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The implications of artificial womb technology on the right to terminate pregnancy

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Abstract

This study investigates the implications, if any, of artificial womb technology on the current legal framework in South Africa, with particular regard to the legal framework for termination of pregnancy. Artificial womb technology has developed significantly throughout the years and will one day offer an alternative method for individuals to reproduce. The word *ectogenesis* has been used to define a pregnancy that has started or completed in an artificial womb. Partial ectogenesis is a form of this technology where a fetus is transferred from a womb in which it was developing to an artificial womb to continue the gestational period. This may be in cases where the continued gestation would prove to be harmful or life-threatening for the individual carrying the fetus, or the fetus itself. There have been promising animal studies demonstrating that partial ectogenesis is possible. Complete ectogenesis refers to where a fetus does not develop in a womb, and completes its entire gestation in an artificial womb. There have been no studies on complete ectogenesis yet, and therefore this will not be explored in this dissertation.

Since the fetus will be developing ex utero, it is unclear as to how the current law should be interpreted. Reproductive autonomy in light of reproductive technologies in its application must ensure that it does not unjustifiably infringe on the reproductive rights of women and additionally creates an equilibrium between the rights and interests of both the fetus and the mother. However, it is crucial to ascertain whether the fetus will be afforded legal rights as in terms of partial ectogenesis, it continues developing ex utero and independent of the mother. This will also affect the Section 12(2) of the Constitution concerning the bodily and psychological integrity of one's own body in the instance where the fetus will no longer be in the womb of the woman.

It will be shown that the Choice of Termination of Pregnancy Act 92 of 1996 will not be applicable in cases of partial ectogenesis. The right to terminate pregnancy within the parameters of that statute remain uneroded, as gestation in an artificial womb is not contemplated as a 'pregnancy' in the Act. The potential of artificial wombs to reduce infant mortality rates is theoretically high and is significant in the instance where a fetus is underdeveloped and exercises no independent capacity of life. However, in this dissertation it is imperative to clarify several legal issues relating to a gestation that is taking place ex utero in an artificial womb.

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Chapter 1 - Introduction to artificial womb technology

1. Introduction

The world has seen many technological developments regarding reproduction and the many advancements it has made thus far such as assisted reproductive technology, which includes inter alia, in vitro fertilization, embryo transfer and gamete intrafallopian transfer. Assisted reproductive technologies increased the methods in which individuals could consider when procreating and it paved the way for many persons who could not reproduce naturally, for example in vitro fertilisation (IVF), genetic testing and surrogacy. These technologies have allowed people to create and expand their families in the spirit of reproductive autonomy. However, technologies are evolving at a rate that is frequently considerably faster than the law has been able to keep up with and artificial womb technology is one example of a developing technology that will require an analysis of the interpretation and application of existing law. AWT is a technology that is being developed in order to allow a premature fetus to survive ex-utero in an environment that is designed to imitate that found in a human womb.[1] Researchers and scientists have created an artificial womb called a 'biobag' in which it could imitate the environment of the uterus to sustain a preterm fetus for the remainder of its gestation. However, this technology has only been tested on lamb fetuses thus far.[2] This technology is important in terms of reproductive health as there may be biological reasons why a woman may be unable to continue a pregnancy for the full gestational period. Partial ectogenesis occurs where a premature fetus is transferred from a human womb to an artificial womb in which the fetus is expected to complete its gestational period with reduced eventuality of complications.[3] Complete ectogenesis of a fetus is where the fetus does not develop in the womb at all, but rather develops in the artificial womb from conception until the time it is fully developed as a fetus to be born.[4]

[1] Romanis, E. C. '(2018) 'Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications,' *Journal of medical ethics*, 44(11), pp. 751–755.
[2] Romanis, E. C. '(2018) 'Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications,' *Journal of medical ethics,* 44(11), pp. 751–755.
[3] Romanis, E. C. '(2018) 'Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications,' *Journal of medical ethics*, 44(11), pp. 751–755.
[4] Kingma, E. and Finn, S. (2020) "Neonatal Incubator or Artificial Womb? Distinguishing Ectogestation and Ectogenesis Using the Metaphysics of Pregnancy," Bioethics, 34(4), pp. 354–363. doi: 10.1111/bioe.12717.

According to the Constitution, everyone has the freedom and security over their own bodies and are therefore able to choose whether to reproduce or not.[5] This is defined as reproductive autonomy which gives an individual the freedom and platform to independently make decisions regarding their own body.[6] However, with partial ectogenesis and other assisted reproductive technologies, the right to bodily and psychological integrity needs to be considered as the environment in which the fetus will be developing ex utero. This change in environment will impact on the provisions of Section 12(2) and whether it would still be applicable at all. The legal personality of the fetus has been interpreted in the context of a fetus in utero. However, a fetus in an artificial womb is not in a womb, and therefore this may be an important consideration. The legal personality of the fetus affects the protection it is afforded and the legal protection it may acquire.[7] This will inevitably have an impact on the right to terminate in an instance where the fetus in an artificial womb is granted legal personality, it acquires all rights and protections of the law and thus cannot be terminated.

In addition to these circumstances the debate of whether this new technology would have any implications on the right to terminate the pregnancy arises, since it affects the reproductive autonomy of the individual and questions if any rights could be attributed to the fetus as it would be placed in a device for the rest of the gestational period. In terms of the *Christian Lawyers Association v Minister of Health*[8] case, the plaintiff argued that according to the Constitution, everyone has a right to life, and the application of the right included a fetus, and therefore termination of pregnancy should not be legally permitted. However, the court did not agree that a fetus had any legal rights as it was not a rights-bearer or legal subject and therefore there was no conflict of legal rights between a pregnant woman and the fetus which she carried.[9] The court further considered this argument as a serious infringement on a womans' right to reproductive autonomy.[10] The termination of pregnancy is regulated in terms of the Choice on Termination of Pregnancy Act[11]. This dissertation will consider the impact of AWT

[5] Constitution of the Republic of South Africa, 1996. Section 12(2).
[6] Shozi, B. ' 'Something old, something new: applying reproductive rights to new reproductive technologies in South Africa', *SAJHR* 2020 36(1), p 13.
[7] Jessica H. Schultz. 'Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?' *Chicago-Kent Law Review*. (2009-2010) p 886.
[8] Christian Lawyers Association of South Africa v Minister of Health (1998) 4 SA 111 3 (T).
[9] Ibid at para 60.
[10] Ibid.
[11] The Choice on Termination of Pregnancy Act 92 of 1996

on the application of the statute. The study will also provide a background to create context, a problem statement that will outline the purposes of the study, study objectives, research questions, and various other noteworthy aspects in the scope of this inquiry.

2. Background

Worldwide, premature delivery is the leading cause of death for newborns.[12] Premature newborns born before 22 weeks of gestation currently have no reasonable chance of survival.[13] Although there has not been much progress in neonatal intensive care, AWT is expected to transform the future of neonatal intensive care. AWT allows for the artificial gestation of fetuses that are medically unable to develop in the uterus of the mother due to various complications such as underdeveloped lungs and respiratory problems, circulatory issues causing low blood pressure and oxygen deprivation, and an underdeveloped ability to swallow or suck. This is commonly referred to as ectogestation in which a fetus is removed and placed in a 'man-made' artificial womb.[14] Ectogestation allows for the extension of gestation to allow the fetus to develop further until it is able to survive outside the womb. AWT must be differentiated from neonatal intensive care (NIC) as babies born with an underdeveloped capacity for life can only get so much care in neonatal critical care units. On the other hand, if a pregnancy fails entirely, artificial wombs might take over the gestation process and alter these odds.[15] AWT aims to allow underdeveloped fetuses to complete the rest of the gestational period in an artificial womb that provides it with the necessary care that does not compromise the health of the mother.

Legal subjectivity begins at birth; and until then, the fetus is considered to be only a part of the pregnant woman and not a legal person in its own right.[16]As a result, it generally lacks all rights, obligations, and abilities. It has been suggested that, these entities should not be referred

[12] Walani, S.R., Global burden of preterm birth. *International Journal of Gynecology & Obstetrics* 2020, 150(1), pp.31-33.
[13] Allen, M.C., Donohue, P.K. and Dusman, A.E., 1993. The limit of viability--neonatal outcome of infants born at 22 to 25 weeks' gestation. *New England Journal of Medicine*, 329(22), pp.1597-1601.
[14] Romanis, E. C. '(2018) 'Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications,' *Journal of medical ethics*, 44(11), pp. 751–755.
[15] Romanis, E. C. '(2018) 'Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications,' *Journal of medical ethics*, 44(11), pp. 751–755.
[16] Romanis, E.C., 2020. *Regulating the 'Brave New World:'Ethico-Legal Implications of the Quest for Partial Ectogenesis.* The University of Manchester (United Kingdom) pp. 93-95.

to as babies or fetuses but rather 'gestatelings'.[17] This term has been used to differentiate between, a fetus that would be in the womb of the mother or a premature neonate in incubation, from an entity that is not considered as 'born' yet and is still developing but in a man-made womb, ex utero.[18]

In terms of the Choice on Termination of Pregnancy Act, all women in South Africa have the right to termination that is free, provided the procedure is done at a government hospital or clinic during the first 12 weeks of pregnancy.[19] It thereafter sets out two more thresholds based on socio-economic and medical reasons, which have strict requirements to be adhered to before a termination may be offered.[20] The Choice Act gives effect to Section 12(2) of the Constitution which allows women to have a choice when it comes to their own body and gives them the right to reproductive autonomy.[21] However, in terms of artificial reproductive technology and artificial womb technology, more specifically, it is unclear whether the Choice Act would still apply since the fetus would no longer be in the womb of the woman. The issue is whether this statute could be applied to include artificial womb technology.

The right to terminate a pregnancy is derived from the right to reproductive autonomy which is embedded in Section 12(2)(a) of the Constitution which states that *all individuals have a right to 'bodily and psychological integrity'* which includes the right to 'make decisions concerning reproduction'.[22] Reproductive autonomy has traditionally been interpreted in the context of avoiding a pregnancy, but in recent years it has been interpreted to include reproduction via assisted means such as surrogacy.[23] It has been extended to include some forms of new reproductive technologies (NRTs) as it allows individuals to exercise their right to form a family.[24] The right to reproductive autonomy enables prospective parents to make informed decisions regarding reproduction and the conception of children whether its via

[17] Romanis EC Artificial womb technology and the significance of birth: why gestatelings are not newborns (or fetuses) *Journal of Medical Ethics* 2019;45:728-731.
[18] Romanis EC Artificial womb technology and the significance of birth: why gestatelings are not newborns (or fetuses) *Journal of Medical Ethics* 2019;45:728-731.
[19] The Choice on Termination of Pregnancy Act 92 of 1996. Section 2(1)(a).
[20] The Choice on Termination of Pregnancy Act 92 of 1996. Section 2(1)(a).
[21] Constitution of the Republic of South Africa, 1996.
[22] Constitution of the Republic of South Africa, 1996. Section 12(2).
[23] Shozi, B. ' 'Something old, something new: applying reproductive rights to new reproductive technologies in South Africa', SAJHR 2020 36(1), p 9.
[24] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

natural or artificial reproduction. These prospective parents may experience medical conditions that inhibit their ability to reproduce or, they may be a 'same-sex' couple in which case natural reproduction is not an option in any of these circumstances. Therefore, NRTs are an option available to these individuals who wish to expand families but are unable to for reasons beyond their control.

Limiting the freedom to start a family, equality, and dignity is against the right to reproductive autonomy.[25] The right to freedom to form a family via NRTs cannot be limited as it would discriminate to those persons in same-sex relationships or cannot medically conceive a child. The result of this discrimination would infringe on the right to dignity. Therefore, in *Dawood v Minister of Home Affairs* the court held, 'the decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance' and if the law limits this right to make such a decision that would result in the right to dignity being infringed.[26] AWT enters the debate as it is presumed to fall under NRTs and since NRTs has been argued to be covered by Section 12(2), the right to terminate pregnancy is also based on the right to reproductive autonomy. This is because a person should have a right in terms of deciding whether to conceive a child or not, as this is central to how they would shape and structure their lives and exercise one of the vital values of the Constitution, freedom.[27]

3 The current legal system and new reproductive technologies

The current legal system regulates new reproductive technologies to an extent, which has been extended to include surrogacy, in-vitro fertilization and artificial insemination. However, artificial womb technology will need to be analyzed from the context of termination of pregnancy and how this statute defines pregnancy and gestation which may exclude AWT in its entirety as it is unclear whether South African law would be applicable.

4 Rationale for the study

This study is important as it considers the implications of artificial womb technology on the

[25] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[26] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37.
[27] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.

existing legal framework. It is relevant especially at present with the emergence of new technologies that are becoming more accessible and available in the world at large including AWT and other technologies that no longer require the natural function of a human being.[28] There are many statutes, legislations and legal rules which exist in our law that were created to regulate and shape our society to ensure they function efficiently and effectively.[29] However, since the introduction of new technologies are increasing exponentially, a call for some development in our law is demanded, so as to incorporate these systems and provide some regulations as well as limitations to these technologies. Section 12 of the Constitution protects freedom and security of an individual which includes the right to 'bodily and psychological integrity' and this explicitly incorporates the right to 'make decisions concerning reproduction' (reproductive autonomy). [30] The findings of the study will allow us to deduce if there is a need for law reform as well as enrich our knowledge with regards to new emerging technologies in South Africa and how this might impact our rights as they stand.

5 Conceptual Legal framework

The basis for this research is the hypothesis that artificial womb technology may impact the freedom to end a pregnancy in addition to other ethical considerations pertaining to the womb and reproductive autonomy. The current law in South Africa does not consider artificial wombs and fetus' that could continue developing ex utero. Therefore, analysis of the current law is required to ascertain whether it may be applicable to artificial womb technology and how it could affect the right to terminate.

National Law:

Section 12 of South Africa's Final Constitution (1996) enshrines the right to freedom and security of the person. In particular, Section 12(2)(a) affirms "the right to make decisions concerning reproduction," while Section 12(2)(b) includes "the right to security in and control over their body." These provisions are foundational to the principle of reproductive autonomy, recognizing that individuals have the constitutional right to make personal decisions about

[28] Romanis, E. C. (2018) "Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications," *Journal of medical ethics*, 44(11), pp. 751–755
[29] Du Plessis, L.M. (2002). *An Introduction to Law*. 3rd Edition. Juta & Co. Ltd.
[30] Constitution of the Republic of South Africa, 1996. Section 12.

reproduction and medical treatment affecting their bodies.[31] In light of emerging Artificial Womb Technology (AWT), Section 12 continues to safeguard the rights of pregnant persons, even if AWT offers the possibility of fetal development outside the human body. While AWT may shift societal and medical understandings of fetal viability, it does not diminish the pregnant person's constitutional right to terminate a pregnancy. Section 12 ensures that any decision to transfer or end gestation—regardless of technological advancements—remains the choice of the individual, grounded in respect for their bodily and psychological integrity. Thus, South Africa's constitutional framework robustly protects reproductive decision-making, ensuring that new technologies like AWT are integrated in a manner consistent with the enduring principles of dignity, autonomy, and equality.

