jurisprudence and limited South African jurisprudence (especially legislation) is used by this paper. This is also because South African jurisprudence is pro-choice whereas this paper posits a pro-life stance, which some international jurisprudence supports. This paper argues that although South Africa promotes the right to choose, there are still strong ethical obligations to preserve human life, even if not yet born. At this juncture it is apt to review what partial-birth abortion entails.

1.2. BACKGROUND

The Choice on Termination of Pregnancy Act¹ (CoToP Act) aims to afford pregnant women,

¹92 of 1996.

the right to decide to terminate their pregnancy if and when they wish to do so. This, *inter alia*, gives effect to the constitutional rights to bodily and psychological integrity,² which extends to the right to make decisions concerning reproduction³ and security in and control over the human body,⁴ as well as rights to privacy⁵ and human dignity⁶. This dissertation purports to critically discuss the extent to which constitutional rights are aimed at protecting the pregnant women in light of PBA.

While terminating a pregnancy is legal in South Africa (S.A.), PBA is more than a mere general termination. Its procedure involves elements of invasiveness and arguably concern partially-born babies as opposed to unborn babies. The manner of terminating and the stage in which the procedure takes place also renders the justification of performing PBAs questionable. While it is important to ensure the fundamental rights of pregnant women, it is necessary to consider such issues as whether the foetus in the case of a PBA is void to protection and whether any less invasive alternatives exist to reach a reasonable balance between the rights and interests of a pregnant woman and that of a foetus.

It is for this reason that the ethical and legal implications of PBAs will be discussed, critically comparing the legal position in South African law to that of the United Kingdom, United States and Australian law and, *inter alia*, establishing whether it can be said that South African law is sufficient and effective in the subject, and, if not, the remedies that can be sought. Many other concerns are raised by PBA either within South African or in other countries. They may include questions on medical implications of the procedure, whether Partial Birth Abortions is similar to infanticide, whether it is solely and/or merely an ethical issue.

Chapter two of this dissertation discusses and gives a brief description of the controversial PBA procedure. It also discusses alternatives to Partial Birth Abortion procedures that may possibly render the same results sought by PBAs. The further discussion of the procedure is aimed at solely assisting in establishing if the alternatives are indeed less invasive and as much effective

²Section 12 (2) of the Constitution of the Republic of South Africa.

³Section 12 (2)(a) of the Constitution of the Republic of South Africa.

⁴Section 12 (2)(b) of the Constitution of the Republic of South Africa.

⁵Section 14 of the Constitution of the Republic of South Africa.

⁶Section 10 of the Constitution of the Republic of South Africa.

as the procedure in question. This chapter assesses the similarity and differences between partial-birth abortion and infanticide.

Chapter three considers South Africa's legal position on PBAs and seeks to establish whose rights are affected by the procedure. Reference is made to the Choice on Termination of Pregnancy Act⁷, the Constitution of the Republic of South Africa, and the International Human Rights Instruments that have been ratified by South Africa.

Chapter four briefly contrasts the legal positions in the United Kingdom, United States, and Australia on Partial birth Abortion. These three countries are known amongst other things for its high practice of the PBA procedure and therefore have had more to say about the subject.

Chapter five focuses on the moral and ethical perspectives on Partial Birth Abortions.

Chapter six is the final chapter of this dissertation and concludes all the issues that were discussed including the writer's recommended way forward.

1.3. RESEARCH METHODOLOGY

This dissertation is underpinned by a literature review (theoretical studies) and is based on doctrinal research. Main sources include the Constitution of the Republic of South Africa, the Choice on Termination of Pregnancy Act⁸, academic writings, as well as International Human Rights Instruments, such as the International Covenant on Civil and Political Rights (ICCPR) (entered into force on 23 March 1976), Committee on the Elimination of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (known as the Maputo Protocol).

Reference is also made to laws from the United Kingdom, United States, and Australia as a comparative study on how the legal stance of these countries differs to that of South Africa.

⁷*Supra* 1.
⁸92 of 1996.

CHAPTER TWO

THE PARTIAL BIRTH ABORTION PROCEDURE, ITS ALTERNATIVES AND INFANTICIDE

2.1. INTRODUCTION

Partial-birth abortion, although possibly performed in South Africa, is not as familiar and practiced as is in countries such as the United States. As a result, in such countries many talks and legislations have surrounded the topic in an attempt to directly regulate it, whereas attempts to directly regulate partial-birth abortion in South Africa are hardly present. Consequently, doctors have witnessed a high rate of partial-birth abortions being requested and done at least in the USA. Absence of evidence and doctors to come forward and talk about PBA, as is done in other countries, does not, however, mean that no PBAs are performed in South Africa. While this controversial procedure remains an option, it is important to note that alternatives to it exist and serve the same purpose.

There is a further practice known as infanticide which is often likened to PBA. It has been argued that “there is no such thing as partial-birth because a fully alive child is proceeding down the birth canal and being killed, which is infanticide.”⁹ Infanticide is defined as “the act of killing an infant or newborn infant”¹⁰. It is a practice that could also easily be confused with foeticide. While infanticide is a killing of an already born child, foeticide is essentially based on foetus (unborn) killing which is often labeled as an illegal abortion¹¹. It is not accurate to equate either of these procedures with PBA. This is mainly because PBAs are essentially abortions that are performed on partially-born babies and not necessarily foetuses or infants, as is the case for infanticide or foeticide.

The aim of the last part of this chapter is to concentrate particularly on infanticide and PBA. Like partial-birth abortion, infanticide is essentially a moral issue and is often judged in that sense by many, although the law has to still play its course. Normally, the difference between abortions in general and infanticide is that in abortions, it is a matter of causing the foetus to die before it

⁹Ibid.

¹⁰The Free Dictionary by Farlex; undated, <http://www.thefreedictionary.com/infanticide> accessed on 04 April 2014.

¹¹Tandon L.S. and Sharma R., ‘Foeticide and Infanticide in India: An Analysis of Crimes against Girl Children’ International Journal of Criminal Justice Sciences, (2006), 5.

becomes alive as opposed to directly and actively killing the baby as is the case in infanticides. Whether this is also the case in PBAs is not a clear direct answer. Causing the foetus to be delivered upside down (that is the feet first and leaving the head to come last) and also actively and intentionally disturbing or destroying its brain may be construed as being indicative of actively and intentionally killing the baby as opposed to passively letting it die. Unlike murder, infanticide pertains to infants specifically which is perhaps the reason why the possibility of infanticide has been argued more than murder in cases of partial-birth abortions.

2.2. BRIEF DESCRIPTION OF THE PARTIAL-BIRTH ABORTION (PBA) PROCEDURE

PBA is “a legal term for what is medically referred to as an intact dilation and extraction (hereinafter called the ‘Intact D&X’) and involves the destruction of a foetus during the birth process”¹². It is an extraction procedure used where the vaginal passage is expanded so that the foetus which is partially alive can be removed completely and in one piece¹³. According to the American College, the PBA procedure involves four elements: “(a) the cervix is deliberately dilated, (b) with instruments, the foetus is converted to breech position, (c) in breech position the foetus is, except for the head, extracted from the uterus and into the birth canal and (d) the intracranial contents of the foetus are partially extracted and which point has the effect of vaginally delivering an intact but dead foetus¹⁴”. During the last stage, “an incision is made at the base of the skull, a blunt dissector is inserted into the incision and opened to widen the opening and then a suction catheter is inserted into the opening¹⁵”. The brain is removed out, which causes the skull to collapse and allows the foetus to pass more easily through the cervix¹⁶.

2.3. THE CONTROVERSY OF THE PROCEDURE

With the kind of procedure as the PBA procedure which would obviously be extremely painful to a normal adult, it becomes a question whether such pain will not be felt by a foetus or a

¹²De Rosa M., ‘Partial-birth abortion: crime or protected right’, (2002), 207.

¹³Hern W.M., ‘Abortion Practice’, (1984), 146-154.

¹⁴Romer G.N., ‘The Medical Facts of Partial-Birth Abortion’, (1998), 58.

¹⁵*Supra 4.*

¹⁶*Ibid.*

partially-born baby. A group supporting PBA procedures may answer this question with the reasoning that the foetus is too young to feel the pain or that the medication given to the mother will help to make the pain fade. Medical literature, however, suggests otherwise and it is important to note that the baby at this stage is no longer really a foetus but 'a partially-born' baby who is viable and has received a certain degree of personhood.

At congressional hearings in the USA, a qualified brain surgeon Robert White testified that "by the 20th week of gestation and beyond, the foetus has in place the neurocircuitry to appreciate pain, and that there are studies that demonstrate that even at 8 weeks through 13 weeks there is enough neurocircuitry present so that pain and noxious stimuli could be perceived"¹⁷. In fact, some are of the view that foetuses at 20 weeks plus can feel pain to a greater degree than adults¹⁸. Research shows that "preterm infants show much greater responses to invasive procedures and surgical operations compared to adults. Further, their neonatal catecholamine and metabolic responses are three to five times higher than those of adult patients undergoing similar types of surgery."¹⁹ This means that it will be fallacious to believe that anesthesia given to the mother will not cause pain to the partially-born baby. The aim may be to do so but such does not happen and as a result section 12 (1)(e) of the South African constitution is greatly infringed.

Amongst many concerns also is the fact that because during this procedure pain is possible, there are then indications of personhood at this stage and not just personhood but the fact that victims of PBA may actually be alive. In 1993, the American Medical News, an official newspaper of the American Medical Association (AMA) conducted an interview with Dr. Haskell concerning this specific abortion method and he indicated that two-thirds of the partially-born children on which he performed this procedure were not dead before he began to remove them²⁰. Concerning the possibility of simply delivering the child alive, Dr. Haskell indicated that such a result was a possibility, but that it was not his goal²¹.

¹⁷Anonymous, 'Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm.on the Judiciary', 15 June 1995 ,67 available at <https://msu.edu/user/.../con-pba.txt> accessed on 02 September 2014.

¹⁸Ibid.

¹⁹*Supra* 89.

²⁰Konetchy P., 'Empowering people: My line in sand empowering people through restrained government', (2013), 241.

²¹Ibid.

This obviously has implications on the issue of legal personality (which excludes unborn babies but not necessarily 'partially-born' babies) and the mere fact that the PBA procedure cannot be guaranteed to be a manner of aborting only and not giving birth accidentally. As said earlier, the AMA made it clear that this procedure is not a medically recognisable one. To perform it then is rather just a chance being taken on the potential lives of unborn soon to be partially-born and then dead babies. Other indications show that even doctors see the extreme potential at the time of a PBA and the procedure as actual means of ending that potential. Although they might wish to suggest this, the mother's autonomy and fulfilling their doctor-patient relationship is their essential priority. Doctor James McMahon had performed thousands of PBAs and supported this notion²².

A further issue is whether PBA is necessary in the sense that it is done when there is no other solution. Dr. Crook, a qualified and recognised professional doctor in one of his testimonies says that "majority of the patients obtaining this procedure do not have significant medical problems and there is evidence showing that PBAs are performed on healthy women and healthy babies²³". Further, Dr. McMahon (qualified medical practitioner) testifies to this in that over one-third of 2,000 abortions he was involved in had 'neither fetal nor maternal health problems'. He also acknowledged that he performed late second trimester procedures that were "elective" ("without fetal or maternal medical justification²⁴").

2.4. PARTIAL-BIRTH ABORTION ALTERNATIVES AND THE ANALYSIS

A reasonable question to ask is whether there is no other means of effecting a late termination. It would not make medical sense or any commonsense at all to opt for a PBA when other alternatives exist. Qualified doctors have recommended certain alternatives to partial-birth abortion that entail less cruelty and more sincere ways of bringing about the desired termination. Although some argue this, there however is belief that some of such alternatives are as sufficient as the controversial PBA. "The D&X method is not a medically recognized procedure nor is it taught in medical schools, not necessary and not the safest as there are safer alternatives and

²²Gianelli D., 'Shock Tactic Ads Target Late-Term Abortion Procedure: Foes Hope Campaign Will Sink Federal Abortion Rights Legislation', (1993), 3.

²³*Supra* 170.

²⁴*Ibid.*

there is scant medical support on the advantages of such procedure²⁵". Research also shows that not only is this procedure lacking humanity especially in connection to the baby, it also poses potentially immediate and long-term risks that can be harmful in the pregnant woman's physical and emotional health²⁶.

Where a woman chooses abortion during the time when a PBA might be suggested, there are other industry standard abortion methods available. While authors do not condone these practices believing that "personhood should be recognized from conception, from a constitutional perspective these alternatives do not involve the killing of a human being and so are constitutionally acceptable under the Court's abortion jurisprudence²⁷". The evidence shows that these alternatives are comparable in safety to the PBA technique and well within the standard of care²⁸.

The answer to whether a PBA is necessary for maternal health is that it is simply not. Because there are 'industry-standard, alternate abortion methods' available (which are well within the medical standard of care and have been described as safe to the mother), it cannot reasonably be asserted that the PBA method is necessary to protect maternal health. The PBA procedure is an undocumented and non-standard procedure²⁹. Review of the medical literature employing standard medical computerized databases reveals no published case series, retrospective reviews or prospective studies of this procedure³⁰.

Necessity is an important consideration in legal issues including this one. It may help in passing or failing the issue in that where it lacked, to have performed that conduct would be unreasonable and without cause and therefore wrongful. However, where necessity existed, the particular doing is then justifiable and not considered wrongful. An example of this is in criminal law where necessity would be used as a defence. The accused will admit to doing the particular act but contend that it was out of necessity and if the court is convinced, such will be allowed to the accused person's favour. If therefore it is unnecessary to use a PBA method for termination

²⁵Sprang M.L. and Neerhof M.G., 'Rational for Banning Abortions Late in Pregnancy', (1998).

²⁶Ibid.

²⁷*Supra* 174, 48.

²⁸Ibid.

²⁹Bopp J. and Cook C.R., 'Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence', (1998), 52 – 53.

³⁰Ibid.

because of other safer and recommended alternatives that exist, using Partial-Birth Abortion for terminating can therefore not be justifiable and is wrong.

“The PBA procedure entails more risk than other abortion procedures because it requires internal podalic version, a technique that has been abandoned by modern obstetrics³¹”. Very little evidence also exists to support partial-birth abortions. For example, Williams Obstetrics does not include partial-birth abortion as a method of surgical abortion techniques³². The American College of Obstetricians and Gynecologists’ discussion of the safety of abortion techniques do not even mention this procedure but manages to mention other methods³³. “Generally, dilation and evacuation and prostaglandin insertions are viewed as the ‘most common and safest techniques for advanced pregnancy abortion³⁴”.