The Choice on Termination of Pregnancy Act 92 of 1996 governs termination of pregnancy in South Africa. The purpose of this study is to analyze the Act's provisions and to consider the implications of artificial womb technology on the Choice Act. This will enable us to determine if it is appropriate to deduce that new reproductive technologies like AWT are implicated in the aforementioned Act. As a result, this study will evaluate the pertinent ethical and legal guidelines as well as their effects on people who are utilizing AWT and have chosen to end their pregnancy, necessitating the need for legislative change.

International Law:

The Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948, it sets out fundamental human rights that should be protected for all people, this includes the right to life, liberty, and security.[32] The UDHR indirectly supports reproductive autonomy by recognizing the right to life and personal freedom.[33] While it fails to explicitly mention reproductive rights, it's principles may influence the interpretation of rights relating to abortion and autonomy in reproductive choices. The UDHR's protection of human dignity and autonomy could influence discussions around the rights of pregnant individuals and the fetus, especially in contexts like artificial wombs.[34]

[31] Constitution of the Republic of South Africa, 1996. Section 12.
[32] Universal Declaration of Human Rights, 1948, General Assembly Resolution 217 A (III), Article 3.
[33] Ibid.
[34] Tan Dewes, T.Y. Artificial Womb Technology: an Examination of Human Rights, Ethics, and Legal Frameworks. 2023. University of Padova.

Another significant international legal instrument that may apply is the International Covenant on Civil and Political Rights (ICCPR).[35] This UN treaty ensures civil and political rights, including the right to life, freedom of movement, and privacy.[36] It has been argued that the right to privacy under the ICCPR can support the right of individuals to make autonomous decisions about their reproductive health, including termination of pregnancy.[37] It's likely to protect personal decisions regarding pregnancy termination. It is conceivable that the right to privacy could extend to decisions about reproduction where artificial womb technology is used.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) treaty protects economic, social, and cultural rights, including the right to health and access to healthcare services. The right to health under the ICESCR supports access to safe, legal abortion and comprehensive reproductive healthcare. It reinforces the importance of ensuring that individuals have access to the services needed to make informed decisions. ICESCR's protection of health rights could extend to the provision of technologies like artificial wombs, ensuring individuals have access to safe, medically supported reproductive options.[38]

The African Charter on Human and Peoples' Rights otherwise referred to as the Banjul Charter, focuses on protecting civil, political, economic, and social rights in Africa.[39] While the Banjul Charter does not directly mention reproductive rights, it recognizes the right to life and individual liberty.[40] These rights can be interpreted to support reproductive autonomy, including abortion. The Banjul Charter's provisions on personal freedom and dignity may guide how artificial womb technology impacts reproductive decisions, as it could shift the

[35] United Nations. (1966) International Covenant on Civil and Political Rights. General Assembly Resolution 2200A (XXI), 16 December.
[36] Ibid.
[37] Kumar, S. Human Rights and Reproductive Health: Understanding Scope and Impact, in Research Handbook on Gender and Sexuality, p.180.
[38] Constitution of the Republic of South Africa, 1996; and International Covenant on Economic, Social and Cultural Rights (ICESCR), discussed in Shozi, B. (2020). Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. South African Journal on Human Rights, 36(1), pp.1–24.
[39] Organisation of African Unity (OAU). (1981). African Charter on Human and Peoples' Rights (Banjul Charter). CAB/LEG/67/3 rev. 5, 27 June.
[40] Ibid.

debate on personhood and fetal rights.[41]

Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that was adopted in 1979, aims to eliminate discrimination against women in all areas, including healthcare and reproductive rights.[42] CEDAW explicitly supports reproductive rights, including access to safe abortion services. It aims to uphold women's autonomy over their reproductive health decisions. CEDAW could influence the use of artificial womb technology by reinforcing women's right to choose the method of managing their pregnancy, whether through abortion or artificial wombs.

The Cairo Declaration on Population and Development (1994) adopted at the International Conference on Population and Development, emphasizes reproductive rights, including the right to choose and control one's reproductive health.[43] The Declaration asserts that reproductive rights are fundamental human rights, supporting access to safe abortion and contraceptive services. It's focus on reproductive autonomy could guide the acceptance of artificial womb technology, advocating for individuals' rights to choose the method of managing their reproductive health.[44]

The Beijing Declaration and Platform for Action (1995) adopted at the Fourth World Conference on Women, it emphasizes gender equality, reproductive health, and rights.[45] It supports the right to family planning, including the right to access safe and legal abortion. It places reproductive autonomy at the center of gender equality. The platform's focus on reproductive health and rights could influence the acceptance of artificial womb technology, especially in relation to women's control over reproductive decisions.[46]

[41] Izunwa, M.O. Beyond The Embryo: Exploring The Limitations Of Regional Human Rights Instruments In Regulating Assisted Reproductive Technologies. Nnamdi Azikiwe University Journal of Private and Property Law, 2024 1(2), pp.179–188.
[42] United Nations. (1979). Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). General Assembly Resolution 34/180, 18 December.
[43] UNFPA. (1994). Programme of Action adopted at the International Conference on Population and Development (ICPD), Cairo.
[44] Cairo Declaration on Population and Development
[45] United Nations (1995). *Beijing Declaration and Platform for Action*.
[46] DECLARATION, B., 2020. Synthesis Report on the Implementation of the Beijing Declaration and Platform for Action.

Additionally, The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) adopted in 2003, this protocol affirms the rights of women in Africa, including the right to control their reproductive health.[47] It guarantees women's right to choose to terminate a pregnancy in cases of risk to the woman's health or in cases of rape, incest, or severe fetal abnormalities.[48] The Maputo Protocol could be used to advocate for a woman's right to choose artificial womb technology as an alternative to abortion, depending on the context and her health needs.[49]

These international instruments collectively support reproductive autonomy, the right to terminate a pregnancy, and potentially the use of emerging technologies like artificial wombs. While some of these instruments explicitly protect the right to abortion and reproductive health, others indirectly support these rights through broader principles like personal autonomy, health, and dignity. They form a global framework that could influence how artificial womb technology is integrated into reproductive rights discussions and whether individuals have the right to choose such technologies as an alternative to traditional pregnancy termination methods. Reproductive rights in South Africa have largely been defined in the context of termination of pregnancy, but in recent times the advent of new reproductive tech has broadened the discussion. This makes the study contemporary as it will focus on new reproductive technology as it may relate to the existing right to terminate pregnancy.

5 Literature review

Neonates that are born prior to 26 weeks of gestation are likely to suffer with underdeveloped lungs, respiratory issues as well as issues relating to their heart functionality and thus cannot survive independently.[50] Neonatal intensive care is a mechanical ventilation system that can assist these preterms with oxygen circulation and breathing, however these systems carry many risks and restrictions that could create an obstruct the lung development of the preterms lungs.

[47] African Union. (2003). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), Article 5 and Article 12.
[48] Sigsworth, R. and Kumalo, L., 2016. Women, peace and security-implementing the Maputo Protocol in Africa. *Institute for Security Studies Papers*, 2016(295), pp.1-24.
[49] Ibid.
[50] Romanis, E. C. (2018) "Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications," *Journal of medical ethics*, 44(11), p 752.

Many of these neonates are unable to survive after depending on NIC. According to Romanis, the main differences between AWT and neonatal intensive care were depicted and it was revealed that to some extent AWT could be an extension of NIC.[51] The author also provided an argument for AWT to be used on preterm fetuses that are beyond the viability threshold. Viability is often the point at which the fetus is granted some legal protections due to the restriction of access to the termination of pregnancy. The researchers might want to keep their work apart of debates about abortion's wider ethical ramifications. Nevertheless, if the biobag is as effective for human premature babies as it has been for animals, it will ultimately have the effect of shifting, if not actual viability thresholds, then beliefs about where they are.

This is the basis upon which the argument for the use of the artificial womb on fetuses, is not significantly far behind the current viability threshold. This issue also points out the need for the reconsideration of the term 'fetus'. AWT aims to treat a fetus as if it had never been born and which is dependent on an artificially created womb for the remaining period of gestation. Romanis proposed a new term, 'gestatling' which means a human person who possesses no self-sufficient capacity for life while in the midst of ex utero gestation, regardless of whether they are capable of doing so.[52] Romanis described the many ethical implications of AWT and the need for terminology development since it may be inappropriate to use in this particular context.26 The author however did not look at all the ethical implications of AWT on the right to terminate the pregnancy and various other affects that I intend to research.

Romanis considered the significance of the womb whilst considering a woman's right to reproductive autonomy as well as the power imbalances between the prospective mother and father.[53] The womb was historically considered an object that was controlled by the state, medical practitioners and husbands. The authors research was significant as it dealt with the notion allowing women first preference when deciding to shift to ectogestation or to terminate the pregnancy as it is their body. This dissertation will consider whether this notion is correct in terms of the artificial womb now that the woman's body will no longer be carrying the fetus

[51] Romanis, E. C. (2018) "Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications," *Journal of medical ethics*, 44(11), pp. 751–755.
[52] Romanis, E. C. (2018) "Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications," *Journal of medical ethics*, 44(11), pp. 751–755.
[53] Romanis, E. C. (2018) "Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications," *Journal of medical ethics*, 44(11), pp. 751–755.

for the remaining gestational period.

Other authors have also considered reproductive autonomy extensively. For example, Shozi. (2020) analyzed the implications of new reproductive technologies (NRTs) on the existing laws regarding the right to reproductive autonomy.[54] He studied the ambit of our current South African Constitution and whether it includes NRTs, specifically Section 12(2)(a). The results of the article showed the need for the development of the law to be 'diverse' enough to adapt to the modern world and its inventions. These new reproductive technologies were introduced to allow individuals to have a child as they could not conceive using biological methods. Hence, restricting this choice is an infringement on the right to form a family. This right includes the protection of the method that is chosen to exercise that choice whether by natural or artificial reproduction.

Moreover, Di Stefano et al. (2020) looked carefully at empirical data as well as an ethical analysis of the concept of viability and the termination of pregnancy[55]. He advocated for the use of partial ectogestation for extremely premature infants (EPIs) and the implications this would have on viability. Generally, the termination of pregnancy is not legally permitted if the infant is considered to be viable, but abortion may be permitted during the early half of the pregnancy in certain jurisdictions. In order to investigate the effects of ectogestation on viability, newborn resuscitation, and abortion, the researcher's used empirical and analytical methodologies. The concept of viability was intensively analysed to explore the different meanings and then decided which definition is most appropriate in the context of ectogestation. Two crucial justifications were made for the need to restrict or prohibit abortion that has surpassed the viability threshold. The first of which is that when a fetus becomes viable, a moral status automatically vests in them and to terminate the pregnancy would mean committing infanticide. The second, was consistency, in that doctors should treat a fetus or a newborn infant that share the same degree of maturity, in the same manner. In terms of the right to terminate pregnancy, the study was not conclusive as to whether the viability debate would create limitations regarding the access to abortion. It considered consistency as an

[54] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.
[55] Di Stefano, L. et al. (2020) "Ectogestation Ethics: The Implications of Artificially Extending Gestation for Viability, Newborn Resuscitation and Abortion," *Bioethics*, 34(4), pp. 371–384.

ethical basis for the abortion policy where ectogestation would not give rise to any alterations for the cut-off gestations for the termination of pregnancy. Although the study provided an in-depth understanding of the 'viability threshold', they did not analyse it from a statutory perspective. The study did not consider that reproductive autonomy might also be an ethical implication when discussing abortion. This is where I intend to extend the parameters of the study.

Romanis, E.C. (2019) responded to the criticisms made by Colgrove regarding her earlier arguments that there is a conceptual difference between neonatal NIC and partial ectogenesis facilitated by artificial wombs (AWs).[56] The author had argued that the "gestateling" undergoing partial ectogenesis and the preterm neonate in NIC were distinct entities that were the subject of each technology. Colgrove argued that gestatelings and preterm infants are morally unimportant distinctions because they are not distinct from newborns. He asserted that to be a "newborn" means to have just given birth, but the author disagreed, stating that the gestational patient undergoing partial ectogenesis is not yet fully born because it has not yet undergone all of the biological adaptations necessary for independent life. The author also said that the ability to live independently is a big difference between gestational babies and newborns because newborns are still developing their capacity for self-sufficiency. Overall, the author maintains that there is a significant conceptual distinction between partial ectogenesis and NIC, as well as between gestating women and newborns. Romanis also stated that humans are endowed with legal personhood from the moment of birth. Birth was historically a distinct indicator of legal standing that could be applied with consistency and predictability. A fetus lacks a legal personality before birth, but after it is born, it gains one. But as this paper has so effectively shown, new reproductive technologies need rethinking how the law confers legal personhood. The advent of new options for humans at earlier stages of their growth that exist ex utero show that the concept of a birth is not straightforward. Birth and being born alive, the two components of the law of personality, require further explanation and depth. This article provided an English law perspective on AWT and abortion. It looked at the possibility of the fetus being exploited while ex utero since it would lack legal personality. This is because a fetus would only gain legal personality once born and if we had to regard the fetus that is ex

[56] Romanis, E.C. 2019, "Artificial womb technology and the significance of birth: why gestatelings are not newborns (or fetuses)", *Journal of medical ethics,* vol. 45, no. 11, pp. 728.

utero as ‘not born’ then it would therefore lack legal personality and perhaps be susceptible to exploitation. The article therefore provides the need for a ‘third status’ approach towards legal personality. In my research, I will extend this argument and attempt to apply it to South African law because it depicts the need for the development in our statutes to accommodate for the emerging technologies that are becoming more prominent in our society.

6 Methodology

This study will be a positivist desktop study where it will analyze various literature and cases that are relevant to the topic at hand. The research would comprise of a critical analysis into AWT and what implications it may have pertaining to abortion as well as other ethical issues such as reproductive autonomy. AWT will be analysed as a new system of technology that is yet to be introduced into the reproductive realm in South Africa. It will consider South Africa’s legislation regarding the termination of pregnancy and the Constitution as well as other jurisdictions and provide a comparison in terms of whether they also call for policy reform with regards to AWT and the termination of pregnancy. Accordingly, the study will analyze the Choice on Termination of Pregnancy Act and Section 12 of the Constitution, as well as cases such as *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T).

7 Research Questions

The main research question that this dissertation will consider is *how will artificial womb technology impact on the right to terminate a pregnancy as recognized in the context of reproductive autonomy in South Africa?*

This question will be considered by studying the following sub-questions -

1. What is the scope of reproductive autonomy in South African Law?
2. What is the extant legal framework for termination of pregnancy in South African law?
3. How does Artificial Womb Technology stand to impact on the right to terminate pregnancy?