Dr. Haskell, set out the industry-standard alternatives in the monograph which ignited the partial-birth abortion controversy³⁵. These types include suction curettage, dilation and evacuation, induction, hysterectomy, hysterotomy and the dilation and extraction (PBA)³⁶. As mentioned above, some of these alternatives carry advantages that PBA lacks³⁷. It is necessary to explain what these methods entail to see if some pass as better alternatives:

2.4.1 Suction Curettage-

This method may be used within 13 weeks of pregnancy. “After dilating the cervix, the doctor uses a tube attached to a vacuum generator to remove the ‘products of conception’ from the uterus”. Major complications from suction curettage are rare³⁸.

2.4.2. Dilation and Evacuation-

This method is performed during the second trimester. The procedure is that “after dilating the cervix, the doctor will use forceps to dismember the foetus while it is in the uterus. A vacuum

³¹*Supra* 103.

³²Cunningham G., Et Al., ‘Williams Obstetrics 589’, (1993),680-683.

³³American College of Obstetricians and Gynecologists, ‘Methods of Mid-Trimester Abortion’, (1987).

³⁴*Supra* 103, 54.

³⁵Haskel M., ‘Haskell Monograph’, (1992).

³⁶*Supra* 106.

³⁷*Supra* 30.

³⁸Hern W.M, ‘Abortion Practice’, (1984),146-54.

then removes the pieces of fetal tissue from the uterus. Often, the doctor must reduce the size of the foetus' skull because it is too large to pass through the cervix without injuring the woman.³⁹ This is done by either crushing the skull or by using suction to remove the intercranial contents. Complications associated with D&E are more likely to occur during the procedure, as opposed to the delayed complications that are associated with suction curettage⁴⁰.

2.4.3. Dilation and Extraction

This is basically a PBA and this method has been discussed above. What is of importance to add is that the reduction of the foetus' head/ skull by scissor is done mainly to ensure that the mother is not hurt which may be considered unfair.

2.4.4. Induction

“Abortions by the induction method account for five percent of all procedures performed after the first trimester and the induction procedure is typically used late second-term but is feasible any time after fifteen weeks of pregnancy⁴¹. In the most common induction, the physician injects the uterus with a substance that both kills the foetus and induces labor. In the less common procedure, the substance used will only induce labor; the resulting contractions actually kill the foetus⁴²”.

2.4.5. Hysterotomy and Hysterectomy⁴³

“The hysterotomy is essentially a pre-term caesarean section. The hysterectomy is the removal of the woman's entire uterus, which leaves her sterile.” These procedures, however, are rarely used perhaps due to their extremity to the pregnant woman.

From the above descriptions, not all alternatives can be reasonably recommended, for obvious reasons. The first alternative which is suction curettage is only available or rather effective in the first 13 weeks and to suggest it as an option will cause undue burden on pregnant mothers experiencing serious complications later in their pregnancy. Dilation and evacuation is also at the

³⁹Ibid, 129-139.

⁴⁰Supra 187, 194-204.

⁴¹Supra 184.

⁴²Ibid.

⁴³Supra 187.

risk of criticism since it permits cruelty and invasiveness towards the foetus for the sake of the mother. Like in dilation and extraction, dilation and evacuation involve crushing of the baby's skull and the removing of its contents to ensure that the mother does not experience pain. Further, hysterotomy and hysterectomy may also not be imposed on pregnant women as a reasonable option since it is too drastic and holds permanent undesirable results against the needs of the society which see value in family and the ability to procreate.

It is submitted however that these alternatives can be useful in eradicating the rate at which PBAs are used, considering the fact that PBAs are sometimes used when it was not even medically necessary to opt for them. The use of these alternatives is dependent on the facts and circumstances of each case. It is further submitted that the most fitting alternative when compared to PBA is induction. The reasons are as follows:

- (a) Whilst acknowledging the pregnant woman's right to bodily integrity and therefore to terminate when necessary, the interest on the potential life of the partially-born baby must be borne in mind and that can be balanced through a procedure such as induction which is not overburdening one side and over freeing the other. The aim of induction is to induce labor and consequently delivery of a then dead foetus. As mentioned above, this is done by use of medicines or injections. Important to distinguish from PBA is that these medicines aim to either start contractions, form enough passage for the foetus and similar intentions that are less invasive and harmful to the foetus. There is no crushing of the foetus's skull or any other conduct of a similar nature.
- (b) Section 36 of the South African constitution allows for the limitation of rights and therefore if PBA is extreme and degrading whilst induction is less extreme, the limitation of the mother's right must be sought.
- (c) The killing of the foetus is not being argued per se; however, the manner of killing is being argued. Induction rather than crushing the partially-born baby's skull, allows for medications inducing labor to be used. All pregnant women who carry their child

up to term become prepared to feel labor pains and mothers that are about to give birth feel such labor pains and more during the giving of birth. To then not use induction because of the labor pains that the pregnant woman will feel is not only unfair towards the partially-born baby who will feel all the pain but also medically unrealistic.

- (d) Induction allows for a share of pain and suffering between the mother and the baby.
- (e) Induction is effective both in the second and third trimester, less complicated and does not cause infertility. Although many societies stand against performances of abortion, it seems to be a procedure many will prefer instead of a PBA that is brutally invasive and inconsiderate of the foetus or partially-born baby.

Attempts have, however, been previously made by writers and doctors to suggest that the PBA procedure is the best procedure to use amongst all the alternatives. Some have even raised numerous concerns about the American bans that were aimed at banning PBAs. They provided that bans created an undue burden for three reasons: “(i) there is no valid state interest that overrides concerns for women's health, (ii) the unavailability of D&X forces women to undergo what may be a riskier method of abortion (iii) the bans create a substantial obstacle for the class of women seeking late-term abortions”⁴⁴.

The above concerns are misguided because it has been discovered that PBA comes uncomfortably close to delivering an alive child. To therefore say that there is no valid state interest that overrides concerns for women's health is uncalled for because the situation exceedingly necessitates for state interest. Further, PBA laws prohibit one method of abortion, these laws do not prevent women from ultimately having abortions; the laws merely require that women choose alternate methods that are less invasive and that cannot be an undue burden. No substantial obstacle therefore exists except reasonable obstacles that can be reimbursed using other options. Several international cases have also disagreed with the above allegations and the

⁴⁴Hern W.M, 'Abortion Practice', (1984),146-54.

cases of *Gonzales v Carhart*⁴⁵, *Doe v Bolton*⁴⁶ and *National Abortion Federation v Gonzales*⁴⁷ are briefly outlined in order to indicate this.

In the case of *Gonzales*, the court held that the Congress ban did not impose an undue burden on the due process right of women to obtain an abortion and found the ban not unconstitutional⁴⁸. It provided that “ there is uncertainty in the medical community over whether the barred procedure is ever necessary to preserve a woman’s health and in the past the court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty”⁴⁹. The Court in the *Doe* case also favoured upholding all the abortion restrictions that were imposed by a ban. Finally, the court in the *NAF v Gonzales* case concluded that the Congress’s determination that D&X is never medically necessary to protect a woman’s health was well founded and supported by the District Court’s opinion and that the right to terminate is not believed to extend to the destruction of a partially-born foetus or overrides the state’s compelling interest in preventing infanticide⁵⁰.

2.5. ISSUES RELATING TO INFANTICIDE AND PARTIAL-BIRTH ABORTION AT LARGE

It is common knowledge that in normal births, it is the head and not feet that comes out first and that a new born baby’s skull is one of the weakest parts of the baby’s body. To touch it carelessly would obviously pose problems and be harmful to new-born or a partially-born. It then becomes undeniable that to haphazardly touch the skull will lead to damage and probably death. This is therefore indicative of an intention to kill the foetus which however cannot legally amount to murder within its legal definition unless certain facts are proven. One of the reasons why it will not qualify as murder is due to the fact that South African law recognises that the legal personality (as discussed previously) only becomes existent when one has born and is born alive. Because the foetus in this situation is cut away from life before it becomes alive, it means that they do not become persons who can qualify as having been murdered and therefore no case of

⁴⁵550, U.S. 124 (2007).

⁴⁶410, U.S. 179 (1973).

⁴⁷437, F.3d, 278 (2006).

⁴⁸*Supra* 114.

⁴⁹*Supra* 114.

⁵⁰*Supra* 116.

murder can be successfully put before court on grounds of a partial-birth abortion having been performed.

Burchell as previously touched on defines murder as the unlawful and intentional killing of a person⁵¹. The challenge therefore in arguing murder on PBA matters when using this definition is first that the manner of the partially-born baby's death will arguably not be an unlawful one as partial-birth abortions are permissible. The second argument is that such partially-born babies, who subsequently become dead, do not acquire the status of a person legally as they are not necessarily born fully alive but are suddenly dead. The intention and the killing requirements will without doubt be met as the whole procedure results to death which is by killing and such being done with full knowledge and intention of ending the potential life. South African case law has also indicated that the killing of an unborn baby cannot amount to murder. In the case of *S v Mshumpa*, the court provided the following although the facts were based on a third party who had shot the mother and killed the unborn baby as a result:

“The Constitution did not expressly confer any fundamental rights on an unborn child, and no South African court had ever held that an unborn child that had not been born alive held any right in its unborn state. There were practical difficulties in formulating a reasonably precise extended definition of murder to include the killing of an unborn child: whether viability should be a prerequisite; whether it should be restricted to third parties and exclude the mother; and how it might fit in with the criminal offence and sanction for illegal abortion. Third parties who intentionally harmed or killed unborn babies might thus be punished within the ambit of existing crimes against the mother⁵².”

This case suggested that the crime that was done to the unborn or viable child can be punished as the crime that was done to the mother and the unborn baby as part of its mother and nothing that can stand on its own.

⁵¹Burchell J.M & Milton J., 'Principles of Criminal Law' Third edition, (2005),157.

⁵²2008 (1) SACR 126 (E).

Murder as a result cannot be argued in cases of PBA and infanticide stands closely compatible with PBAs. It is said that the logic of the supporters of partial-birth abortion bans in arguing that it is not merely a medical procedure, but infanticide is that “if a partial, breech delivery is used in the procedure, a birth occurs for constitutional purposes, as well as a newly-born person with the usual constitutional rights⁵³”. Worth noting further to the statement above is that under our law, it is not provided that the baby must be born fully alive or partially alive, it simply says that the person must be born alive which can mean a partial birth too.

Certain laws also suggest the same notion as that of the partial-birth abortions banners although the position is not the same in South Africa. Missouri law, for example, provides that PBA is infanticide and defines infanticide as “causing the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially-born or born⁵⁴”. Under Jewish law also it is stated that “a foetus becomes a person after its head has emerged⁵⁵”. This therefore suggests that because the head emerges in PBA, infanticide may be the case according to Jewish law.

Amongst the partial-birth abortion criticsers which are also the supporters of the idea of PBA as being infanticide is the AMA. The AMA provides that to claim partial-birth abortion as a constitutional right makes a mockery of the U.S Constitution. It provides that there is no place in a civilised society for this cruel and dangerous practice⁵⁶. It is further provided that:

“A right broad enough to encompass avoiding the burdens of additional children by killing them would encompass infanticide, not just abortion⁵⁷”.

Infanticide as opposed to abortion can be by the parents or on their behalf with their consent⁵⁸. This may suggest otherwise and separates infanticide from PBA as the decision to do a partial-birth abortion is vested explicitly on the mother and consent cannot be given on behalf of the mother. The reasons for PBA and infanticide also vary to a great extent. The reasons for

⁵³Anonymous, ‘Pros and Cons of Massachusetts Mandatory Health Insurance Program’, 17 June 2007, 4 available <http://usliberals.about.com/od/healthcare> accessed on 20 October 2014.

⁵⁴Offences Against the Person, s565.

⁵⁵Berezovsky M., ‘Controversy 101: Abortion and Judaism’, (2005).

⁵⁶Ibid, Medical Association.

⁵⁷Bopp J and Cook C.R., ‘Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence’, (1998), 30.

⁵⁸Van der Westhuizen C., ‘An historical overview of infanticide in South Africa’, (2009) 174.

performing PBAs are based on more pressing issues such as issues of health (mother's life is seriously endangered). For the latter, its reasons are not necessarily pressing. For example, in the past, infanticide was used as control for poverty and to curb overpopulation. Reasons that are mentioned for infanticide include that "the baby was born out of wedlock, economic reasons (for example population control), for sex selection or ridding society of potentially burdensome deformed members⁵⁹".

Moseley provides that there are two types of infanticide and classifies the first as the one which involved the killing of a healthy but unwanted child, and the other which involved the killing of ill, malformed, weak or sickly babies⁶⁰. Methods used for infanticide also need not be medical and are not close to being protective of the child. They include strangulation, drowning and abandoning⁶¹. This is all indicative of the great difference which infanticide has when compared to partial-birth abortion.

Regardless of these differences, it is argued, however, that where partial-birth abortion is considered ethically permissible, infanticide should also be⁶². The rationale for this is based on situations where the same conditions that would have justified abortion become known after birth. It is even proposed that the practice be referred to as 'after-birth abortion rather than 'infanticide' to emphasise that the moral status of the individual killed is comparable with that of a foetus rather than to that of a child⁶³. Giubilini and Minerva reason both that a foetus and a new-born certainly are human beings and potential persons, but neither is a 'person' in the sense of subject of a moral right to life'. They take 'person' to mean an individual who is capable of attributing to her own existence some basic value such that being deprived of this existence represents a loss to her⁶⁴. This is a sound argument considering that the foetus is aborted while partially alive and highly viable while the new-born baby is also simply newly-born.

⁵⁹Silverman A., 'Mismatched attitudes about neonatal death', (1981).

⁶⁰Moseley K.L., 'The history of infanticide in Western society', (1986), 345.

⁶¹*Supra* 10, 174-175.

⁶²Giubilini A. and Minerva F., 'After-birth abortion: why should the baby live?', (2012).

⁶³*Ibid.*

⁶⁴*Ibid.*

2.6. INFANTICIDE IN SOUTH AFRICA

It is important to particularly consider infanticide within South Africa as this paper is focused mainly on the implications within the country. South African law, regarding infanticide has been influenced by both Roman-Dutch and English law⁶⁵. Cases under these laws, that were of influence include the case of *Rex v Oliphant*⁶⁶. In this case, “the accused gave birth to a baby boy. She tried to conceal the birth of the baby by dropping him in a dam. In this case, the accused was charged with ‘concealment of birth’ under section 113 of the General Law Amendment Act 46 of 1935”. Another case is the case of *De Bellocq*⁶⁷. In this case, “the accused drowned her baby while bathing it. She was charged with murder and subsequently found guilty of murder. Since extenuating circumstances were found, she was sentenced in terms of section 349 of the Criminal Procedure Act 56 of 1955. The court recognised the fact that the accused was in a highly emotional state when she killed her baby. However, the court still did not recognise ‘infanticide’ as a separate crime, but rather regarded the act as ‘mercy killing’, and added that euthanasia is still a crime in South African law”.

It was only in 1845 that legislation in South Africa was enacted according to which mothers who had killed their offspring could be convicted for concealment of birth rather than child murder as the punishment of murder at that time was the death penalty. For the crime of concealment of birth, this was not the case⁶⁸. As in the cases mentioned above and now legislation, South Africa could not recognise infanticide as a separate crime and till present, this is the case although certain cases have suggested such. In 1987, the *Jokasi case*⁶⁹ suggested for the first time that infanticide should be recognised as a separate crime as in English law.

Currently in South African law, infanticide is not recognized as a separate crime, but as the common law crime of murder. “This also applies to a parent who abandons a baby with the intention of killing it, if the infant dies, the parent can be charged with murder, or if the baby does not die, with attempted murder⁷⁰. In a case where the parent negligently abandons a child,

⁶⁵Van der Westhuizen C., ‘An historical overview of infanticide in South Africa’, (2009),188.

⁶⁶1950 1 SA 48 (O).

⁶⁷S v De Bellocq 1975 3 SA 538 (T).

⁶⁸*Supra* 216.

⁶⁹S v Jokasi 1987 1 SA 431 (ZCS).

the parent can be charged with culpable homicide⁷¹". This seems to be practically appropriate and adequate as it gives the opportunity for perpetrators to get the maximum punishment. To charge them of murder and not anything less indicates a consideration of infants as persons, important enough to be seen as capable of being murdered where that is the case rather than suggesting that they are of less value as the case is for partial-birth abortions.

Lack of specific legislation dealing with the protection of children in South African law means that they are to be dependent on general legislation for the protection of their rights and lives in cases such as one for infanticide⁷². Such involves the constitution which is the supreme law, and which provides specifically for the children's rights in section 28⁷³. The constitution also provides for such rights as the right to life which is characterised as "the most fundamental right⁷⁴". Section 28 of the constitution⁷⁵ specifically provides for the child's right to things such as shelter, nutrition basic healthcare services and social services. It also provides that they must be protected from maltreatment, neglect, abuse or degradation. Lastly this section provides that the interests of the child should prevail or are of paramount importance in matters involving the child. With these provisions, it seems therefore that the abandoning of the infant or drowning it is against the constitution because of its degrading and abusive nature. The positive value that infanticide carries regarding the law analysis is that its cases are evident, and the question of legal personality in their regard is clear because the child is subjected to such crime after having been born and born fully alive. This is not the case in PBAs as legal personality is frequently argued and unclear. Other general legislation seeking to protect the lives of children in the absence of a specific legislation for infanticide is the Children's Act.⁷⁶

"Despite the fact that there are legislative measures to protect children in South Africa, the brutal killing of babies by their mothers has not decreased. In some cases, the baby is merely abandoned, and it is not always easy to determine who the mother is. In cases where the mother

⁷⁰Criminal Procedure Act 51 of 1977 s 258(d) and s 259(c).

⁷¹Ibid.

⁷²Constitution of the Republic of South Africa, 1996.

⁷³Ibid.

⁷⁴Ibid, section 11.

⁷⁵Supra 234.

⁷⁶38 of 2005.

cannot be found, it is impossible to make an arrest⁷⁷. Thus, it is possible that infanticide is often committed without it receiving media attention or reaching a court of law⁷⁸.

There seems to be a need for legislation that particularly protects the rights and lives of new-born babies, since the general provisions cannot sufficiently cater for such cases of infanticide. As a result of such shortage, courts have often sympathized with the mother who is at the same time the perpetrator to the detriment of the victims (infants). This is also the case in cases of partial-birth abortions as the mothers right to life is seen as the priority to the detriment of the unborn or partially-baby's potential life. An example of this is in the case of *De Bellocq*⁷⁹ that was mentioned above. In this case the infant was killed in the cruelest and premeditated manner and the court was very accommodative and considerate of the mother whom it said was in an "emotional state" when she killed her baby.

This extreme concern about mothers while they deserve punishment was also present in the case of *Matthola*⁸⁰. In this case, the court had the following to say, "The state of emotion of a mother who is driven to the desperate act of taking the life of her newly-born child is an extremely difficult factor to gauge. It is something which is incapable of objective determination. It is one of those things which only a mother who has experienced pregnancy and subsequent birth can understand and appreciate⁸¹." This abundant concern about the mother was the case in a situation where the mother had suffocated her new born baby girl to death with a blanket. Regardless of the cruel and the degrading nature of the crime, the court provided such sympathy. Although the reasoning may not be the same, mothers are also the most considered and guarded in PBAs and general abortions in South-Africa regardless of the time of pregnancy.

Having said above that South Africa does not necessarily provide for the crime of infanticide specifically, there is a legislative provision that might in certain cases fulfill the need of a specific provision dealing with infanticide. As may be known, some women commit infanticide with the aim of concealing the birth of the child for different personal reasons. The Judicial

⁷⁷*Supra* 137, 191.

⁷⁸*Supra* 10, 190-191.

⁷⁹*Supra* 146.

⁸⁰*S v Matthola* 1991 (1) SACR 402 (BA).

⁸¹*Ibid.*

Matters Amendment Act⁸² deals with such. It provides that nobody may dispose of the body with the view of concealing the birth, regardless of whether the child died before, during or after birth. This seems to be the closest legislative provision relating to infanticide. This is because although concealment of birth is not infanticide, it is a way used with the aim of bringing about the killing or infanticide. However, for infanticide to become sufficiently punished, it would make more legal sense to pursue the common law crime of murder or attempted murder route rather than just concealment. The latter will not necessarily require for death to have happened but for concealment only either in terms of for example abandoning the child (although alive) or attempting to kill although without success but with which the aim was to conceal its birth.

Important to note, however, is that the charge of concealment could be of assistance in that it can operate as an alternative to a charge of murder as cases of murder may be sometimes difficult to prove. To ensure that the woman or offender does not escape the charge fully, such charge will assist.

2.7. CONCLUSION

With the controversy attached to the PBA procedure, it is important to ensure that all the other alternatives are considered and exhausted. Failure to do this will mean that the partially-born baby is intentionally subjected to unnecessary pain and suffering which raises medical, legal and constitutional questions. For a procedure that is not only harsh but also medically unnecessary, it is important to consider the interests of the partially-born baby, more so because such considerations will not necessarily affect the rights and interests of the mother since her rights may well be fulfilled using other alternatives that are better at catering for both the mother and the foetus (or partially-born baby) to a reasonable extent.

Infanticide and partial-birth abortion on the other side cannot practically and/or legally be the same. A person who kills the baby using the partial-birth abortion procedure cannot be held liable for infanticide because the two concepts vary from the procedure itself to reasons of their wrongfulness. Further, the reasons of performing these procedures differ and the issue of legal personality renders different results for them. They however both lead to the same result which is the death of an infant and which cannot be permitted without adequate and pressing reason. If

⁸²Act 66, 2008.

they are to be both prohibited and punished, they should be done so separately and differently considering the factors specifically relevant to each of both.

CHAPTER 3

THE LEGAL STANCE OF SOUTH AFRICA ON PARTIAL-BIRTH ABORTION AND RIGHTS OF THE AFFECTED PARTIES.

3.1. INTRODUCTION

Prior to any legislation being enacted to govern abortions, abortions were generally governed by common law. In terms of common law, abortion was permitted only if the continued pregnancy would jeopardize the mother's life⁸³. It was in 1975 that the Abortion and Sterilization Act⁸⁴ was introduced as a legislative instrument on abortions. Prior to that enactment, the history of women was intimately linked to the history of the oppressed, in that women were not allowed to make any decision regarding their lives, including reproductive decision-making. Unlike in the past, abortion has since become more accessible, practiced and addressed with the Choice on Termination of Pregnancy Act accordingly being introduced to solely deal with terminations. Further, with the political liberation of South Africa in 1994, South Africa also started responding to the recommendations of the International Conference on Population and Development (ICPD) and the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other international instruments⁸⁵. It is important to note that not all instruments can be considered as law and therefore they are not necessarily legally binding. However, they are relevant to international human rights law and the protection of human rights in general, especially those of the countries which attest thereto.

It remains a question whether the current Act as the only legislation on abortions is inclusive of and sufficiently addresses PBAs and the important factors associated with it seeing that its procedure is more comprehensive and dangerous.

3.2. ARE PARTIAL-BIRTH ABORTIONS GOVERNED BY ANY LAW IN SOUTH AFRICA?

PBAs are permissible in South Africa because no law, either in terms of the constitution,

⁸³United Nations Publication, 'Abortion Policies and Reproductive Health Around The World', 2014, 98 available at www.un.org/esa/population/publications/abortion/doc/southafrica.doc accessed on the 28 September 2015.

⁸⁴2 of 1975.

⁸⁵International Treaties and Conventions available at <https://treaties.un.org/> accessed on the 22 September 2016.

statutory law, or common law prohibits it. However, generally, termination of pregnancy in South Africa is specifically allowed and therefore legal. It is largely governed by the Choice on Termination of Pregnancy Act (CoToP Act)⁸⁶ which permits all the women of any age to terminate⁸⁷ provided they meet certain requirements based on the stage of the pregnancy. The CoToP Act⁸⁸ defines termination of pregnancy as the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman. To a certain extent, the CoToP Act applies to PBAs because of them being a form of abortion covered by the above definition and falling somewhere in the mentioned trimesters. The CoToP Act provides for the circumstances in which, and conditions under which pregnancy may be terminated. It is important to note that whereas legally, under certain circumstances such termination may be construed as killing because of its legality, according to medicine, it may be considered medically appropriate. In other words, expulsion of the foetus from the womb (medically) does not necessarily equate to the killing of the foetus (as may be sometimes construed legally). The Act provides for lawful abortion on selected therapeutic, eugenic, and humanitarian grounds, as well as abortion on demand in limited circumstances. It has been argued that socio-economic justifications based upon the need for family planning and control are more controversial⁸⁹ but as the law currently stands, termination of pregnancy is permitted up to the second trimester for economic or social reasons.

The CoToP Act provides that a pregnancy may be terminated:

- (a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
- (b) from the 13th up to and including the 20th week if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or(ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality;

⁸⁶92 of 1996.

⁸⁷Section 2 (1)(a) provides that termination may be provided upon the request of a woman and section 1 defines a woman for the purposes of this act as any female person of any age, 92 of 1996.

⁸⁸*Supra* 22.

⁸⁹Burchell J.M.& Milton J., 'Principles of Criminal Law' Third edition (2005),661-662.

or (iii) the pregnancy resulted from rape or incest; or (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, believes that continued pregnancy-(i) would endanger the woman's life;(ii) would result in a severe malformation of the foetus; or (iii) would pose a risk of injury to the foetus.⁹⁰

Partial-birth abortion is a late-term abortion and takes place at about 20 weeks and upwards⁹¹. An inference can therefore be drawn that subsection C of the above section will govern terminations of pregnancy performed during this stage of pregnancy (i.e. PBAs). However, subsection C does not explicitly address the issue. As such, on the face of it, the requirements to be met for a partial-birth abortion to be legally performed are either that the woman's (mother) life is endangered or severe malformation of the foetus would result if the abortion is not performed or the risk of injury to the foetus. Regardless of this permissibility, PBAs are severe and of a cruel nature and that may raise concerns. It then becomes necessary to ascertain whether discoveries about the dangers and risks either to the child or mother were bound to be only realized at a late controversial stage necessitating PBA.

According to the Act, danger or severe malformation will qualify a late termination to be acceptable. However, because of the severity and controversy of PBAs, it is essential that such dangers are discovered as early as reasonably possible. Because of the high level of viability and the harshness of a late termination (specifically PBA rather than a normal abortion falling under sub-section C), the unreasonable failures of mothers to discover the dangers that are present will be unfair and must be looked at closely. Important to note is that the CoToP Act says that from the 13th week up to the 20th week, the doctor must terminate after consultation with the pregnant woman. It however ups the standards for the last trimester to say that termination must be done only after consultation with another doctor or a registered mid-wife instead of just the pregnant woman. As noted previously, PBA is only applicable in the CoToP Act where the issue is that a certain trimester (late stage) has been reached and therefore abortion laws including the CoToP

⁹⁰Section 2, Ibid.

⁹¹*Supra* 2.

Act do not fully address the issues surrounding the PBA procedure. More so as they are not regulating terminations of partially-born babies but rather of foetuses that are still in their mother's wombs. Bopp and Cook support this by saying that 'the abortion right applies only in connection to those who are *unborn* (the pregnant woman's abortion right) and a baby who is partially delivered cannot properly be termed *unborn*'⁹². In the PBA procedure as described by practitioners, "the baby is three-fourths delivered and therefore only three inches of the baby could arguably be said to be *unborn*. The baby as a whole is partially-born and not *unborn*. As a result, it seems that abortion jurisprudence does not apply to a partially delivered child". This is true in as far as South African jurisprudence is concerned since the issue (PBA specifically) still lacks direct regulation.

Further, although the CoToP Act has managed to cover the conditions and circumstances under which the termination may be carried out, it has not mentioned anything about the actual procedure of carrying out the termination. In other words, the Act provides that women may terminate but it does not prescribe how this must occur. An assumption can then be made that the Act's silence on this issue means that it does not necessarily prohibit any procedure provided it is done by trained personnel in a legally registered institution. The procedure that is used to terminate pregnancy in a PBA makes it distinct from any other form of pregnancy termination. In short, the CoToP Act only addresses PBAs partially in the sense that it fails to regulate or address its controversial procedure. Accordingly, it is apt to conclude that partial- birth abortion is not specifically regulated by any law in SA and may be arguably permissible.

3.2.1. The acquisition of a natural person legal status in South Africa

Legal rights are granted to those deemed to have legal personality. In terms of South African law, a natural person's legal personality begins at birth and ends at death⁹³. Before birth the foetus is not a legal subject but merely forms part of its mother⁹⁴. The requirements for the beginning of a legal personality are as follows:

⁹²Bopp J. and Cook C.R., 'Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence', (1998), 26.

⁹³Heaton J., 'South African law of persons', (2008), 7.

⁹⁴Ibid.

- The birth must be fully completed, that is there must be a complete separation between the body of the mother and the foetus;
- The child must live after the separation even if only for a short period (dying during birth insufficient)⁹⁵.