8. Chapter Outline

The dissertation will be structured into 5 chapters as follows:

Chapter 1 will commence with an introduction to the concept of artificial womb technology, providing a background on this emerging and innovative technology. Following this, the chapter will explore the current legal framework surrounding new reproductive technologies in South Africa. Additionally, it will present a conceptual framework outlining the relevant legal principles that may be influenced by the introduction of artificial womb technology under national and international law. The rationale for the study will elucidate the significance of this topic, emphasizing the importance of analyzing artificial womb technology in the context of South African law, particularly with regard to reproductive autonomy and the termination of pregnancy. Moreover, this chapter will include a literature review, examining key scholarly articles on artificial womb technology and offering a critical analysis of these sources. Finally, Chapter 1 will outline the methodology and research questions, providing a roadmap for the structure and progression of the dissertation.

Chapter 2 seeks to examine reproductive rights in South Africa, with a focus on the concept of reproductive autonomy—its origins, significance, and its potential impact on artificial reproduction technologies. The discussion will explore how reproductive autonomy is closely tied to the right to bodily integrity and how both intersect with emerging technologies like artificial wombs. Additionally, the chapter will consider how the right to freedom to form a family plays a pivotal role in shaping reproductive autonomy, influencing individuals' ability to make decisions about reproduction and family-building in the context of new scientific advancements.

Chapter 3 will describe the legal personality of a fetus under South African Law. It will also do so by analysing the legal personality of a fetus which can clarify whether artificial womb technology would change the timeline or conditions under which abortion is permissible. This discussion is significant because legal status of a fetus is an important feature of the debate surrounding the termination of pregnancy and the right to reproductive autonomy. Ultimately, studying the legal personality of the fetus provides the foundational context for understanding how technological advancements could reshape the legal landscape around reproductive rights and the right to terminate a pregnancy.

Chapter 4 will consider the current legal framework that exists in terms of the right to terminate a pregnancy. It will do so by analysing the extant statutes and legislation that currently govern the right to terminate and the conditions under which a termination may be permitted whilst considering women's rights. This is significant as the law may need to be developed to include how it may apply to partial ectogenesis if such situation arises.

Chapter 5 will synthesize the discussions from the preceding chapters and offer recommendations on how South African law may evolve to incorporate artificial womb technology, considering its potential impact on the right to terminate a pregnancy. The chapter will ascertain the nature of the scope of reproductive autonomy within South African law, while also clarifying the existing legal framework surrounding pregnancy termination. By doing so, it will provide insights into how artificial womb technology could alter the legal landscape and influence the right to terminate a pregnancy in South Africa.

Chapter 2 - Reproductive rights and its impact on artificial womb technology

1 Introduction

The South African Constitution grants everyone freedom, security and control over their bodies which includes the freedom to choose whether or not to reproduce.[57] This implies that the decision to have children or not is one's own. The foundation of reproductive rights is the acknowledgement that every couple and individual possess the fundamental right to voluntarily and responsibly choose to procreate, as well as the number, spacing, and duration of their children, and the right to the best possible sexual and reproductive health.[58] This reproductive autonomy includes the right to choose when not to procreate, to obtain safe, effective, reasonably priced, and socially acceptable means of contraception and to seek a termination of pregnancy which is permitted within legal limits.[59]

This chapter will consider reproductive autonomy in an era of reproductive technology. The chapter will explore the meaning of reproductive autonomy by assessing the protection of reproductive health rights under national and international law, and consider how the legal interpretation has developed our understanding of the scope and meaning of these rights in the context of artificial reproductive technologies. By understanding how these rights have been interpreted and applied in the ART context, we may consider their potential application in the context of AWT. It will be shown how the right to terminate pregnancy is a right that is framed by reproductive rights, and the chapter will consider whether AWTs pose any potential legal challenge to terminations.

Reproductive rights fall under Section 12(2) of the Constitution which protects the reproductive rights of both men and women. This includes the decision of whether or not to form a family.

[57] Section 12, Constitution of the Republic of South Africa, 1996.
[58] United Nations (1994) Cairo Declaration on Population and Development, adopted at the International Conference on Population and Development, Cairo, 13 September 1994.
[59] United Nations (1994) Cairo Declaration on Population and Development, adopted at the International Conference on Population and Development, Cairo, 13 September 1994; see also African Union (2003) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), Article 14.

However, it has been argued that the ambit of Section 12(2) only applies if it is the persons own body that is being affected and therefore only then will they be afforded protection of their rights.[60] Reproductive rights ensure that individuals have the autonomy to make decisions about their reproductive health, including the choice to pursue assisted reproductive technologies (ART). These rights empower people to access various fertility treatments, such as in vitro fertilization (IVF) and egg freezing, allowing them to have children when they choose, regardless of age, marital status, or medical conditions. By supporting access to ART, reproductive rights promote equality and the freedom to build families in ways that align with personal, ethical, and medical considerations. The courts have favoured a generous interpretation of reproductive rights to support reproduction using ARTs.[61] Similarly, it is plausible, that AWT, being an emerging reproductive technology, will also be supported using reproductive health rights.

With the emergence of artificial womb technology, the fetus will no longer be in the womb of the mother, rather in a 'man-made womb' and this will affect how the law should be interpreted in respect to 'bodily and psychological integrity'. Reproductive technologies such as artificial wombs will affect the applicability of the Choice Act as the Act has always been applied to one's own body. These artificial wombs will require more legal intervention when looking at the defences of the termination of pregnancy based on arguments for protecting bodily autonomy, as we consider the change in environment in which the fetus is developing. In this chapter we will shift our focus to whether South African law can be interpreted to apply to these new reproductive technologies.

Firstly, we need to consider Section 12(2) of the Constitution and how it has been interpreted in our law. Reproductive rights and autonomy have evolved over the years to accommodate the various obstacles people are now facing. It was initially interpreted in our law to allow for the legal termination of pregnancy which afforded women the right to decide to terminate the pregnancy under certain circumstances. Secondly, new reproductive technologies are emerging and the law has not considered how these will impact the existing legal system. For example, the law only had to consider the reproduction in cases where the fetus is in the womb of the

[60] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) para 78 – 80.
[61] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) para 70,74.

mother, however with technologies such as in-vitro fertilisation and the concept of surrogacy, the law should be reinterpreted in order to provide for these circumstances. Thirdly, artificial womb technology has posed a further obstacle to Section 12(2) where the fetus is not in the womb of the mother, therefore it is important to ascertain whether the relevant sections could be applied to the technology to ensure that all individuals are protected under the law.

2 The legal framework for reproductive rights

2.1 National law: The South African Constitution and Choice on Termination of Pregnancy Act

South Africa's Constitution, adopted in 1996, is regarded as one of the most progressive in the world. It emerged from the ashes of apartheid, which had entrenched racial segregation and inequality for decades.[62] The Constitution was enforced after years of negotiation between political parties, civil society, and various interest groups.[63] The authors of the Constitution drew extensively from international human rights standards, as well as South Africa's history of resistance to oppression. It is now considered the most supreme law and sets out the values of South African citizens, the rights that South African citizens possess, how the government should function, how laws may be implemented on a national level. The most significant chapter of the Constitution is the Bill of Rights which protects and promotes democratic values of human equality, dignity and freedom.

Section 12 of the Constitution guarantees the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to have control over one's own body. It is a cornerstone of reproductive rights, protecting individuals from forced sterilisation, coerced reproduction, and non-consensual medical interventions.[64] Section 12(2) affirms: *"Everyone has the right to bodily and psychological integrity, which includes the right… to make decisions concerning reproduction."*[65] Section 12(2)(a), which guarantees bodily and psychological integrity, will be central to debates around AWT. Should the technology become viable, it may be viewed as an alternative to pregnancy—potentially

[62] Peter, J. 'The supremacy of the Constitution and the rule of law in theory and practice *Advocate* 2014 32-36.
[63] Peter, J. 'The supremacy of the Constitution and the rule of law in theory and practice *Advocate* 2014 32-36.
[64] O'Sullivan, M., 2013. *Reproductive rights. Constitutional Law of South Africa* (Juta Cape Town Revised Service 3 2011), pp.37-1.
[65] Constitution of the Republic of South Africa, 1996. Section 12

allowing individuals who cannot carry a pregnancy to still have biological children. This raises questions about whether the use of AWT constitutes a protected form of reproductive choice, similar to the right to terminate a pregnancy under the Choice on Termination of Pregnancy Act. Section 12 ensures that individuals have the right to make decisions regarding their own bodies, including how they manage their reproductive health.

Section 27 guarantees the right of access to healthcare services, including sexual and reproductive health services, without discrimination.[66] It places a duty on the state to progressively realise access to *healthcare, including affordable maternal and child health services.* Section 27(1)(a) provides: *"Everyone has the right to have access to health care services, including reproductive health care*." The right to reproductive healthcare encompasses access to contraception, family planning, safe abortion services, prenatal and postnatal care, and maternal healthcare. Section 27(1)(a), which guarantees access to healthcare services including reproductive healthcare, may also be relevant if AWT is categorised as a healthcare service. In such a case, the state may be obliged to ensure equitable access to AWT. This would include addressing disparities to ensure that marginalised or economically disadvantaged individuals are not excluded. Key ethical and legal questions would include whether AWT should be provided through the public healthcare system, and whether it is accessible to all, regardless of income or social status. South Africa's constitutional framework offers robust protections for reproductive rights, particularly in relation to bodily autonomy, access to healthcare, and equality. These protections provide a solid legal foundation for addressing the ethical, legal, and social implications of emerging technologies like artificial wombs. As AWT develops, it will challenge existing norms surrounding reproduction, motherhood, and the family. The South African legal system will play a critical role in ensuring that the application of such technologies respects individual rights, promotes equality, and responds thoughtfully to the complex societal and ethical considerations that arise. Although not part of the Constitution itself, the Choice on Termination of Pregnancy Act, enacted in 1996, reinforces constitutional protections by granting women legal access to abortion within certain gestational limits. This Act was groundbreaking in the context of South Africa's conservative past and marked a significant advancement in the recognition of women's autonomy over their reproductive decisions. This statute will be discussed in detail in a forthcoming chapter.

[66] Albertyn, C. 2019. Abortion, reproductive rights and the possibilities of reproductive justice in South African Courts. *University of Oxford Human Rights Hub Journal*, p.104.

2.2 International Law

2.2.1 The Universal Declaration of Human Rights of 1948

Before 1948, rights were national, not universal. Some people had rights; others didn't, depending on their race, class, gender, or citizenship.[67] The atrocities of World War II led to the creation of the Universal Declaration of Human Rights (UDHR).[68] The United Nations Charter (1945) mention human rights however it was not extensive and significant improvement was needed, hence the UDHR was created. The declaration contains 30 articles covering civil, political, economic, social, and cultural rights. Though not legally binding, it laid the foundation for modern human rights law. In terms of Article 3 of the UDHR, "Everyone has the right to life, liberty and security of person." This right guarantees freedom from violence, torture, arbitrary arrest, and abuse. It means governments cannot harm or threaten individuals, nor allow others to do so. The "security of person" is linked to personal safety, bodily autonomy, and freedom from arbitrary detention. The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty adopted in 1966, builds on this right in Articles 6–9. In terms of Article 16 of the UDHR, men and women have the right to marry and to found a family.[69] They are entitled to equal rights as to marriage, during marriage and at its dissolution. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. This article affirms the right to choose whom to marry and start a family, free from coercion or discrimination. It further ensures equality between spouses—important in an era where women often had no legal rights in marriage. Additionally, it protects families from government intrusion or forced separation. In modern era it could be interpreted to further inform laws around same-sex marriage, adoption, reproductive rights, and protection against forced marriage.[70] These two rights, when interpreted together lay a strong foundation for reproductive freedom. The concept of bodily autonomy is a core aspect of "security of person." This means people must have control over their own bodies, including decisions related to pregnancy, childbirth, contraception, and abortion. This right implies that no government, partner, or institution should be able to: force

[67] Baderin, M.A. and Ssenyonjo, M., 2016. Development of International Human Rights Law before and after the UDHR. In International Human Rights Law (pp. 19–44). Routledge.
[68] Ibid.
[69] United Nations. (1948). Universal Declaration of Human Rights (Articles 16 & 12).
[70] Burchill, R., 2003. The right to live wherever you want? The right to family life following the UN Human Rights Committee's decision in Winata. Netherlands Quarterly of Human Rights, 21(2), pp. 225–245.

someone to carry a pregnancy, deny them access to safe abortion or contraception, subject them to forced sterilization or abortion, deny healthcare that is essential to their reproductive health. The UDHR's insistence on personal security and dignity has since been invoked by activists and legal scholars to argue for legal protections over reproductive choices.

The phrase "to found a family" includes not only the right to marry, but also the right to have children — or not to have them. It supports access to: fertility treatments, contraception and, maternal healthcare. It also implies that everyone, regardless of sexual orientation, gender identity, or marital status, has a right to make their own choices about building a family. The UDHR doesn't use the term "reproductive rights" (that term gained prominence later), but its principles have been foundational in framing reproductive freedom as a human right.[71]

2.2.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) forms a cornerstone of international human rights law. Adopted by the United Nations General Assembly in 1966 and entering into force in 1976, the ICCPR seeks to safeguard civil and political rights across the globe.[72] Its relevance to sexual and reproductive rights, the right to security of person, and the right to found a family becomes clearer through an analysis of its historical context, development, and application. The ICCPR emerged in the aftermath of World War II, a period marked by widespread recognition of the need to prevent atrocities and uphold human dignity. The establishment of the United Nations (UN) in 1945 reflected a global commitment to peace, cooperation, and the promotion of human rights, largely in response to the horrors of the Holocaust and other wartime abuses. A key early achievement of the UN was the Universal Declaration of Human Rights (UDHR), adopted in 1948. Although the UDHR provided an important normative framework, it was not legally binding.[73] This spurred efforts to develop enforceable international treaties that would compel states to respect and protect human rights.

The ICCPR, along with its counterpart, the International Covenant on Economic, Social and

[71] Shalev, C. (2000). Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women. Health and Human Rights, 4(2), pp. 38–66.
[72] Unknown Author (1977). International Covenant on Civil and Political Rights. *Bulletin of Peace Proposals*, 8(3), 283-288.
[73] Joseph, S., 2022. *International covenant on civil and political rights (ICCPR).* Edward Elgar Publishing.