The Criminal Procedure Act (CPA)⁹⁶ further provides the following:

“At criminal proceedings at which an accused is charged with the killing of a newly-born child such child shall be deemed to have been born alive *if the child is proved to have breathed*, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.”⁹⁷

South African law, as it currently stands, suggests that no matter how viable the foetus could have been and no matter the actual procedure that brought about the end to the potential legal personality, the foetus has no legal personality and therefore rights such as the right not to be subjected to an inhuman, cruel treatment cannot apply to them. Furthermore, the law suggests that prior to birth, the foetus is part of its mother. This implies that there is only one body and legal personality deserving of its rights and that the foetus is to be disregarded. If this is the case, this then means that the pregnant woman is entitled to seek for a PBA and therefore for the partially-born baby (that is still not completely separated from the mother) to be killed on its way because, legally, she will be doing what she wishes to do with her own body as the foetus is part of her. This argument may be construed as unfair and stringent as it suggests that pregnant women possess unlimited rights regarding their foetuses or partially-born babies. It further suggests that mothers can hurt their unborn or partially-born under the pretext that it is harm to their own bodies and they have autonomy to take such action.

To suggest that an unborn or partially-born baby (as the case is for PBA) is merely part of its mother and that the mother can therefore do as she wishes because it is her own body is debatable legally and medically. Biologically, a human gestation period is divided into three trimesters of approximately three months each for a nine months total. In the first trimester, the pregnancy starts with a fertilized egg that divides to become tissue and cleavage, which becomes

⁹⁵*Supra* 59.

⁹⁶51 of 1977.

⁹⁷*Ibid*, section 239(1).

an embryo⁹⁸. In these first three months, the embryo goes through organogenesis and develops body organs, its heart beats after the fourth week, brain waves can be monitored after six weeks, and by the eighth week all major body parts are present⁹⁹. At the end of the trimester the embryo has matured into a foetus¹⁰⁰. To then suggest that this formation be characterized as being called a part of the mother is arguable and detrimental to the foetus as it leaves the foetus open to harm, with impunity.

The mother's life can, undoubtedly and with reason prevail in most cases over the foetus, but to not recognise the presence of the foetus and simply regard it as a part of the mother is extreme. This is worse in situations where the baby is now partially born and is then killed simply because she is not entirely separated from the mother and therefore enjoys no protection from the law. Even regardless of viability, once the first trimester is complete, the essential parts that constitute a human body are present and if nurtured, the foetus has the potential to become a human being. It could well be said that the pregnant woman is carrying a potential baby rather than a mere unborn with no legal rights, thus exposing the foetus to procedures such as one of PBA, without legal consequence.

Various legislative provisions have indirectly suggested that an unborn baby is not necessarily simply a part of the pregnant woman, without rights of its own. Rather that, as the foetus progresses in terms of its gestational stages, it acquires increasing rights. The National Health Act¹⁰¹ provides that the Minister may permit research on zygotes which are not more than 14 days old on a written application if the applicant undertakes to document the research for record purposes and prior consent is obtained from the donor of zygotes¹⁰². If the zygote has no legal status and is only part of the pregnant woman, why impose restrictions at all? It seems that the legislature is aware that to permit experiment on zygotes after it has reached 14 days of age¹⁰³ is more significant than performing such experiments before it reaches that stage. The reasons for this include the fact that after 14 days, the embryo can no longer split to form twins whereas

⁹⁸Lewis R., 'When does a human life begin? 17 Time points', 3 October 2013 available at <http://blogs.plos.org/dnascience/2013/10/03/when-does-a-human-life-begins-17-timepoints/>, accessed on 16 August 2014.

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹61 of 2003.

¹⁰²Ibid, Section 57 (4)(a) and (b).

¹⁰³*Supra* 24, S 57(4).

before this period twins or even more are possible¹⁰⁴. Furthermore, before day 14, the embryo has no central nervous system and therefore no senses, and the fertilization is still in process¹⁰⁵.

The Births and Deaths Registration Act also provides that a medical practitioner who was present at a still birth or who examined the corpse of a child and is satisfied that the child was still-born, shall issue a prescribed certificate to that effect¹⁰⁶. The amended Act of the above-mentioned Act then defines a still-born. It provides that a still-born in relation to the child, means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth¹⁰⁷. The provision requiring the medical practitioner to issue a prescribed certificate has a further effect in that the still-born baby becomes registered. The above definition of still-born also mentions 26 weeks which is common in PBAs in terms of viability, the difference being that the death of a partially-born baby in the case of a PBA is brought about intentionally and using a severe procedure.

The mere fact that a still-born who was at least 26 weeks needs to be registered is indicative of how more value is afforded to the foetus as it grows inside of its mother, and consequently, how strong the need is for the foetus (more so a partially-born baby) to be protected from use of inhuman and invasive procedures towards it because of its growth and potential. A foetus above 26 weeks of age that is killed using a PBA must therefore be registered as a stillbirth in terms of the Births and Deaths Registration Act. However, it is important to note that they will only be registered as still-borns and not 'persons' and will therefore not qualify for any rights available to a person. This was supported by the court in the case of *Van Heerden and another v Joubert NO and Others* which upheld an appeal in which it was contended that once it was found that the baby was stillborn, the magistrate had no jurisdiction to continue with the inquest as an enquiry¹⁰⁸ (no live birth exists).

As evident above, the CPA suggests a different and somehow flexible position where for instance the mother or doctor was accused of killing a new-born baby. Although PBA is

¹⁰⁴*Supra* 98.

¹⁰⁵*Ibid*.

¹⁰⁶Section 18(1) Births and Deaths Registration Act, 51 of 1992.

¹⁰⁷Section 1, Births and Deaths Registration Amendment Act, 2010.

¹⁰⁸1994 (4) SA 793 (AD); [1994] 2 All SA 468 (A).

permissible in South Africa, the CPA suggests that only breath would have had to be proven as opposed to living independent of the mother for a short period. In that case, it is arguably possible that a baby who is removed from the womb at the crucial stage such as that of a PBA has indeed legally been 'born'. "If a baby at twenty weeks or later is expelled completely from the mother, and shows even the briefest of signs of life, attempts to breathe, movement of voluntary muscles, etcetera legally alive birth has occurred¹⁰⁹".

The above argument is in line with the point made by the obstetricians and perinatologists where they confirmed that "even during the immediate pre-viability twenty to twenty-three-week range, if babies are expelled or removed completely from the uterus, they will usually gasp for breath for some time." This when argued under the CPA may possibly result to an accused person being charged and convicted of at least culpable homicide or even murder as the killing would have been intentional. Moreover, it is said that "even at twenty to twenty-three weeks, infants typically will move and will have a heartbeat which sometimes continues for an hour or more after birth as they struggle to hold onto life¹¹⁰. Beginning at twenty-three weeks, babies have a substantial chance for survival, which rapidly climbs to over 70% by twenty-six weeks¹¹¹." Therefore, although legal personality may be denied, a strong argument can be made that the foetus possesses adequate human characteristics for it to qualify for personhood status consequently necessitating for them to be protected from such procedures as the PBAs.

3.2.2. Constitutional implications and rights at stake

Having argued that PBA is permissible in South Africa because no law explicitly prohibits the procedure, it is important to note that the absence of prohibition does not necessarily mean that the conduct in question has no negative legal effects. Once a pregnant woman presents herself to a hospital or medical practitioner requesting a partial-birth abortion to be performed, it automatically becomes an issue of a woman's rights against that of her foetus. Many

¹⁰⁹Linton P.B., '*Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*', (1993).

¹¹⁰ Anonymous, 'Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm.on the Judiciary', 15 June 1995 , 110-115 available at <https://msu.edu/user/.../con-pba.txt> accessed on 02 September 2014,

110-115.

¹¹¹Ibid.

commentators have had different views as to whose rights should enjoy precedence. These rights vary from rights bestowed by the constitution, to case law, and statutory law. Focusing on constitutional rights, the pregnant woman has a right to privacy¹¹², human dignity¹¹³, bodily and psychological integrity, which includes the right to make decisions concerning reproduction and the right to security in and control over the body¹¹⁴.

The unborn or a partially-born baby on the other hand, arguably possesses the right to life as provided for by section 11 of the constitution, human dignity¹¹⁵ as well as the right not to be treated or punished in a cruel, inhuman or degrading way which is provided by section 12 (1) (e) of our South African constitution. This is, however, simply an opinion based argument; law in South Africa provides otherwise. Further, writers discussing the *Munoz* case¹¹⁶ elaborate on the issue. In *Munoz*, a Texan case, a husband obtained a court order for the removal of 'life support' from his brain-dead pregnant wife¹¹⁷. She was 14 weeks pregnant when she went on life support and the application to stop the machines was done when the foetus was 23 weeks and granted at 23 weeks because of a Texas Code that was applied¹¹⁸. The possibility is that in SA, the courts would have also allowed that the machines be stopped even though the foetus was already 23 weeks (PBA stage), and even though the foetus could have well lived and without any deformation or complication whatsoever. The reasons being that "a foetus has no legal rights until it is born; and that unlawfully subjecting a dead pregnant woman to 'life-support' measures in order to keep a foetus alive, where the deceased has not made a will to that effect, and against the wishes of the family, could result in a criminal charge"¹¹⁹. The CoToP Act will not be applicable because in this case there was no question of expelling 'the contents or the uterus' of Mrs. Munoz. The request was to discontinue 'life support' which meant that the foetus would die while in her uterus¹²⁰.

¹¹²Section 14, Constitution of the Republic of South Africa, 1996.

¹¹³Section 10, Ibid.

¹¹⁴Section 12(2) (a) and (b), *Supra* 6.

¹¹⁵*Supra* 7.

¹¹⁶*Munoz v. John Peter Smith Hospital*, Tarrant County District Court, T, 2014.

¹¹⁷Ibid.

¹¹⁸Ibid.

¹¹⁹McQuoid-Mason D., 'Terminating the pregnancy of a brain-dead mother: Does a fetus have a right to life? The law in South Africa', *South African Journal of Bioethics and Law* (2014).

¹²⁰Ibid.

The woman's right to privacy and human dignity entails that her affairs be respected and not be interfered with, without justification. To therefore interfere will infringe on her dignity and privacy. The woman is also considered an autonomous person who is in charge of her own life and who is therefore entitled to decide on her own on what is to happen to her unborn. However, her rights are not absolute. Accordingly, they can be subject to limitation under the Constitution provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and with all the relevant factors having been considered¹²¹.

In cases of PBA and abortion in general, the fact of rights not being absolute is also indicated by the CoToP Act¹²² itself in that in the first trimester the law has minimum restrictions and grants the pregnant woman her autonomous decision-making power. However, as the pregnancy progresses the pregnant woman's right to terminate and decide freely on what she wishes is increasingly limited and closely governed by the requirements that will have to be met before her wish can be granted.

The foetus' or partially-born baby's rights are on the other side arguably affected in this manner: the right to life is on the basis that a foetus and/or partially-born baby has a potential viable life that is invasively stopped. The right to human dignity is in the respect that everyone deserves to be respected no matter how young and non-existent they may seem according to the society's perceptions. The PBA procedure undermines not just the partially-born baby's potential life but also its capability to feel or respond to pain. To therefore disregard their potential life or their half-birthed life and decide to perform the harmful procedure be construed as undermining their dignity. However, as the law stands, foetuses cannot acquire constitutional rights and therefore arguments of their right to life or dignity and any other are likely to fail although same may not be definitely said for cases where the baby is now partially-born¹²³.

The right not to be treated or punished in a cruel, inhuman or degrading way is based on the actual manner of bringing about the termination in PBA procedures. The following excerpt is of relevance in this regard: -,

¹²¹Section 36, Constitution of the Republic of South Africa, 1996.

¹²²Choice On Termination of Pregnancy Act, 92 of 1996.

¹²³Christian Lawyers Association of South Africa v. Minister of Health 1998 (4) SA 1113 (T).

“The abortionist then sticks scissors into the back of the baby’s skull and spreads the tips of the scissors apart to enlarge the wound. He then removes the scissors, inserts a suction catheter, and sucks the baby’s brains out. The collapsed head is then removed from the uterus¹²⁴”.

This description surely demands the law and the state to have an increased interest in the protection of a helpless partially-born baby who lacks the necessary “legal personality”. It is also important to bear in mind that the unborn or rather the partially-born recipient of this procedure is still medically alive. There is therefore a possibility that she/ he feels the pain of what is being done to him/her, which highlights the cruelty of this procedure and necessitates additional scrutiny as opposed to regular terminations of pregnancies.

Studies have determined that the foetus at this stage of its life can and does feel pain (this is discussed later). The US case of *Casey* found that a woman who waits until viability to terminate her pregnancy consents to state intervention to protect the unborn child¹²⁵. The case of *Gonzales*¹²⁶ further upheld the PBA Ban Act of 2003. It provided that “there is uncertainty in the medical community over whether the barred procedure is ever necessary to preserve a woman’s health.” This is how the issue of partially born babies should be legally considered hence medical opinions remain essential. The mother’s rights are restricted proportionate to her stage of pregnancy. It has been successfully argued that “the state’s interest in protecting unborn human life becomes increasingly compelling as birth approaches. Accordingly, the state’s interest is at its peak when a child is partially delivered, which is tantamount to protecting the interests of born persons¹²⁷”.

The issue of the legal status would however prove to be a problem again as rights are for persons. In the case of *Christian Lawyers Association v Minister of Health*¹²⁸ the court ruled that constitutional rights only apply to people and not to foetuses. The court promoted the CoToP Act provisions provided all the relevant factors of each case will be considered¹²⁹. Whether these rights will be awarded will solely depend on whether the partially-born baby will be construed more as a person or a foetus.

¹²⁴*Supra* 22, 15-16.

¹²⁵*Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), 870.

¹²⁶*Gonzales v Carhart* 550, U.S. 124 (2007).

¹²⁷Bopp J. and Cook C.R., ‘*Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*’, (1998), 31.

¹²⁸2005 1 SA 509 (T).

¹²⁹*Ibid.*

Many US states and laws favour the mother's rights although acknowledging the growing interests it has on the unborn baby. The example of this can be found in the US case of *Roe v Wade*¹³⁰ which although not part of our South African law, can still be considered and be of assistance in analysing this issue. In the *Roe case*, the court held that a pregnant woman has a "constitutional" right to obtain an abortion but States can prohibit abortion if the unborn child is "viable" (capable of sustained survival outside of the womb). This may cause conflict where the pregnant mother's life is in danger and the particular procedure is the only one that will be effective.