Cultural Rights (ICESCR), was a direct result of these efforts. While the ICESCR addresses rights related to work, education, health, and an adequate standard of living, the ICCPR focuses on civil and political freedoms. Its provisions are designed to shield individuals from arbitrary interference by the state, enshrining protections such as the right to life, freedom of expression, and safeguards against torture and inhuman treatment.[74] Crucially, the ICCPR also affirms rights related to equality, personal security, and individual autonomy—principles that underpin sexual and reproductive rights and the right to establish a family. By protecting these fundamental freedoms, the Covenant provides a legal framework that supports individuals in making autonomous decisions about their bodies, relationships, and family life, free from coercion and discrimination.

While the ICCPR does not explicitly reference sexual and reproductive rights, several of its provisions have been interpreted to encompass these issues. Article 23, which recognizes the right to found a family, has been understood by the UN Human Rights Committee to include the freedom to make informed decisions about marriage, childbearing, and family planning—core aspects of reproductive autonomy.[75] Articles 6 and 9, which guarantee the right to life and the right to liberty and security of person, have also been linked to reproductive rights.[76] These provisions have been interpreted to support access to maternal healthcare, protect against forced sterilization and unsafe abortion, and affirm the right to bodily autonomy.[77] Denial of essential reproductive health services may therefore constitute a violation of these fundamental civil and political rights.

The ICCPR has played an evolving role in the recognition and protection of sexual and reproductive rights, largely through interpretative guidance from bodies such as the UN Human Rights Committee.[78] While the Covenant does not explicitly mention these rights, provisions such as Article 17, which protects the right to privacy, have been interpreted to encompass personal decisions related to contraception, abortion, and family planning. These matters, rooted in bodily autonomy, are seen as protected from arbitrary state interference. The ICCPR's

[74] Viljoen, F., 2009. International human rights law: A short history. *UN Chronicle*, 1(2), pp.8-13.
[75] Gebhard, J. and Trimiño, D., 2012. Reproductive rights, international regulation. Max Planck Encyclopaedia of Public International Law.
[76] Shalev, C., 2000. Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women. Health and Human Rights, 4(2), pp. 38–66.
[77] Ibid.
[78] Cumper, P., 1999. *Human rights: History, development and classification. Human Rights: An Agenda For The 21st Century,* pp.1-14.

guarantees of privacy, security, and non-discrimination have also been extended to affirm the right to reproductive health free from coercion or stigma. In particular, the right to found a family under Article 23 is closely tied to reproductive choice, encompassing access to contraception, fertility treatment, and the freedom to decide whether and when to have children.[79] Restrictions on these choices may violate the ICCPR's core protections. As global human rights norms develop, the ICCPR continues to serve as a critical instrument in advancing sexual autonomy and reproductive justice.[80]

2.2.3 The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a key international human rights treaty focused on advancing the rights of women and eliminating gender-based discrimination.[81] Adopted by the United Nations General Assembly on 18 December 1979, CEDAW is often described as the "Bill of Rights for Women" due to its detailed provisions covering political, economic, social, and cultural rights.[82] It obliges states to take concrete steps to eliminate discrimination and ensure equality for women in all areas of life.[83]

CEDAW represents a significant milestone in the global movement for women's rights and has been widely endorsed, with 189 countries ratifying the Convention as of 2021—making it one of the most broadly accepted human rights instruments in the world.[84] The UDHR did not specifically address the unique forms of discrimination experienced by women, especially in

[79] Burchill, R., 2003. The right to live wherever you want? The right to family life following the UN Human Rights Committee's decision in Winata. *Netherlands Quarterly Of Human Rights*, 21(2), pp.225-245.
[80] Shalev, C. (2000). Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women. Health and Human Rights, 4(2), pp. 38–66.
[81] Orta, L.C.G., 2025. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW): from its radical preamble to its contemporary intersectional approach. *Women's History Review*, 34(1), pp.79-92.
[82] Orta, L.C.G., 2025. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW): from its radical preamble to its contemporary intersectional approach. *Women's History Review*, 34(1), pp.79-92.
[83] Englehart, N.A. and Miller, M.K., 2014. The CEDAW effect: international law's impact on women's rights. *Journal of Human Rights*, 13(1), pp.22-47.
[84] Stoilova, R. 2024. *Gender-based discrimination and underrepresentation of female judges in the superior courts in South Africa – a critical analysis of international and domestic laws and policies on the protection of women's rights.* University of Cape Town , Faculty of Law ,Department of Public Law, p 6.

relation to family life, employment, and political participation.[85] This gap highlighted the need for a dedicated legal instrument to advance women's rights on the global stage. In response, the United Nations created a Working Group on the Status of Women in 1967, which eventually led to the drafting of CEDAW. After a decade of negotiation, the Convention was adopted, providing a comprehensive framework to tackle gender inequality and promote the full participation of women in society. Since its adoption, CEDAW has been instrumental in shaping international and domestic legal standards on gender equality. It has helped raise awareness of women's rights and has supported efforts around the world to challenge discriminatory laws, policies, and practices, making it a cornerstone in the ongoing global pursuit of gender justice.[86]

One of the key parts of CEDAW is the promotion of equality in marriage and family life, as outlined in Article 16.[87] This article guarantees women equal rights to enter into marriage freely, choose their spouse, and participate equally in decision-making within the household.[88] It also emphasizes shared responsibilities within the family, particularly regarding childcare and domestic duties, recognizing that unequal divisions of labour often restrict women's participation in public and economic life. Importantly, Article 16 protects women's autonomy in family decisions, including the freedom to decide when to marry and how many children to have, directly linking the right to found a family with reproductive autonomy.[89] While CEDAW does not explicitly use the term "reproductive rights," these rights are clearly embedded in its provisions—most notably in Article 12, which calls for the elimination of discrimination in healthcare, including reproductive health services.[90] It obliges states to ensure women have access to services such as family planning, prenatal and maternal healthcare, and safe abortion where legal. The article also highlights the need to remove barriers—such as cost, distance, and lack of information—that prevent women from accessing necessary care. Additionally, it

[85] Englehart, N.A. and Miller, M.K., 2014. The CEDAW effect: international law's impact on women's rights. *Journal of Human Rights*, 13(1), pp.22-47.
[86] Nazish, M., 2024. United Nations and Women's Rights: A Historical Analysis of CEDAW. *Journal of Arts, Humanities and Social Sciences*, 3(1), pp.41-47.
[87] Jaffal, Z., Shawabkeh, F. and Al Obeidi, A.H., 2022. Toward constructive harmonisation of Islamic family law and CEDAW: a study on the UAE's reservation to CEDAW Article 16 and equal rights to marriage and family relations. *Australian Journal of Human Rights*, 28(1), pp.139-162.
[88] Freeman, M.A., 2009. Reservations to CEDAW: An analysis for UNICEF. *Policy and Practice*, 48.
[89] Shalev, C., 2000. Rights to sexual and reproductive health: the ICPD and the convention on the elimination of all forms of discrimination against women. *Health and human rights*, pp.38-66.
[90] Petersen, C.J., 2018. Reproductive Autonomy and Laws Prohibiting Discriminatory Abortions: Constitutional and Ethical Challenges. *University Of Detroit Mercy Law Review*, 96, p.605.

stresses the importance of reproductive health education, empowering women to make informed choices about their bodies and reproductive lives.[91]

CEDAW recognises that reproductive health is not merely a physical concern but intersects with women's autonomy, equality, and ability to participate fully in society.[92] Access to reproductive healthcare is essential for women to exercise other fundamental rights, such as education, employment, and public participation. The ability to control the timing and spacing of children, for example, directly impacts a woman's opportunities and freedom in other areas of life. The Convention's provisions on marriage, family life, and healthcare reflect its broader aim of promoting gender equality in both public and private spheres.[93] It addresses discriminatory laws and practices that limit women's freedom, such as family planning, reproductive decision-making, and access to health services. By affirming the right to found a family and the right to reproductive health, CEDAW provides a powerful legal framework for protecting women from coercion, discrimination, and harmful practices. In doing so, CEDAW has shaped international discourse on gender equality and reproductive justice and continues to influence national laws and policies around the world.[94] Its commitment to upholding women's rights in all aspects of life—especially in the context of marriage, family, and reproductive autonomy—remains critical to achieving substantive equality for women globally.

2.2.4 The African Charter on Human and Peoples' Rights (the Banjul Charter)

The African Charter on Human and Peoples' Rights (the Banjul Charter) is a key human rights instrument in Africa, adopted in 1981 by the Organization of African Unity (OAU), now known as the African Union (AU).[95] The Charter was named after Banjul, the capital city of The

[91] Fennelly, D., 2018, September. Convention on the Elimination of All Forms of Discrimination against Women: Articles 1, 2, 3, 4 and 11 (CEDAW). In *International and European Labour Law* (pp. 449-455). Nomos Verlagsgesellschaft mbH & Co. KG.

[92] Cusack, S. and 'Pusey, L., 2013. CEDAW and the Rights to Non-Discrimination and Equality. *Melbourne Journal of International Law* 14, p.17.

[93] Rudolf, B., 2020. *Freedom from Violence, full access to resources, equal participation, and empowerment: the relevance of CEDAW for the Implementation of the SDGs. In Sustainable Development Goals and Human Rights* (pp. 73-94). Springer International Publishing.

[94] Englehart, N.A. and Miller, M.K., 2014. The CEDAW effect: international law's impact on women's rights. Journal of Human Rights, 13(1), pp. 22–47.

[95] Blay, S.K.N., 1985. Changing African perspectives on the right of self-determination in the wake of the Banjul charter on human and peoples' rights. *Journal of African Law,* 29(2), pp.147-159.

Gambia, where the OAU summit took place. Its purpose is to promote and protect human rights across the African continent.[96] The Banjul Charter is unique in that it reflects both civil and political rights as well as economic, social, and cultural rights, recognizing the distinct challenges and needs of African peoples.[97]

In the 1960s and 1970s, as many African countries gained independence from colonial rule, there was a growing recognition of the need for a regional framework to protect human rights. At the time, no binding human rights instruments existed specifically for African states.[98] The Organisation of African Unity (OAU), which is the predecessor to the African Union (AU), responded to this gap by working to address challenges such as human rights abuses, discrimination, and political oppression, which were common in the aftermath of colonialism, apartheid, and authoritarian rule.[99] The result was the African Charter on Human and Peoples' Rights, also known as the Banjul Charter, which resulted after extensive negotiations between African states. Unlike other regional human rights instruments, the Banjul Charter has a distinctly African approach, balancing individual rights with collective rights such as the right to development and self-determination.[100] It provides a broad framework to safeguard human dignity and freedom across the continent. One of the Charter's core protections is the right to security of the person, which is closely linked to the protection of human dignity and personal autonomy. To make informed choices about reproductive health, individuals must be free from coercion, discrimination, and violence. Violations such as forced sterilization, denial of reproductive healthcare, or gender-based violence undermine the right to personal security. Although the Banjul Charter does not explicitly refer to reproductive rights, its provisions on health, personal liberty, and protection from abuse create a legal basis for advancing these rights within the African human rights framework.[101] The Charter also aligns with the South African Constitution, which recognizes the right to security of the person as essential for the enjoyment of other rights, including freedom of expression, political participation, and the right

[96] Ibid.
[97] Ibid.
[98] Uchegbu, A., 2019. Human and Peoples' Rights in the Banjul Charter. In *Peace Culture And Society* (pp. 181-195). Routledge.
[99] Uchegbu, A., 2019. Human and Peoples' Rights in the Banjul Charter. In *Peace Culture And Society* (pp. 181-195). Routledge.
[100] Shepherd, G.W., 1985. The Tributary State and" Peoples' Rights" in Africa: The Banjul Charter and Self-Reliance. *Africa Today*, 32(1/2), pp.37-50.
[101] Abubakar, I.B., 2022. Leaving no one behind: Older African women's rights to sexual and reproductive health. *African Journal of Reproductive Health,* 26(12), pp.21-26.

to live free from violence. By embedding protections against arbitrary detention, torture, and inhumane treatment, the Banjul Charter plays a vital role in supporting both personal and reproductive autonomy.[102] In doing so, it helps lay the foundation for a more just and equitable society, where individuals are empowered to live with dignity and make choices about their own lives and bodies.[103]

2.2.5 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

The Maputo Protocol, formally known as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, is a landmark legal instrument aimed at advancing and protecting the rights of women in Africa.[104] It was adopted by the African Union (AU) on July 11, 2003, in Maputo, Mozambique.[105] This protocol is a significant step in the development of regional human rights protections for women on the African continent, building on the principles set out in the African Charter on Human and Peoples' Rights (Banjul Charter). It is a comprehensive treaty designed to address the specific challenges faced by women in Africa, many of which are rooted in traditional cultural practices, gender inequality, political instability, and socio-economic hardships.[106] It reflects the continent's desire to promote gender equality, eliminate discrimination, and protect the human rights of women in various spheres of life, including health, education, work, and family relations.[107] The Maputo Protocol sought to build on the African Charter on Human and Peoples' Rights and other international human rights instruments such as CEDAW, but with a particular focus on addressing issues unique to African women.

[102] Motlalekgosi, P. and Cilliers, C., 2020. The right to freedom and security of the person: Implications for the South African correctional system. *Acta Criminologica: African Journal of Criminology & Victimology*, 33(1), pp.20-43.
[103] Langley, W., 1987. The rights of women, the African Charter, and the economic development of Africa. *Boston College Third World Law Journal*, 7, p.215.
[104] Sigsworth, R. and Kumalo, L., 2016. Women, peace and security-implementing the Maputo Protocol in Africa. *Institute for Security Studies Papers*, 2016(295), pp.1-24.
[105] Sigsworth, R. and Kumalo, L., 2016. Women, peace and security-implementing the Maputo Protocol in Africa. *Institute for Security Studies Papers*, 2016(295), pp.1-24.
[106] Article 5 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).
[107] Bond, J.E., 2021. Intersectionality, Women's Rights in Africa, and the Maputo Protocol. *Patriarchy and Gender in Africa*, p.53.