South Africa's *Rall case* provided that a nasciturus is not a legal subject as legal subjectivity begins at birth¹³¹. Although this case pertained to curatorship and not abortion, the case held that the mother's interests are supreme and the foetus' viability is subordinate to the mother's rights. Accordingly, by extension, any woman has the right to receive a late-term abortion, if she meets the relevant statutory requirements. In the *Rall case*, the court added that where the unborn child is not born alive, there can be no suggestion of any rights accruing to him and no rights attach to him on the grounds of which it can be said that he is a legal subject¹³². The court also provided that there are no legal grounds for the appointment of a curator ad litem to represent a foetus in cases or matters concerned with the termination of the mother's pregnancy¹³³. This is understandable but only in as far as it does not involve the invasive procedure used in PBAs or that of the same nature. As the foetus grows, there are procedures that should not be performed on them because of their sense of cruelty and invasiveness. The remedy to this, in order to ensure that rights and interests although affected are minimally or reasonably affected could be making use of alternatives that are also available for late-term abortions. This will ensure that the mother's rights are given to her whilst the state's grown interest on viable foetuses is also not undermined. It has been mentioned that rights are not absolute. PBA and particularly its procedure being a right possibly owed to the pregnant woman is therefore subject to limitation. This is not to say that the foetus suddenly has the legal personality that has been argued by others to be absent. It is to say that with the state's grown interest on the unborn baby that is at this stage (when the procedure is applied) viable and literally partially-born, it is then the duty of the

¹³⁰410 U.S 113 (1973).

¹³¹Christian League of Southern Africa v Rall, 1981 (2) SA 821 (0).

¹³²Ibid.

¹³³Ibid.

state to at least prevent the specific procedure because its harmful and cruel nature especially considering the presence of other available alternatives.

The constitution provides the factors that are to be considered when the limiting rights although these factors are not exhaustive. These factors are mentioned and discussed below:

(a) The nature of the right

Ensuring that pregnant women can attain termination as provided to them by the CoToP Act¹³⁴ and indirectly by other provisions such as the constitutional right to bodily and psychological integrity¹³⁵ is important. It is a right that enables women to be in control of their bodies and particularly to decide if they want to continue with a pregnancy or not. In the case of *Christian Lawyers Association*, judge Mojapelo said that: “Our constitution protects the right of a woman to determine the fate of her own pregnancy. It follows that the State may not unduly interfere with a woman’s right to choose whether or not to undergo an abortion¹³⁶”. This is a right that, however, has a capability of suppressing other rights because although legal personality may be argued, PBA procedure by its own nature forces the partially-born child to experience pain and suffering due to them being half alive. Important to note is that the judge in the above case specified that it is only the undue interference that is not allowed with an implication that there are instances where interference is justified.

(b) The importance of the purpose of the limitation

It is important to ensure that where possible, the lives of the pregnant women are saved from death or serious dangers. However, the consideration of other factors is also important (for example, the importance of avoiding a cruel and degrading procedures and opting for alternatives when they exist).

(c) The nature and extent of the limitation

The limitation in this regard is based on the possible disproportionate result that a PBA is likely to cause when looked at in the view of the mother (terminating) and the partially-born baby

¹³⁴Act 92 of 1996.

¹³⁵Section 12(2), Constitution of the Republic of South Africa, (1996).

¹³⁶*Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T).

(being subjected to pain). The extent of the limitation is not to render mothers completely unable to have terminations when they wish to do so, but to ensure that other less invasive means other than that of a PBA procedure are sought. Further it is not the rights of a foetus per se that are being argued for but those of a partially-born baby, capable of feeling pain.

(d) The relation between the limitation and its purpose

It is common occurrence that often mothers present themselves for PBAs when they could have presented themselves earlier and/or when other forms of terminating may have well been used. It is also common knowledge that PBA achieves the purpose of termination through a more severe and inhumane procedure that may be avoided. The limitation would mean that the right holders which are women will be entitled to their fair share whilst not going over the limit to infringe on the partially-born baby's right to be free from a cruel, degrading and inhuman procedure. It will ensure that other ways of terminating without being completely non-accommodative of the baby are also considered and used.

(e) The less restrictive means to achieve the purpose

The question here is whether there are no other means in which the mother's right to a late termination (using a PBA form) can be fulfilled without having to apply the maximum degree of harshness on the part of the partially-born baby. Studies show that there are other alternatives to PBA which achieve the same purpose with fewer infringements on both the mother and the partially-born baby¹³⁷. In cases where the need for a PBA is not pressing and where such other alternatives are readily available, it will not be justifiable on the part of the partially-born baby to then opt for a PBA procedure. Justification of the permissibility of PBA may perhaps only be successful in cases where a PBA would have been the only solution to a problem.

What then exists is a conflict of choice (mother's) versus life (partially-born baby'). Which one is to prevail may be argued and will vary from each individual's view, but a human life should arguably always be the most important when compared to any other, including the right to choose. A blind eye cannot however be turned away from that one of the reasons why a PBA is sometimes performed is because the life of the mother is in serious danger. Sometimes it is also

¹³⁷Haskel M., 'Haskell Monograph', (1992), 3-4 available at www.nrlc.org/.../Shafer%20smeared.pdf accessed on 02 September 2015.

because that of the foetus is in danger in a sense that for example the child once born will be subjected to disability or alternatively that both the life of the pregnant woman and the unborn child will be in danger¹³⁸.

When the life of the pregnant woman is in danger and not that of the foetus, to perform the PBA is to sacrifice the life of the unborn child and progressively that of a partially-born for a pregnant woman's life. It would be to say that the life of the partially-born baby is not worth it, and that the life of the mother is more deserving. Where it is the child's life that is in danger (e.g. disability), it becomes a question when partial-birth abortion is to be performed whether children that are born or are to be born with certain disabilities are less deserving of life¹³⁹. Where both the pregnant woman and the foetus are in danger (that is if one lives and one dies) the question of who is to be compromised also arises. It has been argued that the state cannot favour the life of the foetus over the life or health of the pregnant woman¹⁴⁰. This means that the health of the mother prevails over that of the unborn baby. This may appear unfair and morally and unethically unworthy of any justification especially considering the actual procedure of bringing about this result. Many favour the pregnant woman and her rights and the potential healthy baby is compromised regardless of that it may have been a few minutes away from the actual life.

The aim of this paper is not to dwell on the issue of competing rights because it is common knowledge and has been previously discussed that although the foetus cannot have the rights conferred to them while they have not yet obtained legal personality, the state has an interest in protecting them as they progress in their mothers' wombs. "The assumption is that irrespective of the status of the foetus in law, the state has an interest in protecting potential life and regulating abortion, particularly in the late stage of pregnancy"¹⁴¹.

The aim of this paper is to emphasize the legal and ethical implications of PBA especially in connection to the procedure that is used. As mentioned above, the state's interest in relation to the foetus grows as the foetus grows and for such procedure to be effected means certain rights

¹³⁸Choice on Termination of Pregnancy Act, 92 of 1996.

¹³⁹Moodley K., 'Feticide and late termination of pregnancy: five levels of ethical conflict', (2008).

¹⁴⁰Ibid.

¹⁴¹*Supra* 44.

will somehow be affected (more so as the partially-born baby is the case). It would be a squeamish excuse to say that an unborn child does not have any legal personality and therefore does not deserve any protection from such procedures being performed on them. To say that would open a flood of immoral and unjustifiable terminations, it would connote that medical practitioners can actually do whatever that is asked of them by the pregnant mothers even if it is wrong under the excuse that unborn babies are nobodies and are to be dependent on anything that the parent wishes to do at any stage before their 'complete' birth. The victims of PBAs may therefore conclusively be protected as the law has a grown interest on them, but no rights can be legally attached to them.

3.2.3. Is Partial-Birth Abortion *contra boni mores*?

The doctrine of *contra boni mores* (also known as public policy) basically means against good morals¹⁴². The aim of this doctrine is to address social, economic and moral values that tie society together¹⁴³. However, case laws, legislative laws and bills of rights often overlook the question of public policy. While it is correct to uphold these laws, and put them into effect, it must be borne in mind that for them to be effective they must be in line with the norms and moral standards of the society¹⁴⁴. This implies that judges must indeed always consider whether a rule of law should, indeed, be applied in a certain issue. It is, however said that tolerance of the doctrine of public policy should be if it knows its place in that it is a servant of the formal rule of law¹⁴⁵.

While this was a more familiar concept in history due to the absence of the constitution and/or relevant laws, cases such as the *Friedman* case¹⁴⁶ should be commended for their ability to sought applying the concept of *boni mores* regardless. In this case, the pregnant woman (plaintiff) consulted with a specialist gynecologist (defendant) regarding her pregnancy. The plaintiff told the defendant that she wished to terminate the pregnancy if the risk of the foetus being born abnormal/disabled would be greater than the normal risk and the defendant agreed. After tests, the defendant advised the plaintiff that there was no such risk and that it was safe to continue to full term. The baby was however, born with disabilities due to the defendant's negligence in his

¹⁴²Plascia J., 'The Development of the Doctrine of *Boni Mores* in Roman Law', (1987), 268.

¹⁴³Ibid.

¹⁴⁴Lowi T.J., "Law vs. Public Policy: A Critical Exploration", (2003), 499.

¹⁴⁵Ibid, 501.

¹⁴⁶*Friedman v Glicksman* 1996 (1) SA 1134 (W).

advice. The plaintiff then alleged that the failure to correctly diagnose was a breach of their contract. The court then had to first consider whether the contract between the parties was *contra boni mores*. The court held that abortions are permissible if the birth of the child would be with significant mental or physical defect provided it is the mother's decision. The contract was held to be not *contra boni mores*. In the *Amod case*¹⁴⁷ where the court decided that the former spouse to a Muslim marriage could successfully invoke the dependent's claim, the court also accessed the concept of *boni mores*. It concluded that the "new ethos" had then informed the determination of the community and that these ethos were substantially different from the one that spawned the traditional non-recognition of "potentially polygamous" unions¹⁴⁸.

It is therefore submitted that with the influence of case law and changing moral standards, the courts (judges) are likely to consider PBAs as being permissive. Cases such as the *Amod case* promote being attentive to the changes within societal standards and that while conducts such as abortions may have successfully raised questions of public policy in history, this may not necessarily be the case anymore. PBA is a form of abortion which while severe, is largely based on reasons of health problems and severe disability possibilities amongst other grounds. It is further performed upon a mother's request. It is therefore likely that PBAs may be considered not to be *contra boni mores*, in line with the *Friedman case*. This may be subject to the minority judgment raising issues of the procedural manner in which PBAs are carried, if it can be medically proven that other equally successful procedures are available at the pregnant woman's disposal.

3.3. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS.

3.3.1. Convention on the Rights of the Child (CRC)

The CRC was adopted on 20 November 1989¹⁴⁹ and ratified by South Africa on 16 June 1995¹⁵⁰.

¹⁴⁷ *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

¹⁴⁸ *Ibid.*

¹⁴⁹ UN General Assembly, Convention on the Rights of the Child: resolution/adopted by the General Assembly, 20 November 1989 available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed on 17 March 2016.

¹⁵⁰ Unicef Fact Sheet: A summary of the rights under the Convention on the Rights of the Child, Undated, available at www.unicef.org/crc/files/Rights_overview.pdf, accessed on 17 March 2016.

Article 6 provides that States Parties recognize that every child has the inherent right to life and that States Parties shall ensure to the maximum extent possible the survival and development of the child.¹⁵¹ While it may be argued that these may not be applicable because they are only pertaining to a “child”, it is important to remember that unlike in other cases of abortion where the child is undoubtedly unborn, PBA is a procedure performed on partially-born foetuses which raises concern.

Article 37 further says that States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.¹⁵²

3.3.2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW is an international treaty adopted in 1979 by the General Assembly of the United Nations, signed and ratified by South Africa in 29 January 1993¹⁵³.

Article 12 (II) of the CEDAW promotes the health of mothers and infants as a pair¹⁵⁴. Article 12 (III) further permits abortion for any woman who requests termination of her pregnancy regardless of the number of children she already has. The Convention, however, notes that abortion has social implications in that in one hand it reduces maternal mortality, combats infanticide and promotes the abandonment of children on the other¹⁵⁵.

3.3.3. The International Covenant on Civil and Political Rights (ICCPR)

¹⁵¹ *Supra* 149, 2-3.

¹⁵² *Ibid.*

¹⁵³ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women : resolution/adopted by the General Assembly, 18 December 1989 available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> accessed on 06 April 2016.

¹⁵⁴ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women : resolution/adopted by the General Assembly, 18 December 1989, 138-143 available at www.un.org/cedaw/cedaw27>tun3-4 accessed on 17 March 2016.

¹⁵⁵ *Ibid.*

On 19 December 1966, the General Assembly of the United Nations adopted the International Covenant on Civil and Political Rights¹⁵⁶.

Part 3 (III) Article 6.1 of the ICCPR provides that every human being has the inherent right to life and that this right shall be protected by law¹⁵⁷. Article 7 further says that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment¹⁵⁸.

South Africa ratified the ICCPR on 10 December 1998¹⁵⁹ and its provisions are very similar to those of the South African Constitution. This Covenant is legally binding on S.A. The rights contained in the ICCPR pit the competing interests of the mother's right to privacy and freedom to make reproductive decisions against that of the partially-born child's right to life and not to be subjected to inhuman and cruel treatment. As discussed earlier, the decision of whose interests are worthier or are subject to legal protection will depend on many aspects including that of whether the partially-born baby can be given the legal personality or not.

3.3.4. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

This African instrument is also known as the Maputo Protocol. South Africa signed and ratified the Protocol on 16 March 2004 and 17 December 2004.¹⁶⁰

Article 4(1) - provides that "every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited¹⁶¹".

¹⁵⁶UN General Assembly International Covenant on Civil and Political Rights: resolution/adopted by the General Assembly, 19 December 1966 available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> accessed on 06 April 2016.

¹⁵⁷Ibid.

¹⁵⁸*Supra* 78.

¹⁵⁹Anonymous, 'International Agreements and/or Conferences Signed by South Africa in Relation to the Youth, Children and People with Disabilities, Particularly with Regard to the United Nations and the African Union', 4 November 2005 available at http://www.dirco.gov.za/docs/2005pq/pq2_455.htm accessed on 15 October 2016.

¹⁶⁰The Maputo Protocol (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa), undated available at www.achpr.org/instruments/women-protocol/ accessed on 17 March 2015.

¹⁶¹Ibid.

Article 14(1) - provides that “States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: (a) the right to control their fertility; (b) the right to decide whether to have children, the number of children and the spacing of children; (c) the right to choose any method of contraception¹⁶²”.

Article 14(2) - further provides that “States Parties shall take all appropriate measures to: b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding; c) protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus¹⁶³”.

3.4. CONCLUSION

The Choice on Termination of Pregnancy Act remains the only legislative instrument in South Africa that governs abortions. In the absence of its prohibition in the TOP Act, partial-birth abortions are, by implication, permissible in South Africa. Whilst it is certain that mothers have a legal personality, the same cannot be necessarily said for a foetus or at least a partially-born baby. It is therefore highly likely that when considered within the context of South African law, the rights of the pregnant mother will prevail over those of a partially-born baby. Section 36 of the South African Constitution, however, provides for limitation of rights when it justifiable to do so. In the case of a partial-birth abortion, where a highly controversial procedure is involved and the alternatives which can serve the same purpose exist, it is arguably just and proper to limit the mother’s right to a PBA and provide for her right using less dangerous and invasive measures. It is submitted that the International instruments serve the same purposes as the South African Constitution does and raises similar difficulties in issues of clarity and particularity of PBAs.

¹⁶²Note 81 above.

¹⁶³Note 81 above.

CHAPTER 4

LEGAL AND MEDICAL STANCE ON PARTIAL-BIRTH ABORTIONS: UNITED KINGDOM, UNITED STATES AND AUSTRALIA

4.1. INTRODUCTION

The South African constitution is freely and clearly adopted as the supreme law of the land as stated by its preamble. This means that any law that is not consistent with our constitution will have to suffer the prevalence of its supremacy. Section 39 of the South African constitution however provides as follows:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) Must consider international law;
 - (c) May consider foreign law.

While the constitution enshrines all the rights and responsibilities and marks its supremacy, it makes it an order that international law be considered and allows for foreign law to be also considered.

4.2. UNITED KINGDOM

The United Kingdom (U.K.) is a state made up of four nations, namely England, Wales, Northern Ireland, and Scotland¹⁶⁴. Abortions in this state are largely governed by the Abortion Act of 1967. Like in many countries, the large parts of the U.K. have legalized abortions with the exception of just the Northern Ireland, which has its abortion laws as part of its Criminal Law under the Offences against the Person Act¹⁶⁵. Section 1 (1) of the U.K. Abortion Act provides that

¹⁶⁴Anonymous, 'United Kingdom', undated available at <http://thecommonwealth.org/our-member-countries/united-kingdom> accessed on 15 April 2016.

¹⁶⁵Sections 58-59, Offences against the Person Act of 1861.

“a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated (i) by a registered medical practitioner, (ii) with two registered medical practitioners being of the opinion formed in good faith that: (a) the pregnancy is twenty four (24) weeks old or less, (b) the continuance of pregnancy will involve risk, greater than if the pregnancy was terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family, (c) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman, (d) the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated, (e) there is substantial that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped¹⁶⁶”.

With the Offences against the Person Act¹⁶⁷ criminalizing an act of aborting or helping one to abort, abortion in both England, Wales and Scotland is then illegal unless it meets one of the requirements in section 1 (1) of the Abortion Act. Important to note is that the Offences against the Person Act has been amended and replaced by section 37 of the Human Fertilization and Embryology Act¹⁶⁸ in as far as England, Wales and Scotland are concerned. This section puts no substantial changes on the grounds for abortion although it may be safe to say that it is the current operative law instead of the Abortions Act. The same sections 58 and 59 of the Offences against the Person Act are the operating law in the Northern Ireland in cases of abortion and provide that abortions are illegal. However, the ground to exonerate the mother or the person who assists the mother in aborting and therefore rendering an abortion illegal is provided by the Criminal Justice Act (Northern Ireland)¹⁶⁹. This Act renders abortion legal if the abortion was done in good faith for sole purpose of preserving the life of the mother. Another United Kingdom statute worth noting is the Infant Life (Preservation) Act¹⁷⁰ which also makes it a felony of child destruction to willfully cause an unborn child capable of being born alive to die.

¹⁶⁶Section 1 (1) (a)-(d), Abortion Act of 1967.

¹⁶⁷See sections 58- 59.

¹⁶⁸Human Fertilization and Embryology Act, 1990.

¹⁶⁹Section 25 (1), 1945.

¹⁷⁰Section 2(1), Infant Life (Preservation) Act, 1929.

Like in South Africa, U.K. only provides for abortions in general and legalizes it to up to 24 weeks. Likewise, then it is insinuated that with abortions being legal and no law prohibiting PBAs, they are therefore not illegal. The U.K. law has not stated any limits on surgical methods or products that can or cannot be used in effecting a legal abortion.

4.3. UNITED STATES

The United States of America (U.S.) is most likely one of the most popular countries with many community groups looking up to it due to its popularity. Abortion generally is common practice in America and many controversies have surrounded it both legally and from the communities generally. The current position in America from the constitutional and case law interpretation point of view is that abortions are legal in America¹⁷¹. However, States are allowed to make laws that may trigger or restrict abortions of certain degrees¹⁷². This means that abortion requirements and restrictions may vary from each state. For example, restrictions on late-term abortions, grounds allowing legal abortion and many more.

The Fourteenth Amendment of the American Constitution¹⁷³ states as follows:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

It then becomes a question of whether such right to life is extended to the life of the unborn or partially-born foetus. The landmark case of *Roe v Wade*¹⁷⁴ has assisted in shaping what the current law is regarding abortions in America and providing clarity after many cases have failed. This case was decided simultaneously with the *Doe v Bolton*¹⁷⁵ case. It held that the Fourteenth Amendment of the constitution does extend to the woman's right to terminate pregnancy (privacy and liberty). This case held that regarding first trimester abortions, the decision is with the pregnant woman's doctor whereas during the second trimester states are given the authority

¹⁷¹Roe v Wade 410 U.S 113 (1973).

¹⁷²Proxy Author for Import, 'States probe limits of abortion policy.', 22 June 2006 available at www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2006 accessed on 15 April 2016.

¹⁷³The Constitution of the United States of America: As Amended, 2007.

¹⁷⁴*Supra* 99.

¹⁷⁵410, U.S., 179 (1973).

to promote their interests by regulating abortion procedures related to the health of the mother. Regarding third trimester pregnancies (including PBAs), the court held that states may promote their interests in the potentiality of human life by regulating or even prohibiting abortion unless abortion is necessary to save the mother's life or health¹⁷⁶.

This necessitated the current U.S. legal abortion regime of determining when the fetus is "viable" outside the womb as a measure of when the "life" of the fetus is its own (and therefore subject to being protected by the state). In the majority opinion delivered by the court in *Roe v. Wade*, viability was defined as "potentially able to live outside the woman's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."¹⁷⁷ The *Roe* case decision on trimesters was, however, declared obsolete by court in the 1992 case of *Planned Parenthood v Casey*¹⁷⁸ which, however, still left the viability regime as the deciding tool. Unlike in South Africa then, America is very clear in acknowledging the foetus in its unborn state and thereby allowing it to be protected by the laws imposed by each state based on its potentiality to live. It then goes without saying that this is perhaps even more so in the controversial cases of PBA procedures.

U.S. law makers and activists have made several attempts aimed at banning specifically Partial-birth abortions with the 2003 Partial-birth Abortion Ban Act (hereinafter, 'the Act')¹⁷⁹ finally being upheld by the Supreme Court in *Gonzales v. Carhart*¹⁸⁰ in year 2007. The major reason for the failure to pass the bill was that it failed to include health exceptions (e.g. mother's health in danger) and these exceptions were argued by the bill supporters to be of a nature that will render the bill unenforceable¹⁸¹. The Act provides that "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both¹⁸²". It is important to note that this Act does not criminalize abortions generally but rather the procedure of PBAs as defined in the Act. The Act defines Partial-birth abortion procedures as follows:

¹⁷⁶*Supra* 99.

¹⁷⁷*Ibid*.

¹⁷⁸505, U.S., 833, (1992).

¹⁷⁹Partial-Birth Abortion Ban Act, 2003.

¹⁸⁰550, U.S., 124, (2007).

¹⁸¹*Ibid*.

¹⁸²*Supra* 107.

“ an abortion in which the person performing the abortion, deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus¹⁸³⁷.”

From the definition provided by the Act, it is important to note the difference between how the procedure is defined legally and medically. Also, worthy of being noted are elements such as that of intention, overt act and killing which form part of the legal definition.

The Act further includes two findings of Congress which are as follows:

“(1) A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

(2) Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives.”

In one following chapter, alternatives to PBAs that may be well adequate are discussed as an option rather than the medically unnecessary procedure that is PBA as commented on by Congress of the U.S. above.

¹⁸³⁷Ibid.

4.4. AUSTRALIA

Like in many other countries, Australia's legal system is largely governed by the Australian constitution which is considered the country's supreme law¹⁸⁴. However, the Australian constitution does not include the Bill of Rights section as may be common in other countries although it does have a list of express rights included. This means that such rights as rights to privacy or decision making are not expressly mentioned in their constitution. Australia has different states, all of which have different legal or parliamentary systems. These systems may influence each other but may not be binding on states in which they do not belong except for parliamentary laws imposed by the constitution¹⁸⁵.

Abortion generally is then governed by differing state laws as opposed to national laws. Although all states have legalized abortion, their grounds and circumstances under which they permit abortion differ with the life and health of the mother being unsurprisingly a common ground in all states. While early-term abortions are allowed in all states, this is not the position for late-term abortions (most likely including PBAs). For instance, "once an unborn is capable of being born alive, a termination may be subject to a separate crime of child destruction in some States¹⁸⁶".

Australia consists of the following states: Australian Capital Territory, New South Wales, Queensland, Northern Territory, South Australia, Victoria, Tasmania and Western Australia¹⁸⁷. Previously, the Australian Capital Territory considered abortion as a criminal offence. The Crimes Act,¹⁸⁸ however, changed that position. The position in this state currently is that unborn babies are considered as lacking legal personality and therefore have no right to life. This state further has no gestational requirements and allows for abortions on request by the mother at any stage of the pregnancy¹⁸⁹. This perhaps means that PBAs which are a late-term abortion will be allowed in this state provided they are simply requested.

¹⁸⁴Commonwealth of Australia Constitution Act, 1990.

¹⁸⁵Ibid, section 109.

¹⁸⁶See section 10 of the Crimes Act 1958, section 1(1), Infant Life (Preservation) Act 1929, Abortion Law Reform Act 2008 and section 4(1) (a) of the Crimes Amendment (Grievous Bodily Harm) Act 2005.

¹⁸⁷*Supra* 164.

¹⁸⁸Crimes Act (Abolition of Offence of Abortion), 2002.

¹⁸⁹Section 9, Human Rights Act, 2004.

Technically, in the state of New South Wales abortions are legal. This is because of the ruling in the case of *R v Wald*¹⁹⁰ and other decisions that followed it. In this case, the court held that abortion is legal if a doctor found 'any economic, social or medical ground or reason' that an abortion was required to avoid serious danger to the pregnant woman's life or to her physical or mental health at any point during pregnancy. This then renders the statute provision¹⁹¹ which provides abortions to be unlawful somehow irrelevant and unenforceable. This further means that the ground of the woman's life or health being in danger is at any stage of the pregnancy considered superior compared to that of the unborn life even if viability exists. PBAs therefore are legal in the New South Wales if considering the time during which they take place and not its procedure. In the Northern Territory, gestational limits are in place. "Abortions may be performed up to 14 weeks of pregnancy, except when there is a serious risk to the woman's health, in which case abortions are allowed up to 23 weeks"¹⁹².

In Queensland, abortions are normally referred to as therapeutic miscarriage and are allowed on request up to 22 weeks of pregnancy¹⁹³. "They must be performed by specialists, upon request of the woman after an appointment with a general medical practitioner. Further, abortions can be performed if a fetal defect is considered to be inconsistent with life"¹⁹⁴.

In South Australia, "abortion is legal when necessary to protect the life or physical or mental health of the woman, taking into account the current and reasonably foreseeable future or in cases when the child was likely to be born with serious handicaps"¹⁹⁵. The time limit in South Australia is 22–23 weeks of pregnancy with exception of 28 weeks¹⁹⁶. In Tasmania, since 2013, abortions are allowed upon request up to 16 weeks of pregnancy, after that the consent of two doctors on medical or psychological grounds is required¹⁹⁷.

In Victoria, "abortions are allowed on request up to 24 weeks of pregnancy, with abortions after that also requiring two doctors' consent based on the woman's current and future physical,

¹⁹⁰(1971) 3 DCR (NSW) 25.

¹⁹¹Section 82-84 of the Crimes Act, 1990.

¹⁹²*Supra* 190.

¹⁹³ *R v Bayliss and Cullen*, (1986), QDC, 011.

¹⁹⁴*Ibid*.

¹⁹⁵Section 82A, Criminal Law Consolidation Act (amended 1969), 1935.

¹⁹⁶ *Ibid*.

¹⁹⁷See part 2, sections 4 and 5, Reproductive Health (Access to Terminations) Bill 2013.

psychological and social circumstances¹⁹⁸”. “In Western Australia, since 20 May 1998, abortions are allowed on request up to 20 weeks of pregnancy with the requirement of a counselling by a medical practitioner other than the one performing the abortion or when serious personal, family or social consequences will result to the woman if an abortion is not performed, when the life or physical or mental health of the woman is endangered and when the pregnancy causes serious danger to the woman's mental health¹⁹⁹”. After 20 weeks, abortions may only be performed if the foetus is likely to be born with severe medical problems, which must be confirmed by two independently appointed doctors²⁰⁰”.

Australia, like South Africa is very clear on its position regarding abortions, generally. However, the country has not created legislation to specifically govern PBAs. This means current provisions on abortions will apply to PBAs and these will differ from state to state because of the differing abortion laws that each Australian state has. It seems that all states are legally permissive of PBAs.

4.5. CONCLUSION

Countries like the United Kingdom and Australia and perhaps, many other countries, seem to follow the same pattern as that of South Africa. They are generally permitting abortions up to the late-term stages. This position fails to address PBAs as a particular procedure and therefore fails to be explicitly clear on whether such procedure is a legally permissible act. The United States is an exception with its continuous attempts at directly tackling PBAs and finally reaching their 2003 Partial-Birth Abortion Ban Act. The route of the United States is a recommendable one due to the clarity and directness it provides.

¹⁹⁸Abortion Law Reform Act ,2008 .

¹⁹⁹Section 334(3) (a)-(d), Acts (Abortion) Amendment Act ,1998.

²⁰⁰Ibid.

CHAPTER 5

MORAL AND ETHICAL PERSPECTIVES ON PARTIAL-BIRTH ABORTIONS

5.1. INTRODUCTION

Abortion is often highly associated with morals and ethics. It then goes without saying that PBAs, being a form of abortion, and a very controversial one, have been scrutinized. Because of its nature, it means that there cannot be one agreed upon principle regarding abortions or PBAs but that views will differ depending on the individuals' beliefs. The American Medical Association (AMA) supports this view by saying that "the issue of support of or opposition to abortion is a matter for members of the AMA to decide individually, based on personal values or beliefs²⁰¹". It goes on to say that "the AMA will take no action which may be construed as an attempt to alter or influence the personal views of individual physicians regarding abortion procedures²⁰²". This all indicates the moral distinctiveness attached to the topic.