The right to security of the person is a fundamental principle of the Maputo Protocol, reflecting the need to protect women from physical harm, abuse, and violence. In the African context, women's security has long been compromised by multiple factors, including gender-based violence in both public and private spaces, harmful cultural practices such as child and forced marriage, and the devastating effects of armed conflict and political instability. These issues have exposed women to rape, female genital mutilation (FGM), trafficking, displacement, and the loss of loved ones—all of which undermine their physical autonomy and well-being.[108] In response, the Maputo Protocol requires states to take concrete steps to eliminate violence against women, outlaw harmful traditional practices, and support survivors. It recognizes that personal security is fundamental to women's ability to participate fully in society and exercise their rights.[109] By affirming the right to bodily autonomy and calling for the prevention of violence and exploitation, the Protocol creates a vital framework for safeguarding the physical safety and dignity of women in Africa.[110]

The Protocol also plays a key role in advancing reproductive rights, which are closely tied to the right to security of the person. Reproductive rights ensure that women can make informed choices about their reproductive health without fear of coercion, discrimination, or violence. This includes access to family planning, maternal health services, and—significantly—safe abortion under specific conditions. Several articles of the Protocol speak directly to these rights. Article 12 affirms women's right to access family planning services, prenatal care, and safe childbirth, recognising that reproductive health is essential for women's overall well-being.[111] It also makes the Maputo Protocol one of the first international treaties to explicitly guarantee the right to safe abortion in cases where a woman's life or health is at risk, or where pregnancy results from rape or incest. Article 5 addresses harmful traditional practices such as FGM, child marriage, and forced marriage—practices that not only violate bodily autonomy but also endanger women's sexual and reproductive health. By tackling both gender-based violence and

[108] Bond, J.E., 2021. Intersectionality, Women's Rights in Africa, and the Maputo Protocol. *Patriarchy and Gender in Africa*, p.53.
[109] Mutambasere, S., Budoo-Scholtz, A. and Murden, D. eds., 2023. *The impact of the Maputo Protocol in selected African states*. Pretoria University Law Press p.3.
[110] Snyman, T.C., 2019. *The protection of African transgender women's rights to dignity, life and health through a teleological reading of the Maputo Protocol* (Doctoral dissertation, Stellenbosch: Stellenbosch University).
[111] African Union. (2003). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. African Union. Article 12.

reproductive health challenges, the Maputo Protocol provides a comprehensive legal and policy framework for protecting and promoting women's rights across the continent. It recognises that women cannot be truly free or equal without control over their bodies and safety in their daily lives. The Protocol continues to serve as a powerful tool for advancing gender equality, combating discrimination, and improving the lives of women across Africa.

2.2.6 The Beijing Platform for Action (Beijing Declaration)

The Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women held in Beijing, China, in September 1995, stands as one of the most influential international agreements on gender equality and women's empowerment.[112] It laid out a global agenda to advance women's rights and is widely regarded as a landmark framework for promoting gender equality in the 21st century.[113] The Declaration presents a comprehensive and strategic plan of action that continues to guide national and international efforts to eliminate gender-based discrimination.[114] Its foundation was built on earlier global efforts to address gender inequality, particularly following World War II, when the international community began acknowledging the need to improve the status of women.[115] Its development involved widespread consultation and collaboration among governments, women's organisations, international NGOs, and UN agencies. These efforts culminated in a forward-looking declaration that identified 12 critical areas of concern affecting women globally. These included poverty, education and training, health, violence against women, human rights, economic and political participation, and the rights of the girl child, among others.[116]

The Declaration identifies 12 critical areas of concern, including violence against women, access to education, political participation, economic empowerment, and reproductive health and rights.[117] The Declaration recognized violence against women as a major barrier to gender

[112] DECLARATION, B., 2020. Synthesis Report on the Implementation of the Beijing Declaration and Platform for Action.
[113] DECLARATION, B., 2020. Synthesis Report on the Implementation of the Beijing Declaration and Platform for Action.
[114] Musasa, T., 2023. An Analysis of the 1948 Universal Declaration of Human Rights (UDHR) on Gender Inclusivity. The Fountain: *Journal of Interdisciplinary Studies*, 7(1), pp.187-206.
[115] Allotey, P. and Denton, F., 2020. Challenges and priorities for delivering on the Beijing Declaration and Platform for Action 25 years on. *The Lancet*, 396(10257), pp.1053-1055.
[116] United Nations (1995), Beijing Declaration and Platform for Action.
[117] Reilly, N., 2005. The United Nations 'Beijing Platform for Action'(1995–2005): Local–global political spaces, NGO activism and governmental responses in the republic of Ireland. *Irish Political Studies*, 20(2), pp.187-200.

equality, urging states to implement national strategies to combat domestic violence, trafficking, sexual harassment, and harmful traditional practices such as female genital mutilation (FGM) and child marriage. It framed such violence as a violation of human rights and a direct threat to women's security and well-being, calling for stronger legal frameworks and support systems to protect women from harm and uphold their dignity. In doing so, the Declaration helped shift global discourse, emphasizing that ensuring the right to security is essential for women's empowerment and full participation in society. A central feature of the Declaration is its strong endorsement of reproductive rights as fundamental human rights. The Declaration affirms that individuals must be free to make decisions about marriage, childbearing, and parenting without coercion, discrimination, or violence. It explicitly promotes universal access to reproductive health care, including family planning services, safe motherhood care, and safe abortion where permitted by law. It also commits to eliminating harmful practices like FGM and early marriage, which undermine reproductive autonomy, and calls for comprehensive sex education to empower individuals with knowledge about sexual and reproductive health. Additionally, the Declaration stresses the need for legal protections to safeguard reproductive rights and ensure that national laws reflect and uphold women's autonomy. These provisions connect directly to the right to found a family, emphasizing that reproductive choices must be respected and supported within a rights-based framework. Overall, the Beijing Declaration was a landmark achievement that continues to guide global efforts to strengthen reproductive rights, advance gender equality, and protect women's security and dignity in both public and private life.

2.2.7 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the UN General Assembly in 1966 and entering into force in 1976, is one of the core international human rights treaties.[118] Developed in the aftermath of World War II, it reflects a global commitment to preventing atrocities and promoting human dignity and social justice.[119] Complementing the ICCPR, which addresses civil and political rights, the ICESCR focuses on essential economic, social, and cultural rights—such as access to education, health care, social security, and an adequate standard of living—that enable individuals to live with dignity and

[118] Viljoen, F., 2009. International human rights law: A short history. *UN Chronicle*, 1(2), pp.8-13
[119] Viljoen, F., 2009. International human rights law: A short history. *UN Chronicle*, 1(2), pp.8-13

equality.[120] Although the ICESCR does not explicitly mention the right to found a family, this right is closely linked to several of its provisions, particularly those found in Articles 10, 11, and 12, which relate to the protection of the family, the right to health, and social support systems.[121] These provisions collectively support the conditions necessary for family life and reproductive autonomy.[122]

The ICESCR recognizes the family as the fundamental unit of society and affirms the right of individuals to marry and raise children (Article 10). It obliges states to support and protect family life, particularly through policies that uphold the rights of parents and children. Article 12 further guarantees the right to health, which is critical to family well-being and includes specific provisions related to maternal and reproductive health care. The ICESCR underscores that access to prenatal and postnatal services, family planning, and maternal health care is essential to enabling individuals—especially women—to make autonomous and informed decisions about founding a family. These protections ensure that people can raise families in safe, supportive, and dignified conditions, free from coercion or discrimination. Reproductive rights are a core aspect of the ICESCR's broader guarantees, particularly as part of the rights to health and social security. Article 12 supports access to comprehensive family planning services, including contraception, sexual health education, and reproductive health programmes. The Covenant also affirms the importance of safe maternal care, including skilled birth assistance and postnatal support, to safeguard the health and autonomy of women. Moreover, it extends to broader reproductive health needs, such as access to safe abortion where permitted, infertility treatment, and care for sexually transmitted infections. Together, these rights empower individuals—especially women—to exercise control over their reproductive lives and choices. By promoting reproductive autonomy and supporting the conditions needed for healthy family life, the ICESCR plays a vital role in advancing gender equality, dignity, and the full realization of economic and social rights globally.

2.2.8 Cairo Declaration on Population and Development

[120] Narumugai, P., 2021. Role of ICCPR and ICESCR in the Working of the Constitutions. *Indian Journal of Law and Legal Research* 2, p.1.
[121] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966,
[122] Albertyn, C., 2019. Abortion, reproductive rights and the possibilities of reproductive justice in South African Courts. *University of Oxford Human Rights Hub Journal* p.89.

The Cairo Declaration on Population and Development was adopted at the International Conference on Population and Development (ICPD), held in Cairo, Egypt, in 1994. This conference marked a pivotal moment in the global discourse on population, development, and reproductive health.[123] It was organized by the United Nations Population Fund (UNFPA) and brought together representatives from 179 governments, alongside civil society organizations and experts from around the world. The result of the conference was a bold new vision for population and development issues, underscoring the importance of human rights and individual empowerment in discussions around reproductive health and family planning.[124] It established a set of guiding principles and concrete actions aimed at addressing global population challenges while respecting and promoting human rights.

The Cairo Declaration affirmed that reproductive health and reproductive rights are integral to human rights. These rights include the ability to decide freely and responsibly on the number and spacing of children, access to family planning services, sexual health education, and safe motherhood services.[125] Reproductive health services were defined as services that help individuals achieve safe pregnancies and childbirth, access contraception, and receive health care for the prevention and treatment of sexually transmitted infections (STIs), including HIV/AIDS. A central theme of the Cairo Declaration was the right to found a family. The Program of Action emphasized that all individuals should have the right to choose freely the number and timing of their children and to have access to the necessary services to realize this right. The right to found a family was linked to reproductive health services, such as family planning, and ensuring that individuals, especially women, could make informed decisions about their reproductive lives. The Cairo Declaration also underscored that population growth should be considered in the context of broader sustainable development, which includes ensuring access to basic needs like education, health, and employment, as well as fostering environmental sustainability. It emphasized that population policies should promote individual rights and should not rely solely on population control measures. Rather, policies should create conditions that allow people to make informed choices about family life, fertility, and health.

[123] Mwamburi, A.H. and Fahm, A.O., 2018. Islam and human rights with special reference to the universal human rights and the Cairo declaration on human rights. *Jurnal Syariah*, 26(1), pp.123-140.
[124] Mwamburi, A.H. and Fahm, A.O., 2018. Islam and human rights with special reference to the universal human rights and the Cairo declaration on human rights. *Jurnal Syariah*, 26(1), pp.123-140.
[125] DeJong, J., 2000. The role and limitations of the Cairo International Conference on Population and Development. *Social science & medicine*, 51(6), pp.941-953.

It also set a target for universal access to reproductive health care by the year 2015. This goal was aimed at ensuring that all people, particularly women, could access quality reproductive health services, including contraceptive methods, maternal care, safe abortion, and STI prevention services, based on their needs and choices.

The Cairo Declaration significantly advanced the understanding of the right to found a family. This right is closely connected to the reproductive health and rights of individuals. The Program of Action recognized that individuals and couples should have the right to decide freely and responsibly the number and spacing of their children, without coercion or discrimination. Family planning was identified as a key mechanism for empowering individuals to make informed decisions about the number and timing of their children. The declaration acknowledged that individuals should have access to contraceptive methods, including information, education, and the means to prevent unintended pregnancies.[126] This is vital for the right to found a family because it allows individuals to plan their families in accordance with their desires, health, and socio-economic circumstances. Moreover, the Cairo Declaration redefined the right to family life as a fundamental human right, affirming that individuals must have the ability to choose freely and responsibly how and when to establish a family.[127] This includes addressing the social, economic, and health barriers that might prevent individuals from exercising this right.[128]

The Cairo Declaration was one of the first international agreements to place reproductive rights at the center of development policy. These rights include the right to access family planning services and contraceptives; the right to maternal health services, ensuring that women have access to safe childbirth and pre- and post-natal care and the right to safe abortion where it is legally permitted, and access to quality sexual and reproductive health services for all individuals, regardless of their socio-economic status.

The Cairo Declaration also made clear that reproductive health is not only about family planning and birth control but also about the right to sexual health, freedom from violence, and

[126] United Nations, *Cairo Declaration on Population and Development*, International Conference on Population and Development, Cairo, 5–13 September 1994.
[127] Ibid.
[128] Ibid.

the ability to make informed decisions regarding reproductive life.[129] The Program of Action called for the provision of comprehensive sexual education, as well as the elimination of gender-based violence and discrimination in reproductive health services. It marked a transformative shift in how the global community views population and development. By placing human rights, gender equality, and individual choices at the center of the conversation, the Cairo Declaration advanced the right to found a family and reproductive rights. It established a framework for addressing these rights through universal access to reproductive health services, the elimination of discrimination and violence, and the empowerment of individuals to make informed decisions about their own sexual and reproductive health.

3 Exploring Reproductive Autonomy in South Africa

Historically, reproductive rights were introduced in South Africa as a form of population control.[130] There was an exponential increase in population growth following the Universal Declaration of Human Rights and the inclusion of the right to found a family which sought to allow men and women to reproduce without any unfair discrimination.[131] While South Africa did not "ratify" the UDHR in the traditional sense, it endorsed the declaration upon its adoption and has since aligned its national laws and policies with the principles outlined in the UDHR. Although the UDHR allowed individuals the freedom and liberty to start a family, the significant increase in the population caused by increased fertility rates, introduced a strain to the socio-economic development of many countries.[132] This resulted in the development of such rights into one that is considerate of women's autonomy as mentioned previously. However, the right was further developed and acquired explicit international recognition in the Declaration of Mexico on the Equality of Women and their Contribution to development and Peace where Principle 12 specifically provides that:

"Every couple and every individual has the right to decide freely and responsibly whether or not to have children as well as to determine their number and spacing, and to have information,

[129] United Nations, *Cairo Declaration on Population and Development*, International Conference on Population and Development, Cairo, 5–13 September 1994.
[130] UN General Assembly Res 2211 'Population growth and economic development' (17 December 1966) UN Doc A/RES/2211 (XXI).
[131] UDHR art 16 (1)
[132] Baderin, M.A. and Ssenyonjo, M., 2016. Development of International Human Rights Law before and after the UDHR. In *International Human Rights Law* (pp. 19-44). Routledge.

education and means to do so"[133]

This afforded women the right to choose not to reproduce, in addition, it mentions the right of women to the resources required to implement their reproductive choices in addition to their right to family planning information and education.[134] What this did was further the rights on reproductive autonomy and ensure that women have a choice and not an obligation to reproduce. It also affected the means which they chose to conceive. However, these developments existed only in the international law realm and therefore was not binding in South Africa, but it did have an influence on our law. This is evident where the recognition of reproductive autonomy as well as reproductive healthcare reached a critical point in terms of the International Conference on Population and Development.[135] The conference promulgated the initial prescribed definition of reproductive rights in its 'Programme of Action' in the presence of South Africa.[136] This affected South African law and the way in which the rights to protection were protected. Section 12 of the Bill of Rights relates to the freedom and security of an individual which is interpreted as including reproductive rights.[137] Furthermore, reproductive health rights are guarded in terms of Section 27(1)(a) of the Constitution which deals with socio-economic rights. Reproductive rights gained some recognition in South Africa from the Choice of Termination of Pregnancy Act of 1996. The Choice Act was influenced by Section 27(1)(a) of the Constitution which afforded the right to acquire healthcare as well as reproductive healthcare. In the early 1990s, South Africa was still trying to implement equality and promote non-discrimination in terms of its laws during the apartheid era.[138] This included the rights of women which have been ignored relating to their reproductive choices. Therefore, South Africa used international instruments to shape the manner in which reproductive rights are recognised.[139] It was the Universal Declaration of Human Rights (UDHR) which recognised the freedom that individuals have in order to form a family with whom they

[133] Report of the World Conference of the International Women's Year' (1975) UN Doc E/CONF.66/34 (Report on the Women's Conference).
[134] Report of the World Conference of the International Women's Year' (1975) UN Doc E/CONF.66/34 (Report on the Women's Conference).
[135] UNFPA 'Programme of Action' adopted at the ICPD (1994)
[136] United Nations Population Fund (UNFPA), Programme of Action of the International Conference on Population and Development (ICPD), Cairo, 5–13 September 1994 (New York: UNFPA, 1995).
[137] Constitution of the Republic of South Africa, 1996, Section 12.
[138] Gutto, S., 2001. *Equality and non-discrimination in South Africa: The political economy of law and law* making. New Africa Books.
[139] Albertyn, C. (2015). Claiming and defending abortion rights in South Africa. *Revista Direito* GV, 11(2), 429–454.

choose.[140] However, the Declaration did not bind South Africa to its provisions as it is not a legally binding instrument. It is important to know that previously in South Africa, reproductive rights focused mainly on the manner in which individuals would avoid reproduction.[141] International human rights documents looked at balancing of the right to reproductive autonomy with the concept of non- discrimination. Reproductive rights in terms of international law are looked at from a perspective including other inter-related rights that are combined to give rise to reproductive rights.[142] Article 16 of the UDHR laid the foundation for which the right to form a family is based and which reproductive rights were developed from. Following which the first World Conference on Women was held by the United Nations which further developed reproductive rights into being inclusive of women's autonomy and independence so as to make their own choice.[143] This development in reproductive rights furthered the previous position women had in society and their choices regarding reproduction which would take precedence over the preservation of the freedom to form a family.

These rights amongst others, are put forward in the Bill of Rights and protects the reproductive rights of both men and women which also obliges accessibility to voluntary reproductive health information.[144] The right to reproduction falls in the ambit of Section 12 of the Constitution. Section 12 guards against a person's right to freedom and security including to not be a victim of torture or to be treated in a cruel, inhuman, or humiliating manner, to decide whether to reproduce and to have autonomy in order not to be subjected to inhumane medical or scientific experimentation. Section 12 of the Constitution provides that:

"Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction".[145]

[140] Universal declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
[141] van Niekerk, C. Assisted reproductive technologies and the right to reproduce under South African law. *Potchefstroom Electronic Law Journal (PELJ*), 2017 20(1), 1-31.
[142] Shalev, C., 2000. Rights to sexual and reproductive health: the ICPD and the convention on the elimination of all forms of discrimination against women. *Health and human rights*, pp.38-66.
[143] Report of the World Conference of the International Women's Year' (1975) UN Doc E/CONF.66/34 (Report on the Women's Conference).
[144] O'Sullivan, M., *2013. Reproductive rights. Constitutional Law of South Africa* (Juta Cape Town Revised Service 3 2011), pp.37-1.
[145] Section 12(2)(a) of the Constitution.

The advancement and development of reproductive rights especially in South Africa, led to a lot of controversy regarding the issue of termination of pregnancy. Various individuals opposed the idea of allowing the termination of pregnancy by women to be recognised under the notion of autonomy. This was partially because the statute regulation the termination of pregnancy, the Choice of termination of Pregnancy Act, was still in the process of being developed at the time.[146] Section 12(2)(a) of the draft Constitution which encompassed the rights to reproduction and a women's freedom of choice, came under scrutiny as it was said to allow for abortion. However, this was not considered as reasonable ground for the objection of reproductive autonomy and that the Constitution has a duty to uphold all the 'universally accepted fundamental rights'.[147] Therefore, reproductive autonomy has been a protected right in the Constitution to ensure that all men and women have a choice regarding reproduction and women are allowed to make reproduction related decisions independently, with all the necessary information.

Section 12 (2)(a) of the Constitution was subject to further constitutional scrutiny for the first time in a case, *Christian Lawyers Association of South Africa v Minister of Health*.[148] The case looked at the definition of a 'woman' relating to the termination of pregnancy.[149] The court looked at Section 5(1), (2) and (3) which was contested by the plaintiffs where it allowed for the termination of pregnancy only with the pregnant persons informed consent and in cases of the woman being a minor, then she must be advised by a registered medical practitioner or mid wife, to consult with her parents or guardian/family member.[150] Following which, if the pregnant minor refuses to consult with her parents, she cannot, on that ground alone, be denied termination of the pregnancy.[151] The plaintiffs in this case contested that pregnant minors who are younger that eighteen are incapable of making such decisions without their parents' consent.[152] However, the High court looked at the capacity of the minor rather than their age to determine their capability to give informed consent.[153] In order for a minor to have given

[146] Both the Choice Act and the Constitution were finalized in the same year – 1996.
[147] *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 59 and 60
[148] *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T) para 17-19.
[149] *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T) para 17-19.
[150] *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T).
[151] Van Oosten, F., 1999. The choice on Termination of Pregnancy Act: some comments. *S. African LJ*, 116, p.60
[152] *Christian Lawyers* 2005 513C. The plaintiff relied on the following sections of the Constitution: 28(1)(b); 28(1)(d); 28(2); 9(1); and 7(1).
[153] *Christian Lawyers* 2005 516E.

informed consent, she must have knowledge of the risk; she must be able to acknowledge and comprehend the nature and extent of the risk the termination procedure may result in; and she must consent in a manner in which she agrees to the entire process and accepts it in its entirety with all its consequences.[154]

In the end, the court came to the conclusion that the Choice of Termination of Pregnancy Act afforded a woman with capacity the right to terminate a pregnancy since this right derives from the fundamental constitutional right to self-determination in terms of sections 12(2)(a) and (b), 10, 14 as well as 27(1)(a).[155] This conclusion shows how Section 12(2)(a) extends the realms of reproductive autonomy in respect to minors and women relating to the termination of pregnancy. The court essentially used reproductive autonomy to allow minors who are pregnant to have a choice when it comes to making reproductive choices. However, we need to consider whether the interpretation of reproductive autonomy and the Choice Act can be applied to artificial womb technology. In South Africa, the primary focus of reproductive rights has historically been on an individual's ability to choose not to have children.[156] As assisted reproductive technology (ART) has become more widely used, the focus has changed from the ability of individuals to refuse reproduction to individual's rights to reproduce non-coitally.[157] The increasing prevalence of non-coital means of reproduction due to technological advancements has made the right to employ these new technologies increasingly important.[158]

[154] *Christian Lawyers* 2005 516B
[155] Pickles, C., 2012. Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: the Choice on Termination of Pregnancy Act 92 of 1996. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 15(5).
[156] Van Niekerk, C., Assisted Reproductive Technologies and the Right to Reproduce under South African Law [2017] *Potchefstroom Electronic Law Journal* 31.
[157] Shozi, B., 2018. *A Human Rights Analysis of Posthumous Reproduction in South Africa* (Doctoral dissertation, University of KwaZulu-Natal, Howard College).
[158] Van Niekerk, C., Assisted Reproductive Technologies and the Right to Reproduce under South African Law [2017] *Potchefstroom Electronic Law Journal* 31.

3.1 Reproductive autonomy and artificial reproduction

With the emergence and increase in the use of artificial means to reproduce, the controversy lies where there is a need to determine if there is right to participate in these new reproductive technologies. The case that is relevant in this matter is that of *AB v Minister of Social Development*, where the Constitutional Court focused extensively on the scope of reproductive rights and whether it could be interpreted to include artificial reproduction.[159] In this case the first applicant was a woman (AB), who wished to have a child and start a family. However, she could not do so medically and was diagnosed as 'pregnancy infertile'.[160] This meant that she could neither fall pregnant by using IVF nor using a donor's sperm and eggs. AB then decided to use surrogacy as another option where she quickly learned that in terms of Section 294 of the Children's Act, she will not be permitted to use a surrogate as one of the requirements for surrogacy is that the conception of the child must be the product of the gametes of either both the commissioning parents or at least one of the commissioning parents.[161]

This provision hindered AB's ability to form a family and to reproduce using artificial reproduction. Her goal was to show the courts that Section 294 violated her rights to privacy, reproductive autonomy, equality, dignity, and non-discrimination. It also affected her right to seek health care, therefore she aimed to establish its unconstitutionality.[162] AB's claim was successful in High Court, however the Constitutional Court found that in order for AB's right to reproductive autonomy to be infringed upon, the right would need to extend to the body of another to which the majority held that the right should not be interpreted so broad so as to include the body of another individual.[163] Nkabinde J, delivering the majority in the Constitutional Court reasoned that Section 12 (2) of the Constitution mentions the right to both bodily and psychological integrity which must be applied to cases as one and not as one or the other. This means when this interpretation has to be applied to reproductive autonomy, then the right to reproductive autonomy can only be infringed upon if there's an unnecessary limitation to both the applicants bodily and psychological integrity.[164]

[159] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[160] Employed by the court in AB, this terminology is used in the article. See AB (Ibid) para 8(d).
[161] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[162] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) para 12.
[163] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) 313.
[164] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

Since AB could not contribute any of her gametes to the surrogate, her bodily integrity was not infringed upon as it was not her own body rather[165] In contrast, the minority judgment disagreed with the Constitutional Court judgment where Khampepe J looked at surrogacy linked to new reproductive technologies (NRTs). She called it one of the miracles of contemporary medicine and said that even in situations in which one's own body is not involved, Section 12(2) is appropriate.[166] The minority considered the fact many individuals cannot reproduce using their own bodies due to medical reasons or being in a same-sex relationship and therefore resort to surrogacy or artificial reproduction.[167] With artificial reproduction, these prospective parents are able to form a strong psychological bond with the child throughout the gestational period and beyond. Thus, the minority concluded that an infringement to this psychological bond that is created between the parent and the child should be sufficient to declare that their reproductive autonomy in terms of Section 12(2) of the Constitution has been violated.[168]

When we consider the minority and majority judgment in AB, we are able to understand the scope of reproductive autonomy and the different ways in which it could be interpreted. The majority looked at Section 12(2) of the Constitution in a narrow perspective so as to limit reproductive autonomy whereas the minority interpreted the section in a broader manner in order to allow for artificial reproduction to be insinuated.[169] The broader interpretation posed by the minority was based on the right to freedom that is articulated in Section 1 which establishes that South Africa is a sovereign, democratic state founded on values including human dignity, equality, human rights, and freedoms, non-racialism, and non-sexism of the Constitution which allows the freedom of choice and in this context, it would allow AB to reproduce in her chosen method that is her last resort.[170] Khampepe J emphasizes that this is the lens with which Section 12 (2) regarding reproduction should be looked at so as to protect those individuals rights and freedoms to make decision regarding reproduction even in situations where it is not their own body.[171]

[165] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) para 15.
[166] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) 70.
[167] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) para 19.
[168] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[169] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) para 18.
[170] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[171] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) 70.

If the narrow interpretation posed by the majority were to be applied, then that will bring serious limitations to the use of NRTs and its regulation. This could prevent a child conceived through artificial insemination from being afforded the protections outlined in Section 12(2)(a). There was also the misconception that as a prerequisite for a right in terms of Section 12 (2) to be infringed upon, there is a link to the requirement of bodily integrity that must be fulfilled. However, the development of the Constitution indicates that Section 12(2)(a) has been implemented to instances of abortion as in many case law because it affects a woman's body as well as their freedom of choice.[172]This is how Section 12(2)(a) has been clarified to include bodily integrity related to natural reproduction, however this does not mean that this is how the law should always be applied especially since the emergence of new reproductive technologies and artificial reproduction. The courts never had to consider new reproductive technologies before and therefore the requirement of bodily integrity was at the centre of the reproductive autonomy debate.[173]

3.2 Reproductive autonomy and the right to bodily integrity

This issue regarding bodily integrity in the case of AB was considered in terms of the fact that AB would require another person's gametes hence their body to reproduce and therefore the dispute was related to the 'decision concerning reproduction'.[174] If this would be accepted, then that would not allow for new reproductive technologies as this would mean that individuals that wish to reproduce and cannot physically do so, would have no other option to reproduce as new reproductive technologies do not involve their own bodies. It is argued that this cannot be the aim of our law that restricts an individual's rights in such a manner that deprives them from the freedom of forming a family. Another example that could be discussed is the scenario of a gamete donor.

In terms of the narrow suggestion, it indicates that a person's gametes are only protected whilst

[172] *AB v Minister of Social Development* 2017 (3) SA 570 (CC) 78
[173] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.
[174] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), p 14.

inside their body and not when they are extracted and stored in an institution since it is not part of the person's body and therefore does not fall within the realm of the sections' bodily integrity.[175] Reproductive autonomy is only considered deserving of constitutional protection when the gametes are inside the individual's body, and this interpretation is viewed as arbitrary. However, it is contested that this interpretation seems to be contrary to the aims of the Constitution, namely Section 1(c) which indicates that the Constitution is supreme and any laws that go against it and the Bill of Rights are deemed to be invalid.[176] The restrictive nature of Section 294 of the Children's Act may be inconsistent with the constitutional vision of inclusivity, dignity, and reproductive freedom, and arguably stands in direct conflict with the supremacy clause enshrined in Section 1(c).[177] This interpretation will not be able to be applied to new reproductive technologies and thereby excluding a vulnerable group of individuals who cannot reproduce naturally. In the past, reproductive autonomy was linked with bodily integrity as natural reproduction was prominent, however as technology evolved, it brought along many emerging technologies such as artificial womb technology which no longer requires an individuals' body and therefore should not be a requirement to show that there has been an infringement of the Section 12 (2) right.[178]

3.3 Reproductive autonomy and the right to freedom to form a family

The broad interpretation of Section 12 (2) in the *AB* case was linked with a woman's right to determine their stance regarding reproduction that is free from any undue influences and/or violence. This right is derived from the right to human liberty in terms of Article 9(1) of the International Covenant on Civil and Political Rights.[179] If women had to be deprived of their right to reproductive health care and service, they would be severely discriminated against and this would violate their rights in terms of Section 12 (2). This would also cause psychological pain and suffering that could have been avoided. Reproductive autonomy will also be threatened if there are unnecessary limitations placed on a women's right to reproductive health as this would constitute a violation in terms of international human rights law. In order for

[175] *AB v Minister of Social Development* 2017 (3) SA 570 (CC)
[176] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.
[177] The Children's Act 38 of 2005
[178] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.
[179] Shalev, C. 'The ICPD and the convention on the elimination of all forms of discrimination against women' (2000) 4 *Health and Human Rights* 38, 45, 46.

South African law to advance alongside international law, courts should take international law into consideration under specific conditions even though they are not required to do so, this corresponds to Section 39(1)(a) of the Constitution which states that, "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."