5.2. THE MORAL PERSPECTIVE ON PARTIAL-BIRTH ABORTIONS.

5.2.1. THE CHRISTIAN PERSPECTIVE

Christian life is mainly governed by the book of God's law called the bible and Christians are to abide by the provisions of the bible for their actions to be morally acceptable. "If we want to know what to think about war, marriage, homosexuality, drinking, suicide, or economic ethics, we turn to the bible for moral commands that address these issues²⁰³". It becomes a problem however when the issue is not directly addressed by the bible because it means that it requires interpretation and interpretation can vary amongst the bible interpreters. In cases of abortions however, many interpretations under this religion have pointed to the direction of perceiving life as beginning from conception and in turn the act of killing and aborting being wrong and not acceptable from a Christian being. PBA, regardless of the rationales behind it, is a form of abortion which entails taking one's life or preventing it from even beginning.

²⁰¹'Health And Ethics Policies Of The AMA House Of Delegates', (2004), 2.

²⁰²Ibid.

²⁰³Gushee D.P., 'Ethical Method in Christian Bioethics: Mapping the Terrain', (2003).

Many biblical provisions such as scriptures under Psalms; Jeremiah 1:5; and Luke 1:41-44 although not directly, suggest that abortion cannot be an acceptable action for a Christian. In Jeremiah God said, "Before I formed you in the womb I knew you, and before you were born I consecrated you: I appointed you a prophet to the nations". Unlike in legal law where the unborn is seen as of no value as long as it is unborn, God under Christianity appoints the unborn individuals for tasks when they are not even yet born because of the belief that they are already persons worth of recognition and respect. Christians respect and honour the pregnancy of a woman and see life in an unborn child and they indicate that God has a purpose for every human life and makes plans for his people even before they are born. PBA will be therefore conceived as unchristian and immoral by many Christian populations, if not simply all. Whereas the law does not see life as beginning from conception, this is the case for the Christian population.

5.2.2. THE ISLAMIC PERSPECTIVE

The general Islamic view is that, although there is some form of life after conception, full human life, with its attendant rights, begins only after the ensoulment of the foetus. Most Muslim scholars agree that ensoulment occurs at about 120 days after conception whilst other scholars in the minority, hold that it occurs at about 40 days after conception.²⁰⁴

An inference can then be drawn that when the Islamic perspective is compared to Christianity, it will be a bit accommodative and less stringent than Christianity. This is because according to Christianity a one day or two days conceived foetus will be of value and it would be wrong to kill or abort it whereas according to Islamic beliefs, ensoulment may only take place in months and before that exceptions can perhaps be allowed to make right the situation of aborting an unborn child. Because PBA is performed at a later stage of pregnancy, it will be against Islamic beliefs to perform it because at that time the ensoulment stage would have passed and therefore making it morally wrong to end the life of the child. Islamic views although based on the ensoulment principle are still however based on the holy book of Muslims and share a lot of similarities with Christianity.

5.2.3. THE HINDU PERSPECTIVE

²⁰⁴Daar A.S. and Khitamy A.I., 'Bioethics for clinicians: Islamic bioethics', (2001).

To understand bioethical dilemmas from a Hindu standpoint, one must be familiar with the law of karma and beliefs about reincarnation. “The theme of Hindu bioethics is that death is not opposite to life; rather, it is opposite to birth. Hindus consider life to be a journey between birth and death²⁰⁵.” According to Hinduism, the concept of karma entails that all of life is governed by a system of cause and effect, action and reaction, in which one’s deeds have corresponding effects on the future²⁰⁶. The sacred texts of Hindus (Vedas) suggest against abortion. They see abortion as a morally reprehensible deed and list it as one of the most heinous actions²⁰⁷ (therefore bad karma). However, Hindus, as is the case in the laws of many countries, also support abortion in cases where the mother’s life is in danger or in cases of severe abnormality on the part of the foetus²⁰⁸.

5.2.4. THE SECULAR MORALITY PERSPECTIVE

Secular humanists are of a different view, that “if the prenatal personhood depended upon the notion of ensoulment at conception or a similar supernatural phenomenon, it would then mean that the issue of abortion is a purely religious matter when this is not the case”²⁰⁹. An argument is made that abortion is wrong and consequently that PBA is wrong because unlike any other issue, the need for protection of the foetus is created by the mother in the first place²¹⁰. An example is made between the need for kidney donation to the foetus by the mother and the need to not abort the foetus. “Whereas the transplant is an extraordinary measure and the need for it is caused by disease or injury, in pregnancy the child himself, and his need for shelter and protection in the womb, is a direct result of actions taken voluntarily by both parents²¹¹. The need to live in the mother’s uterus for approximately forty weeks is also not an extraordinary measure. It is a basic human need, every single person who has ever been born required it”²¹². This claim is basically based on that the parents created him in all his helplessness and consequently a general principle that our actions have consequences for other people, and we must avoid inflicting negative

²⁰⁵Lakhan S.E., ‘Hinduism: Life and death’, (2008).

²⁰⁶Van Buitenen, Edward C. and others, ‘Hinduism: Doctrines of transmigration and karma,’ undated, available at www.religionfacts.com/karma/hinduismbritannicaonline (Accessed 8 April 2014).

²⁰⁷*Supra* 57.

²⁰⁸*Ibid.*

²⁰⁹Roth J., ‘A secular case against abortion’, (2000).

²¹⁰*Ibid.*

²¹¹*Ibid.*

²¹²*Supra* 175.

consequences upon those people (partially-born babies in this case)²¹³. The acceptance of abortion as a response to a sexist society is considered inconsistent with humanist ideals as humanism values are the inherent worth and dignity of every human being²¹⁴.

5.2.5. CONCLUSION

The above differences indicate how differently dilemmas will be decided upon morally and the mere fact that morals cannot be uniformly applied and decided upon. This is unlike in law, where if the law provides that PBAs are prohibited in a particular country then that will be the case. Important to note is that although the moral groups mentioned above hold the said views about abortion, these are their views on abortion in general. Therefore, their views on partial-birth abortions specifically may be likely to change or become even more stringent considering the nature of the procedure and its timing. It is also without doubt that not only is PBA despised by different religions, certain human beings not belonging to any religious group may also be of the sentiments that it is wrong and not necessary to a certain degree.

5.3. ETHICS PERSPECTIVES ON PBAs.

5.3.1. INTRODUCTION

This section aims to discuss the ethical implications of PBA. Ethics and law at many times render and share different sentiments and consequences although the issue may be same. It is then an advantage to use ethics where the law has found in favour of a certain issue that is also ethically questionable. An example is that although the law permits PBAs and holds that babies only have a say once they are born alive, ethics when correctly argued may hold quite the opposite. This is not, however, always the case. Ethical views or implications can be the same as what the law provides. Further, while the law binds the people of that country or state, the same may not be said for ethics. It therefore remains that although ethics may assist in defending an opposite view regarding PBA, if the law permits it in South Africa, that will continue to be the case and no one will be held liable solely on ethical grounds although it could assist as a factor of

²¹³*Supra* 63.

²¹⁴*Ibid.*

consideration. Another concern with ethics is that it is formed by individuals who will bring their personal moral opinions, formed through education, cultural background and religious beliefs to bear on individual ethical issues. Therefore, many different decisions on the same issue are likely to be the case depending on the differing individual moral and/or ethical views. The principles of biomedical ethics together with the theories will however be used in order to address how these issues will be tackled ethically.

5.3.2. GENERAL DISCUSSION ON ETHICS

The ethical issues that PBA is likely to raise include some of the issues that are also raised by normal abortions and also issues that are specific only to PBA. Amongst these, are issues of the moral status of the unborn baby, issues of viability, abnormality where abnormality is the case and the obstetrician's wish to not take part in the partial-birth termination and so on. It is also a huge ethical issue whether a procedure that deliberately lets the foetus live only partially and eventually deliberately kill it can be ethically acceptable. The manner of bringing about the termination is also controversial as it involves cruelty towards the foetus, cruelty being in the pain and suffering that the partially-born baby is exposed to as studies suggest. The moral status of the foetus and its viability has been previously discussed.

On the issue of abnormality, Moodley states that where non-threatening abnormality exists; such (termination) could be viewed as discrimination against "abnormality"²¹³⁷. This suggests that threatening abnormalities can be arguably ethically justifiable. This however raises a question of what is to be considered a threatening or non-threatening abnormality. Whatever the definition may be, it will stand that one between the foetus and mother will have to be considered less important. Undeniably, under ethics or even law, discrimination on grounds of disability is wrong and therefore to terminate under such will be unethical although legal, as the disability ground will not pass in law because of the lack of legal personality on the foetus.

Touching on the obstetrician's wish to not take part in a PBA procedure, pregnant mothers present themselves to a hospital seeking abortion or when they present themselves, abortion is mentioned to them as an option. Abortion practice is an activity that arises from the moral imperatives to respect the autonomy (to be discussed more below) of the patient and to alleviate

²¹³⁷Moodley K., 'Feticide and late termination of pregnancy: five levels of ethical conflict', (2008), 94.

suffering²¹⁶. Thus, within the clinician-patient relationship, the provider's foremost obligation is the medical duty to protect, advance and advocate for the health and well-being of their patient²¹⁷. PBA entails a severe procedure and the question is whether doctors can ethically object to take part. In terms of South African law, clinicians also have their right to freedom of conscience as provided by the constitution²¹⁸. This means that like anyone else they can refuse to perform a PBA on the grounds of their conscience.

It is argued, however, that doctors may claim a right to conscientiousness and refuse to conduct a late-term termination provided that other obstetricians are available to perform these procedures. In more poor or rural areas where fewer obstetricians are available, it is argued that it is unethical for an obstetrician to refuse to conduct a late-term termination²¹⁹. It can be argued therefore that it will be unethical for a clinician to refuse to conduct a PBA where it is for pressing medical reasons such as an endangered life (emergency) and where the clinician in question is the only clinician who will be able to do such. To argue that partial-birth abortion is highly immoral or involves an inhuman procedure that kills partially-born babies will be of no assistance to the obstetrician refusing to conduct a PBA in the above-mentioned situations.

Health ethics encompasses the principles of biomedical ethics as well as the public health ethics. However, for the purposes of this paper, only the principles of biomedical ethics are relevant and will be discussed. This is because public health ethics become only relevant and applicable when the purpose is the well-being of populations rather than that of individuals. While biomedical ethics give priority to the individual autonomy, such kind of priority cannot be the case in public health ethics²²⁰. To further clarify, PBA involves a pregnant woman who wants to terminate pregnancy and end a potential life and therefore only the interests of two as opposed to the whole population are the issue.

5.3.3. PRINCIPLES OF BIOMEDICAL ETHICS

²¹⁶National Abortion Federation, 'Ethical Principles for Abortion care', (2011), 1 available at prochoice.org/...NAF-Ethical-Principles.pdf accessed on 02 September 2014.

²¹⁷Tbid.

²¹⁸Section 15, Constitution of the Republic of South Africa, (1996).

²¹⁹Savulescu J., 'Conscientious objection in medicine' *Br Med J* (2006), 332.

²²⁰Childress J.F. et al, 'Public Health Ethics: Mapping the Terrain', (2002).

Ethics has its roots in philosophy which involves some of the principles that are relevant for the purposes of this chapter. These include the principles of non-maleficence, beneficence, justice and respect for autonomy²²¹. One author says that these principles require a conversation about the needs and desires of the patient²²².

(a) The principle of non-maleficence -

Basically, this principle requires that we not deliberately harm others. The expression that this principle has led to is, “do not harm and maximise possible benefits and minimise possible harms.”²²³ Secondary principles such as: do not kill, do not cause needless pain and do not incapacitate others come under the principle of non-maleficence.

The principle of non-maleficence might say that to terminate pregnancy of foetuses that are even possibly viable and to cause them to be given birth to upside down and damage their brain is to harm them. Therefore, because this principle is against harming others, some may say that partial-birth abortion is not ethical. For this principle and perhaps other principles, it is possible that the ethicist’s view would also depend on their moral backgrounds as discussed earlier. This is because while others, such Christians may be of the belief that life begins at conception, others may be of a different view. Therefore, for an individual who believes that life does not begin at conception, it would be impossible to argue that such “foetus” is being harmed by such doing since it would not necessarily be possessing any life worthy of harming or not harming.

(b) The principle of beneficence-

This principle involves making efforts to secure one’s well-being. It comes from the word benefit which represents a positive rather than a negative and protection rather than harm²²⁴. Both principles of non-maleficence and beneficence rest on the fundamental importance of what

²²¹Ibid.

²²²Garrett et. al., ‘Health Care Ethics’, (1993).

²²³Beuchamp T.L., Childress J., ‘Principles of Biomedical Ethics’, (2001).

²²⁴Ibid.

is in the patient's interest. One is the positive requirement to further the patient's interest. The other is the requirement to refrain from doing what damages the patient's interest²²⁵. Important to note then are the words "patient's interests". The patient in the case of a PBA is the pregnant woman and not the foetus. This consequently favours the mother in suggesting that an abortion be done if it be in the mother's interests or be not done if it will harm the pregnant mother.

The following are secondary principles falling under the principle of beneficence: prevent the infliction of needless pain, prevent killing and prevent incapacitating others²²⁶. While the principle of beneficence requires one to do something, principles under non-maleficence can be fulfilled by simply doing nothing. For example, by not doing an abortion procedure, the woman may well have been protected from pain. However, the conflict may be that an abortion procedure may need to be done in order for the woman's interest to be met but pain will have not been prevented. Which one is to override the other therefore becomes a problem. What seems to be an attempt to answer this is the following explanation:

"The principle of beneficence means that unless there is a sufficient reason not to, one has an obligation to do those acts that are likely to do more good than harm. The principle of non-maleficence means that unless there is a sufficient reason not to, one has an obligation not to do those acts that are likely to produce more harm than good²²⁷".

This therefore means that the principle of beneficence will not override maleficence in the sense that two good outcomes do not override the demand that we not harm patients and end up doing a particular thing because we consider it a benefit. The principle of beneficence may contrary to the principle of non-maleficence suggest that to allow the pregnant woman to terminate will be of benefit to her because it will save her life and enable her to make more other babies in cases where the reason is that continued pregnancy will cause health complications to the mother or even death. This is however problematic because it means benefiting the other and burdening the other. This will also depend on whether one considers only the woman as the patient or both the

²²⁵*Supra* 79.

²²⁶*Ibid*, 194.

²²⁷*Supra* 79.

foetus and mother. If we are to say that partial-birth abortion would be of benefit to the pregnant woman, are we not burdening the partially-born potential baby by trying to save the life of the mother to its death? Are we also not suggesting that babies that are still in their mother's wombs are less important regardless of their tremendous potential?