In this way in order to recognise reproductive rights, we need to understand what they mean and their origins. Reproductive rights, as defined by the ICPD Programme of Action, are based on the understanding that every couple and individual has the fundamental right to choose for themselves how many, when, and how many children to have.[180] Loosely translated, this would mean the freedom to form a family.[181] Therefore, it is suggested that reproductive rights should be viewed in the same light as the freedom to form a family in terms of Sections 12(2)(a) and s 27(1) of the Constitution.[182] The form of reproduction, whether natural or artificial should not be looked at from different perspectives but rather viewed conjunctively as a form of reproduction of which the same rights would apply.

3.4 Reproductive autonomy in an era of Artificial Womb Technology

Artificial womb technology is closely associated with reproductive rights because it offers novel opportunities for reproductive autonomy and decision-making. By allowing a fetus to develop externally from the human body, this technology could give individuals the ability to make more educated choices regarding reproduction, providing alternative solutions for those experiencing medical issues, infertility, or various obstacles to conventional pregnancy. It may allow individuals to have more control over the timing, spacing, and circumstances in which they decide to have children. As an aspect of reproductive rights, artificial womb technology supports the larger idea that people should have access to safe and creative reproductive health choices, guaranteeing that all individuals can choose how to begin a family, no matter their situations or biological constraints. Nevertheless, the ethical and legal consequences need to be thoroughly analyzed to guarantee that it respects the principles of consent, equality, and

[180] Shalev, C., 2000. Rights to sexual and reproductive health: the ICPD and the convention on the elimination of all forms of discrimination against women. *Health and human rights*, pp.38-66.
[181] Report of the International Conference on Population and Development'
[182] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.

non-coercion in decisions about reproduction

4 Conclusion

In this chapter, reproductive rights and autonomy were defined and analysed. This was done so that we can identify how it will affect new reproductive technologies and whether it can be applied to artificial womb technologies. It can be argued that reproductive rights are created as a legal mechanism to further the reproductive freedoms and choices of woman rather than to limit them.[183] However, there are many obstacles the current legislation creates relating to the manner in which it is interpreted. These obstacles include restrictive abortion laws in terms of the Choice Act, the termination of a pregnancy is only permitted for up to 12 weeks and is only allowed under specific circumstances which may limit a womens' reproductive choices. Another obstacle includes contraceptive access which hinder a womens' ability to exercise their reproductive rights to its full extent as there are many barriers to access, social stigma, lack of awareness, inadequate health services and particularly in rural areas, inequality in healthcare access. Other obstacles include Gender-Based Violence (GBV) and Coercion, lack of comprehensive sexual education, and the failure to address reproductive rights for marginalized groups. Reproductive rights allowed for termination of pregnancy to be regulated in a manner that allows pregnant woman to safely terminate their pregnancy without too many unnecessary restrictions which was rectified in the Choice Act.[184] It is important to recognise that reproductive rights are not only protected in terms of Section 27 of the Constitution, but it can be interpreted from other fundamental rights in the Constitution which allow for the freedom to form a family and the right to bodily integrity.[185] In our courts, reproductive rights have been narrowly interpreted which protected those whose own bodily integrity is being affected.[186] This implies that in order for one's reproductive rights to be infringed upon, it must be the person's own body. This creates an obstacle in terms of new reproductive technologies

[183] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[184] Pickles, C., 2012. Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: the Choice on Termination of Pregnancy Act 92 of 1996. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 15(5).
[185] Shozi, B. 2020. Something old, something new: applying reproductive rights to new reproductive technologies in South Africa. *South African Journal on Human Rights*, 36(1), pp.1-24.
[186] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

in which the fetus may not be in the womb of the mother. An example could be artificial womb technology which will affect how reproductive rights are interpreted in light of termination of pregnancy as the fetus is completing the rest of its gestational period in a man-made womb. How then, will reproductive autonomy apply since the individuals own body is not being directly affected? This will be considered in the following chapter.

The intersection of international human rights law and reproductive autonomy presents a complex landscape where the rights of individuals to make decisions about their bodies and reproductive futures are increasingly recognized and protected under various legal instruments. Throughout the chapter, we have explored how international frameworks, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Banjul Charter, CEDAW, the Maputo Protocol, the Beijing Declaration, the ICESCR, and the Cairo Declaration on Population and Development, collectively shape the understanding of reproductive rights and autonomy. These documents underscore the necessity of respecting individual choices related to reproduction, emphasizing the rights to family planning, safe abortion, maternal health, and gender equality, among others.

The *AB v Minister of Development* case is a critical example of how South African law is evolving in relation to reproductive autonomy. The case highlighted the importance of respecting individual decision-making in reproductive matters, particularly where there is a conflict between personal freedoms and legal or governmental constraints. The ruling, which focused on the state's duty to ensure that reproductive rights are not restricted unjustly, aligns with international standards that advocate for autonomy in reproductive health choices. This case could have a profound impact on how South African law may address emerging reproductive technologies, such as artificial womb technology. The application of international human rights principles, especially regarding reproductive autonomy, could guide the integration of such technologies into the legal framework, ensuring that they are used to expand, rather than limit, women’s reproductive choices. Similarly, the Choice on Termination of Pregnancy Act (CTOPA) in South Africa, which allows for abortion under certain conditions, may need to be reassessed in light of both AB v. Minister of Development and advances in reproductive technologies. Artificial wombs could potentially offer new reproductive options, challenging current legal definitions of pregnancy and reproductive

rights, and pushing for a more nuanced understanding of the right to terminate or carry a pregnancy to term. The ruling in *AB* could further strengthen the legal foundation for ensuring that individuals are empowered with the choice to use or decline these technologies without fear of discrimination or coercion. In conclusion, the legal recognition of reproductive autonomy in South Africa, framed by international human rights law, provides a solid foundation for the ongoing evolution of reproductive technologies. The *AB* case serves as a critical stepping stone in reaffirming the right of individuals to make informed, voluntary choices regarding their reproductive health. As technologies like artificial wombs continue to develop, South African law, bolstered by international human rights principles, will likely be called upon to expand its view of reproductive autonomy and ensure that individuals' rights to make reproductive choices are not only respected but also actively protected in an evolving legal landscape.

Chapter 3 - Legal personality and the fetus ex utero

1 Introduction

The previous chapter focused on reproductive autonomy and how this would affect artificial womb technology. Chapter 2 explored the concept of reproductive autonomy under contemporary international and national law. It thereafter discussed the interpretation of the scope of reproductive autonomy under South African law. Including a discussion of how South African courts have interpreted reproductive autonomy in the context of assisted reproduction. It found that the aforementioned right as set out in section 12(2)(a) is applicable to all persons granted that their own bodies are directly involved in the act of reproduction. South African courts embraced a progressive definition of the right to reproductive autonomy and it would be acceptable to assume that AWT will be accommodated. The analysis of reproductive autonomy demonstrated that the conclusion could be drawn that the use of AWT could be embraced within the definition of reproductive autonomy. Artificial womb technology will not only have implications on our understanding and interpretation of the concept of reproductive autonomy, but will also require us to consider our understanding and interpretation of other significant concepts such as the termination of a pregnancy but also the concept of 'birth' and the inception of legal personality.

The chapter will set out the development of legal personality through legal and judicial interpretation. Legal personality is the recognition by the law that an entity (like a person, company, or organization) acquires legal rights and obligations. It is important to consider legal personality in the context of AWT. Legal frameworks were built around gestations that were in utero. AWT is set to challenge our understanding of when legal personality begins, as the principle that legal personality begins when a person is born alive and separated from their birth mother does not easily translate in the context of a fetus that is in an artificial womb. For this reason, we may ask the question as to when legal personality in such a situation would being. Would it begin at the time that a fetus is removed from the womb of the pregnant woman, or would it begin at the moment that the fetus is removed from the machine?

2 Development of the concept of Legal Personality

The concept of legal personality has its roots in Roman law, where a clear distinction was drawn between legal subjects (*personae*), who could hold rights and duties, and legal objects (*res***),** which could be owned or controlled.[187] Only free persons (*liberi*) were granted legal personality, while slaves, who did not possess the same level recognition as free persons, were excluded from this status. Legal personality in Roman law commenced at live birth and ceased at death. The Romans developed the *nasciturus fiction*, which is a legal principle that treats an unborn child as if they have already been born, but only if it benefits the child.[188] In terms of the fiction, an unborn child could be treated as if they had already born (and hence commenced being a bearer of rights) in a case such as inheritance—on the condition that the child was later born alive.[189]

The right to life is guaranteed in terms of section 11 of our Constitution.[190] Under English law, legal personality, along with the full spectrum of legal rights and protections, is unequivocally conferred upon an individual only upon live birth.[191] The acquisition of legal personality is contingent not merely upon birth, but specifically upon live birth or 'born alive'.[192] The concept of being 'born alive' remains closely associated with the moment of delivery, primarily because the presence of life in a neonate can typically be observed without the need for advanced diagnostic methods.[193] Prior to the development of technologies such as ultrasound, birth also served as the most reliable indicator of the existence of a developing human being.[194] The emergence of ex utero gestation, for reasons that will be explored in subsequent discussion, lends further support to the argument that anchoring legal personality to the event of birth may represent an increasingly outdated legal construct.[195]

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[187] Davel, C.J. and Jordaan, R.A., 2005. *Law of persons*. Juta and Company Ltd, Page 3.
[188] Simić, J., 2018. The protection of nasciturus within the civil law. *Pravni zapisi*, (2), pp.255-270. The word nasciturus means "one who is to be born".
[189] Davel, C.J. and Jordaan, R.A., 2005. *Law of persons*. Juta and Company Ltd, Page at 13.
[190] Constitution of the Republic of South Africa, 1996, Section 11.
[191] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, *Medical Law Review*, Volume 28, Issue 1, Winter 2020, Pages 93–123.
[192] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, Medical Law Review, Volume 28, Issue 1, Winter 2020, Pages 93–123.
[193] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, Medical Law Review, Volume 28, Issue 1, Winter 2020, Pages 93–123.
[194] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, Medical Law Review, Volume 28, Issue 1, Winter 2020, Pages 93–123.
[195] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, Medical Law Review, Volume 28, Issue 1, Winter 2020, Page 101.

The concept of "birth" holds particular significance in this discussion, as it denotes the moment at which legal subjectivity is established.[196] Within common law, two criteria are employed to assess whether the conditions of birth have been satisfied. First, the fetus must be physically separated from the mother's body.[197] Second, it must exhibit signs of independent life following this separation, however brief that period may be.[198]

By contrast, civil law systems adopt a more nuanced and often more inclusive stance. In jurisdictions such as Germany and France, the fetus is conditionally attributed legal subjectivity. German law, for example, recognizes the *nasciturus* principle, allowing a fetus to acquire legal rights from the moment of conception, contingent upon subsequent live birth. French civil law similarly allows a fetus to inherit property or claim certain rights retroactively, provided it is born alive and viable.[199] These doctrines operate on the basis of a fiction that the child was already a legal subject at the time the relevant right or harm arose.

A critique of the traditional common law position, argues that the exclusive reliance on live birth as the basis for legal personality fails to adequately account for the complex moral and biological status of the fetus. However, legal systems must move beyond binary classifications of personhood and adopt more flexible legal frameworks that acknowledge the unique position of the fetus.[200]

Camilla Pickles introduces a relational framework that seeks to navigate the complex terrain between the rights of the pregnant woman and the interests of the fetus. This model challenges the traditional dichotomy of "single-entity" and "separate-entities" approaches, proposing instead a "not-one/not-two" perspective that emphasizes the interdependent relationship

[196] Davel, C.J. and Jordaan, R.A., 2005. *Law of persons*. Juta and Company Ltd, Page 12.
[197] Davel, C.J. and Jordaan, R.A., 2005. *Law of persons*. Juta and Company Ltd, Page 12.
[198] Davel, C.J. and Jordaan, R.A., 2005. *Law of persons*. Juta and Company Ltd, Page 12.
[199] Eberle, E.J., 2012. Observations on the development of human dignity and personality in German constitutional law: an overview. *Liverpool Law Review*, 33, pp.201-233.
[200] Maitland, P., 1905. Moral personality and legal personality. *Journal of the Society of Comparative Legislation*, 6(2), pp.192-200.

between the woman and the fetus.[201] This framework allows for a nuanced understanding of legal subjectivity that considers the contextual and relational aspects of pregnancy.

However, this approach has been met with critical scrutiny. Professor Shaun de Freitas, in his response to Pickles' work, contends that the relational framework disproportionately privileges reproductive autonomy, particularly in the early stages of pregnancy.[202] It is argued that by focusing primarily on the rights of the pregnant woman, the model marginalizes the potential personhood of the fetus, thereby failing to adequately address perspectives that ascribe full moral and legal status to the unborn from conception.[203] However, using ideas like viability (when a fetus can survive outside the womb) and sentience (the ability to feel or sense things) as markers for giving the fetus legal recognition is not a neutral choice. These ideas often reflect a pro-choice viewpoint and may not be accepted by everyone, especially those who believe the fetus should have rights from the moment of conception.[204]

Key aspects of Camilla Pickles' relational framework reflect a nuanced approach to the legal consideration of the fetus in pregnancy law. Central to her model is the denial of full legal personality for the unborn; rather than attributing constitutional rights or personhood to the fetus, she recognises "fetal interests," which derive meaning only within the context of the pregnancy and do not carry the weight of independent legal rights.[205] Her framework adopts a gradualist approach, in which the value and protection accorded to the fetus increase as pregnancy advances—particularly in the third trimester—using thresholds such as human dignity and viability to mark heightened legal significance.[206] It is clear that this approach does not support the extension of constitutional rights to the fetus, maintaining that while the fetus is biologically alive, it is not a legal person.[207] Instead of basing legal determinations on the

[201] Pickles, C., 2014. Approaches to pregnancy under the law: A relational response to the current South African position and recent academic trends. *De Jure*, 47(1), pp.20-41.
[202] De Freitas, S., 2022. A Reply to Camilla Pickles'"Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests". *Potchefstroom Electronic Law Journal* 25(1).
[203] De Freitas, S., 2022. A Reply to Camilla Pickles'"Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests". *Potchefstroom Electronic Law Journal* 25(1).
[204] De Freitas, S., 2022. A Reply to Camilla Pickles'"Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests". *Potchefstroom Electronic Law Journal* 25(1).
[205] Pickles, C. (2017). *Pregnancy Law in South Africa: Between Reproductive Autonomy and Fetal Interests*. Juta.
[206] Pickles, C. (2017). *Pregnancy Law in South Africa: Between Reproductive Autonomy and Fetal Interests*. Juta.
[207] De Freitas, S., 2022. A Reply to Camilla Pickles'"Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests". *Potchefstroom Electronic Law Journal* 25(1).

individual status of the fetus, her model emphasises the relational dynamic between the pregnant woman and the fetus, wherein the latter's interests are contingent upon and mediated through the former's legal personhood.[208] In this regard, the "separate-entities" approach is rejected as adversarial and unhelpful, positioning her own framework as a compromise—although critics such as Shaun de Freitas question its neutrality.[209] Any legal protection extended to the fetus, according to Pickles, must be assessed in light of the woman's rights and the broader social, medical, and economic context in which the pregnancy occurs. Since the fetus is entirely embodied in and dependent upon the pregnant woman, her bodily autonomy is positioned as the foundational consideration in determining legal outcomes.[210] While Pickles' relational framework offers a significant contribution to the discourse on pregnancy law in South Africa, it is not without its critics. De Freitas' analysis highlights the ideological underpinnings of the model and calls for a more balanced consideration that equally weighs the rights of the pregnant woman and the interests of the fetus. As legal scholars continue to explore this complex issue, the challenge remains to develop a framework that respects both the autonomy of the woman and the potential personhood of the fetus, ensuring that legal protections are appropriately balanced and contextually applied.