(c) The principle of justice-

This principle entails fairness and equal treatment. It asks who ought to receive the benefit and who ought to bear burdens. In terms of this principle, if the person deserving of those benefits is denied them, that is seen as injustice and if one is given certain burdens unduly that will also amount to injustice²²⁸. In cases of PBAs, the justice of the pregnant woman is compared to that of the partially-born baby. While it is impossible to ensure equal treatment to both, questions such as whether the PBA is a necessary procedure therefore deserved by the mother are questions to consider. If a PBA procedure is unnecessary and therefore underserved by the mother, it is an injustice to then subject the foetus to it. Further, the principle of justice seeks to work out who ought to receive the benefit. This is a question that is hard to answer fairly in this case as the life of the mother might be in serious jeopardy whilst the life of the unborn (and later partially-born) is of great value too. However, to kill the partially-born baby to save a life would be to unduly burden the baby and will therefore amount to injustice on the baby. Some may suggest that to leave the situation as is, thereby allowing the risk of the mother dying and the unborn baby possibly surviving would be to let the situation take care of itself and not favour anyone. By letting the baby live, if that will end up the case, no positive act would have been done to cause the injustice.

(d) The principle of respect for autonomy-

This principle simply provides that individuals should be treated as autonomous agents and that persons with diminished autonomy (for example mentally ill individuals and minors) are entitled to protection²²⁹. In a health care setting, this principle translates into the principle of informed

²²⁸Mappes T. and DeGrazia D., 'Ethical Theories in Biomedical Ethics', (2001).

²²⁹Ibid.

consent which means you shall not treat a patient without informed consent, except in narrowly defined exceptions²³⁰.

An autonomous person is a person capable of deliberation about personal goals without being obstructed. To not respect such is to repudiate that person's considered judgments and to deny that person the freedom or opportunity to act on those considered judgments. The principle of autonomy is basically similar to the common law right of privacy or the right to privacy under the constitution. It is said that even though people may lose some of their independence due to their illnesses or conditions, they are still to be treated with respect and be in control of their lives²³¹. Respecting the autonomy of a mother who may request a termination late in her pregnancy raises enormous ethical conflicts for the treating obstetrician who must balance this request against the principle of non-maleficence (doing no harm) inherent in killing a viable foetus²³².

This principle is useful in supporting the pregnant mother's decision. It will suggest that no matter how late in terms of the stage of pregnancy and no matter how invasive the procedure is, it is the mother who is entitled to decide what she wants to happen. It will further suggest that the termination and/or procedure are done in her own body and it will therefore be against the principle of autonomy to try and not respect her decision. This principle supports more the mother as the foetus is not in a stage where he can be autonomous. This however must not necessarily mean that because it is impossible to grant the unborn baby the respect of autonomy, they then fall short of the justification of their ethical right to live.

Although it has been said that the principle of autonomy is the most important when compared to the other principles, in cases where it will be impossible to apply it at all to a competing group or interests, it seems ethically acceptable to make an exception especially where there stands to be a risk of other principles being gravely affected. Put differently, because the principle of autonomy is impossible to apply to a foetus because he/she is still unborn, it will be unfair to say that the mother's autonomy is the most important and simply disregard other important principles.

²³⁰*Supra* 79.

²³¹*Supra* 194.

²³²MoodleyK., 'Feticide and late termination of pregnancy: five levels of ethical conflict', (2008), 93.

There are also ethical theories that become of assistance in ethical issues like partial-birth abortion. These theories may include deontology, utilitarianism (rule and act utilitarianism), virtue ethics, casuistry, reflective equilibrium and more. However, only relevant theories will be discussed for the purposes of this paper.

5.3.4. ETHICAL THEORIES AND DISCUSSION

(a) The deontological theory

This theory assumes that what makes an action right or wrong stems from the intrinsic property of the action. This means that this theory is action-based. What it says is that only if the action conforms to a morally acceptable principle will that action be acceptable. For example, an action will be correct if it conforms to the golden rule of “treat others as you would like to be treated.”

The action of abortion is often morally reprehensible if not always. This is because it is usually considered to be the same as murder no matter how early it is performed. It therefore is analogous to say that abortion is even more morally reprehensible when it has reached a late stage (foetus at this stage has all the necessary body parts, looks completely human and is viable) and when it involves a maximally harmful, cruel and inhuman procedure. Because the theory of deontology is based on the action, this may lead to a conclusion that deontologically, PBA will not be ethically permissible. In addition to the reasons above, the action of PBA suggests morally reprehensible preferences that, in turn, render it ethically questionable. It suggests that mothers have the utmost unquestionable say over the life or death of their potential babies. It also suggests that mothers deserve to live and unborn babies do not and in other situations it may suggest that babies with disabilities or unusual features are less deserving of the chance to live. This then raises such questions as who decides who deserves or is fit to live and other concerns. Therefore, because of this, partial-birth abortion can be rather construed as a negative and therefore unethical procedure.

(b) Utilitarianism

As opposed to the deontological theory, utilitarianism is result, or consequence based. It is focused on what one seeks to achieve with an action. An action may therefore be wrong but if the result serves a “good purpose”, then that particular conduct may be ethically acceptable²³³.

Actions which are thought most likely to produce a good consequence for the majority are good actions and vice versa. The downside of this theory is that consequences will not always be good consequences for everyone and they are not always accurate to predict. For example, in PBAs, while one may argue that to perform a PBA will yield a good consequence for e.g. the pregnant mother who seeks for it, same might not be the case in terms of consequences regarding the partially-born baby.

This theory may suggest that although PBA may end a potential life and be considered a sinful act, there are positive consequences that it brings about and therefore argue that it is an ethically permissible act. It seems, however, that there are different kinds of consequences that a partial-birth abortion can bring, both good and bad consequences depending on each person's view. Amongst positive consequences that are possible, is that PBA can possibly save the life of at least the mother where she is in danger or where both the baby's and the mother's lives are in danger.

Further, a person relying on utilitarianism may reason that although PBA is a late-term abortion and places the partially-born baby in a terrible position, to let it live and let the mother die where it is a situation of only one can live will render rather negative results. This is because by so doing, no more babies could be given birth to when the mother is dead and that will not be in the interests of the majority but rather of the foetus only. Negative consequences may include the fact that partial-birth abortion will inhumanly and cruelly decide the fate of a potential life and also that it will let someone live just partially and then decide to have their lives ended same time.

(c) Reflective equilibrium

This theory will be applied where there is a conflict between theories. That is both conflicting theories will be reflected upon and an equilibrium point will be reached²³⁴. For example, the deontological approach conflicts with the utilitarianism approach in the case of partial-birth abortions and an equilibrium point may be necessary. The reflective equilibrium may say that the action of aborting (PBA) is wrong and unnecessary (deontology) but in cases where it brings

²³³*Supra* 194.

²³⁴*Ibid*

more positive consequence than negative and on condition that it is the only way to bring that consequence (utilitarianism) it is acceptable to do it.

5.3.5. ETHICAL GUIDELINES

There are also a few ethical guidelines that touch on the topic of either abortion in general or PBAs specifically. Although South Africa may not have been involved in the drafting of such guidelines and therefore not bound by them, these guidelines are arguably influential and relevant to South Africa, given its diversity. Amongst these is the American Medical Association (hereafter addressed as the Association or AMA) Code of Medical Ethics²³⁵.

The Association says that “according to the scientific literature, there does not appear to be any identified situation in which intact D&X (PBA) is the only appropriate procedure to induce abortion, and that ethical concerns have been raised about intact D&X”. The AMA recommends that the procedure not be used unless alternative procedures pose materially greater risk to the woman²³⁶. “The physician must, however, retain the discretion to make that judgment, acting within standards of good medical practice and in the best interest of the patient²³⁷”. This indicates the controversy attached on PBAs, more especially its procedure. Because of its immoral and cruel nature, it is then placed as a last resort. We must also be wary of facts such as that the complications necessitating this invasive procedure could have been due to the carelessness and lack of care on the side of the mother (e.g. failure to seek abortion earlier and making use of prohibited products during a pregnancy).

A hypothetical scenario could be that of a mother who knowing of her pregnancy, continues to drink alcohol and take drugs and intentionally omit to go for regular pregnancy check-ups. If these facts are known to everyone (i.e. doctor) and the mother and her unborn child become in danger as a result of the pregnant mother’s actions, is it ethically appropriate to choose to save the life of that mother and sacrifice that of the unborn potential baby simply because the mother’s life is viewed as more important than that of a child. Even more so, subjecting the foetus (and later a partially-born) to an inhuman and cruel procedure that is extreme because of

²³⁵American Medical Association Code of Medical Ethics, 2004.

²³⁶Ibid.

²³⁷Ibid, 1.

the mother who chose to intentionally bring about the situation. To be considered also is that the foetus did not bring about its conception but that the mother decided to form the baby and should live with the consequences of her decision unless it is reasonable and fair to decide otherwise as suggested by the AMA.

The Association further provides that “in recognition of the constitutional principles regarding the right to an abortion articulated by the Supreme Court in *Roe v. Wade*, and in keeping with the science and values of medicine, the AMA recommends that abortions not be performed in the third trimester except in cases of serious fetal abnormalities incompatible with life”²³⁸. It went on to say that “although third-trimester abortions can be performed to preserve the life or health of the mother, they are, in fact, generally not necessary for those purposes”²³⁹. Except in extraordinary circumstances, maternal health factors which demand termination of the pregnancy can be accommodated without sacrifice of the foetus, and the certainty of the independent viability of the foetus argues for ending the pregnancy by appropriate delivery²⁴⁰.

The above paragraph concurs with the view that the termination of pregnancy where a viable foetus is involved should not be a rule but rather an exception. It also makes it clear that sacrificing the foetus by performing a late-term abortion or partial-birth abortion cannot be construed as a normal or acceptable act. Acknowledgment is made to the fact that although the wish is for abnormalities and complications to be detected early, there are several instances where these abnormalities and/or complications can only be detected late in pregnancy.

However, even in this case, the most important question to ask is whether termination involving the procedure such as one involved in PBAs is the only option available to address those complications that are only discovered late. Also, there are cases in which when the abnormalities are found, the parent is given or still has the chance of choosing between two or more options. That is choice between late-term abortion (particularly PBA) or continued pregnancy (or even procedures such as fetal therapy or treatment which is rather based on improving the chances of the well-being of the foetus as opposed to bringing about its death) which will lead to for example, the birth of a disabled child. Consideration of the ethical

²³⁸Ibid.

²³⁹*Supra* 159.

²⁴⁰*Supra* 159.

principles discussed above such as utilitarianism is necessary in solving dilemmas such as this. Ethically, where the availability of mentioned options is the case, it is submitted that to allow continued pregnancy and spare the partially-born baby from the cruelty of the procedure will be ethically appraisable when looked at with the utilitarian eye. This is because it will mean the potential life is not sacrificed and the mother will also continue to live.

Moodley supports the above arguments by saying that “when the request arises due to a potential disability that is not life threatening such as Down’s or cleft lip/ palate, this becomes more ethically questionable.”²⁴¹She further says that a blind eye will not however be turned away from the fact that most regulations regard severe fetal abnormalities as being incompatible with life and having the potential to cause severe pain and suffering after birth²⁴². This is true as can be seen from a massive number of legal cases for both wrongful birth (action brought by parents saying they would have avoided conception or terminated had they been made aware of for example the complications attached to their pregnancy) and wrongful life (action brought by the child on the basis of the doctor’s negligence arguing that but for the inadequate advice it would not have been born to experience the pain and suffering attributable to the disability).

5.3.6. CONCLUSION

With the law being strict on the topic of abortions and PBAs, ethics is likely to assist in providing grounds to render PBAs unacceptable. Ethics, however, is not law. Institutions, especially medical institutions, need to have their specific ethical frameworks dealing with the issue to ensure that even if our law may not be able to place laws dealing with the issue, doctors still become bound ethically. For instance, ethical frameworks regulating and ensuring that the termination procedure used is appropriate and justifiable given the circumstances of each case. This will assist in avoiding the usage or the excessive usage of partial-birth abortions in instances where for example the mother’s life was not in danger or the risk was not proportionate to the use of a PBA. These ethical frameworks will subject doctors who fail to ensure that the given boundaries and conditions are ensured to disciplinary hearings or even dismissals and this will in turn curb the unnecessary use of the invasive procedure of PBA.

²⁴¹Moodley K., ‘Feticide and late termination of pregnancy: five levels of ethical conflict’, (2008), 94.

²⁴²Ibid,93.

CHAPTER 6

Conclusion and way forward

Abortions are legally permissible in South Africa. However, PBAs are controversial and affect many interests and rights. The aim is to grant mothers their rights while also taking into account the interests of a partially-born baby. While the law is of the notion that a mother can terminate pregnancy even at the latest stage and kill a partially-born baby, morals and ethics suggest the opposite. Morals are of the notion that life begins at conception or at the earliest stages which renders the procedure morally wrong. Ethics further carry an advantage in that unlike in law, both the unborn baby and the mother are equally considered through a fair engagement of ethical theories and principles.

South Africa is a country that is largely based on constitutional provisions. While partial-birth abortions may be permissible with the aim of acknowledging the mother's constitutional rights, the interest of the unborn and/or partially born baby should also be protected. Because the procedure is very controversial in that it is cruel and performed on a partially-born baby rather than an unborn baby, measures to regulate the issue specifically are therefore a requirement and need to be put in place. It is submitted that while the mother's life is an important concern, the law should also go an extra mile in curbing improper, harmful and inhuman conducts that are unreasonably necessary. Law and ethics should be used concurrently in addressing the issue. The starting point could be to consider alternatives to PBAs that achieve the same end, but with fewer controversies. Considerations of what the international instruments provide may also be of assistance although such instruments may not necessarily override local law.

It is submitted that South Africa as a country must also consider having legislation that will directly and specifically deal with PBAs as may be the case, for example, in the US, where PBA is currently prohibited. While infanticide and partial-birth abortion may carry certain similarities and moral concerns, it is concluded that they cannot be said to be the same.

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16 August 2018

ZSW Ndebele (209519062)
School of Law
Howard College Campus

Dear Mr/s Ndebele

Protocol reference number: HSS/0163/014EX
Project title: The legal and ethical implications of partial birth abortions

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 07 August 2018 has now been approved as follows:

- Change in Supervisor

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an 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 period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

Dr Shamila Naidoo (Deputy Chair)

/ms

cc Supervisor: Professor Jerome Amir Singh
cc Academic Leader: Dr Donrich Thaldar
cc School Administrator: Mr Pradeep Ramsewak

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I, Ms Zamandaba Silindile Welile, declare as follows:

1. That the work described in this thesis has not been submitted to UKZN or other tertiary institution for purposes of obtaining an academic qualification, whether by myself or any other party.

2. That my contribution to the project was as follows: All the contents of the thesis were either thoroughly researched and conveyed by me or merely my own submissions. The whole paper was written by me.

3. That no other third parties contributed to the authorship of this paper.

4. Signed  _____ Date 22 December 2017