The legal recognition of fetal personhood within civil or criminal law would represent a substantial limitation on the autonomy of pregnant women.[211] Such recognition could also create disincentives for vulnerable women to seek medical or social support, thereby potentially endangering both their own well-being and that of the fetus.[212] Within the context of artificial womb AWT, the fetus maintained ex utero occupies a distinct existence, independent from the woman who previously carried it. Whilst a fetus in utero, even when near full term, does not possess legal personality under current legal frameworks, a fetus sustained ex utero by an artificial womb (AW) may arguably be presumed to acquire legal personality and the

[208] Pickles, C. (2017). *Pregnancy Law in South Africa: Between Reproductive Autonomy and Fetal Interests*. Juta.
[209] De Freitas, S., 2022. A Reply to Camilla Pickles'"Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests". *Potchefstroom Electronic Law Journal* 25(1) p 16.
[210] De Freitas, S., 2022. A Reply to Camilla Pickles'"Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests". *Potchefstroom Electronic Law Journal* 25(1).
[211] E Romanis, 'Pregnant Women may have Moral Obligations to Foetuses they have Chosen to Carry to Term, but the Law should never Intervene in a Woman's Choices during Pregnancy' (2017) 6 *Manchester Review of Law, Crime and Ethics* 69, 78.
[212] E Romanis, 'Pregnant Women may have Moral Obligations to Foetuses they have Chosen to Carry to Term, but the Law should never Intervene in a Woman's Choices during Pregnancy' (2017) 6 *Manchester Review of Law, Crime and Ethics* 78.

corresponding legal protections - even in instances where it is premature or potentially pre-viable.[213] Birth can occur through various methods, including vaginal delivery, assisted vaginal delivery using medical technology, and caesarean section.[214] It is also not always clear how far a fetus must progress through the process of delivery to be considered legally born. A broad definition of birth, as simply no longer being physically inside another person, helps to accommodate these complexities. However, such an inclusive and open-ended definition may also present challenges by potentially being too expansive.[215]

The rights and entitlements linked to legal personality are generally seen as more inherent when applied to human beings than to other entities that also hold legal personality, such as corporations. Human rights law affirms that all individuals must be treated equally under the law, and no one may be reduced to a lower legal status than another.[216] This is because legal personality serves as the foundation through which core human rights are recognized and through which individuals are protected from abuse and oppression. However, recognizing that legal personality might be lost or withdrawn based on a person's physical condition or location, such as in the case of a fetus undergoing surgery, raises concerns. While fetal surgery may seem like a separate issue, unrelated to broader patterns of discrimination or exclusion, the idea of reversing legal personality for reasons other than death can evoke discomfort, as it challenges fundamental principles of human dignity and equality which may directly impact how we would view potential developments to the concept of artificial womb technology and legal personality.[217] Legal personality has developed from a rigid classification of legal subjects in Roman law to a nuanced and evolving doctrine that accommodates natural and juristic persons, unborn children in limited contexts, and potentially even non-human entities.[218] In South Africa, the doctrine retains its Roman-Dutch roots while also engaging

[213] E Romanis, 'Pregnant Women may have Moral Obligations to Foetuses they have Chosen to Carry to Term, but the Law should never Intervene in a Woman's Choices during Pregnancy' (2017) 6 *Manchester Review of Law, Crime and Ethics* 102.
[214] Johnson Memorial Health, '5 Different Types of Childbirth and Delivery Methods You Should Know' (*Johnson Memorial Health Blog* 15 January 2015)
[215] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, *Medical Law Review*, Volume 28, Issue 1, Winter 2020, Page 103.
[216] For example, the Human Rights Act 1998 prohibits all slavery and forced labour (Sch 1, art 4) and protects the right to liberty and security (Sch 1, art 5).
[217] Elizabeth Chloe Romanis, Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood, *Medical Law Review*, Volume 28, Issue 1, Winter 2020, Page 105.
[218] Davel, C.J. and Jordaan, R.A., 2005. *Law of persons.* Juta and Company Ltd.

with modern realities.[219] As technology continues to advance, the legal system will face increasing pressure to redefine and expand the concept of legal personality in response to novel ethical, social, and legal challenges.[220]

3 Legal Personality under South African law

The *nasciturus fiction* has been affirmed in South African jurisprudence, notably in *Pinchin and Another NO v Santam Insurance Co Ltd*, where the court confirmed its applicability beyond the law of succession, extending it to the law of delict.[221] It prevents an unborn child from being disadvantaged by the timing of their birth.[222]

Under South African law there are two categories of legal subjects: (i) natural persons and (ii) juristic persons.[223] In order for person to acquire legal personality the entire birth process must take place and there ought to be an absolute division between the mother and fetus' bodies.[224] The fetus also needs to have survived the separation no matter how short it might have been.[225] Natural persons is any living human being. Legal personality is afforded to a person at birth therefore, a fetus does not acquire any legal protection or recognition until it is born 'alive'.[226] The definition of what it means to be 'born alive' is still however unclear in terms of the law.

The term 'fetus' was argued to be inaccurate and therefore the term 'gestateling' was suggested by scholars (specifically EC Romanis) as the subject is still developing ex utero and is argued to be functionally different from a fetus or a premature newborn.[227] Because entities in the AWs continue to develop, the biological state alterations that occur at birth are not fully

[219] van Eck, M. and Agbeko, F., 2023. Electronic persons in contracts. *Obiter*, 44(4), pp.808-827.
[220] Bilchitz, D., Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals'(2009). *South African Journal on Human Rights*, 25, p.68.
[221] 1963 (2) SA 254 (W).
[222] 1963 (2) SA 254 (W).
[223] Smit, V.T., 2015. Everyone has the right to life-Fact or a nasciturus fiction?: opinion. *De Rebus*, 2015(550), p.42.
[224] Schultz, J. 'Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?' *Chicago-Kent Law Review*, Volume 84,Issue 3.
[225]. Smit, V.T., 2015. Everyone has the right to life-Fact or a nasciturus fiction?: opinion. *De Rebus*, 2015(550), p.42.
[226] Smit, V.T., 2015. Everyone has the right to life-Fact or a nasciturus fiction?: opinion. *De Rebus*, 2015(550), p.42.
[227] Romanis, E.C., 2020. Challenging the 'born alive'threshold: fetal surgery, artificial wombs, and the English approach to legal personhood. *Medical Law Review*, 28(1), pp.93-123.

completed throughout gestation. The process of birth is incomplete. This term is not universally accepted by other scholars namely Nick Colgrove, as he wrote a paper arguing that the term is morally irrelevant.[228]

However, this was not the only term proposed. 'Human developing ex utero' was also another term coined to better suit the term 'fetus' and clear any misconceptions that may exist, as well as to draw the line between artificial womb technology and neonatal intensive care.[229] As mentioned above, these technologies may seem similar, but they are in reality very different from each other and assist the 'fetus' at different stages of development. The term 'gestateling' was suggested as it refers to the organism ex utero still undergoing gestation and not yet 'born' in the legal sense, therefore the 'gestateling' will not acquire any legal rights and be regarded as not being born.[230] However, in terms of neonatal intensive care, the term fetus is used as the premature fetus is merely being assisted by an incubator.[231] Many authors have argued that a fetus should not be afforded legal personhood or recognized as a human being until it is born and 'has a separate existence from its mother'.[232] Affording a fetus legal rights would mean that they would encompass all the rights a human being would have including the right to life in terms of s 11 of the Constitution. A fetus that has legal personality would then be protected in the eyes of the law and abortion would be illegal since 'everyone' has a right to life. This would pose a serious infringement of the rights of a women, their choice and freedom to decide whether to form a family and would put their lives as well as the fetus' life at risk.[233]

In South African law, the prevailing position aligns with the view that legal subjectivity begins at birth. The Constitutional Court in *Christian Lawyers Association v Minister of Health (2005)* upheld the finding that a fetus does not enjoy the same legal status as a born person. While certain statutes may extend limited legal recognition to the unborn in specific contexts—such

[228] Romanis, E.C., 2020. Challenging the 'born alive'threshold: fetal surgery, artificial wombs, and the English approach to legal personhood. *Medical Law Review*, 28(1), pp.93-123.
[229] Colgrove N. Subjects of ectogenesis: are 'gestatelings' fetuses, newborns or neither? *Journal of Medical Ethics* 2019;45:722–5.
[230] Romanis E.C. Artificial womb technology and the significance of birth: why gestatelings are not newborns (or fetuses) *Journal of Medical Ethics* 2019;45:728-731.
[231] Romanis E.C. Artificial womb technology and the significance of birth: why gestatelings are not newborns (or fetuses) *Journal of Medical Ethics* 2019;45:728-731.
[232] Paton (n 1), per Sir George Baker P at 279.
[233] Romanis, E. C. (2020) "Challenging the 'born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood," *Medical law review*, 28(1), pp. 93–123.

as the ability to inherit under the nasciturus fiction—this does not equate to full legal personality. Consequently, South African law maintains a delicate balance between protecting potential life and safeguarding the constitutional rights of women, particularly the right to reproductive health care as guaranteed under section 27 of the Constitution as well as Choice on Termination of Pregnancy Act 92 of 1996.[234] Under South African common law, there is no dispute that 'birth' means a live birth.[235] Additionally, legal subjectivity is created at the time of birth. The attribute that distinguishes a legal subject, known as legal subjectivity, outlines the attributes that an entity possesses to engage in legal proceedings as a subject rather than an object.[236]

Allowing a fetus to have legal personality in the eyes of the law would have catastrophic effects for the mother of the child. This will severely impact the right to terminate a pregnancy not mentioning the artificial womb. However, not affording the 'fetus' in the artificial womb would raise issues of exploitation by researchers claiming that the fetus is not a legal person which allows for research, and negligent treatment before they may be born.[237] If the law had to recognize the fetus as an entity that encompasses rights, this would have serious legal and societal complications. In order to determine the legal personality of the fetus there needs to be a weighing of the rights and interests of the fetus against the rights of the individual involved and thus a balance must be created between protecting the potential life within the artificial womb and respecting the autonomy and choices of the parties. Therefore, there is a need for a deeper look into the extant law and extend some of its provisions to provide for artificial womb technology and its many effects on the legal system and rights of individuals. It could be suggested that the law should make provisions for a fetus in utero and provisions for a fetus ex utero, where it deals with the legal personality of each, however this would not be practical as it will lead to numerous undesirable legal complexities.[238]

[234] Choice on Termination of Pregnancy Act 92 of 1996.
[235] Pickles, Camilla. (2014). Approaches to pregnancy under the law: a relational response to the current South African position and recent academic trends. *De Jure Law Journal,* 47(1), 20-41.
[236] Smith, J. (2020*) Introduction to legal theory*. Oxford: Oxford University Press, p. 45.
[237] Romanis, E.C., 2020. Challenging the 'born alive'threshold: fetal surgery, artificial wombs, and the English approach to legal personhood. *Medical Law Review*, 28(1), pp.93-123.
[238] Romanis, E.C., 2020. Challenging the 'born alive'threshold: fetal surgery, artificial wombs, and the English approach to legal personhood. *Medical Law Review*, 28(1), pp.93-123.

4 Artificial womb technology and legal personality

In order for the fetus to attain legal personality, they must be born 'alive' which means that the baby must be able to survive independently and there must be proof that they were born alive.[239] Historically speaking, birth was used as a point at which legal personality was afforded and because medical technology was not as advanced as it is today, the only reliable indicator of life was a child being born alive and able to survive independently.[240] The concepts of 'birth' and 'born alive' need to be considered in the context of artificial womb technology. Artificial womb technology may create a challenge to interpretation of the born alive doctrine as this creates a legal conundrum between the status of a fetus that is in- utero and one that is in an artificial womb. The technology requires the fetus to be removed from the womb of the mother and transferred to the artificial womb, since the fetus would technically be developing ex utero, the traditional birth and born alive definition would bestow legal personality on the fetus at the moment that it is removed from the womb of the pregnant woman. This could create complications around decisions to withdraw support. Questions around legal personality in the context of artificial wombs must be clarified before the technology is made clinically available.[241]

5 The South African Legal Framework and the Concept of Legal Personality

As mentioned above, reproductive autonomy in the past generally focused on the reproductive rights in light of avoiding reproduction. Until recent years due to the vast development of technology and many ways in which one can reproduce, reproductive autonomy had to be reinterpreted and extended to include these technologies. The issue to be dealt with is concerning reproductive autonomy in conjunction with legal personality and whether it would be applicable even though the fetus is not in the womb of the mother but rather in an artificial womb created to support premature fetuses that are unable to survive independently.

The link that needs to be drawn with the *AB* case, reproductive autonomy and AWT is that if reproductive autonomy as recognised by Section 12(2) is to be interpreted in a narrow

[239] Romanis, E.C., 2020. Challenging the 'born alive'threshold: fetal surgery, artificial wombs, and the English approach to legal personhood. *Medical Law Review*, 28(1), pp.93-123.
[240] Romanis, E.C., 2020. Challenging the 'born alive'threshold: fetal surgery, artificial wombs, and the English approach to legal personhood. *Medical Law Review*, 28(1), pp.93-123.
[241] This question falls outside the scope of the dissertation, but may be explored in future research.

perspective in which it only applies if it is the individual's 'own' body then this would mean that a mother whose offspring is developing in the artificial womb would have no reproductive autonomy in respect to the fetus as it is not in her body.[242] In terms of legal personality in South Africa, the fetus is not recognised as a person as it displays no signs of independent life and is still attached to the mother which affects how the fetus is classified in the artificial womb and the reproductive autonomy of women.[243] However, if this is true then it would mean that there will be little to no protection afforded to the fetus and scientists or researchers will be allowed to conduct research of premature fetus'.[244] This would be unethical. Therefore, this calls for further clarification to reproductive autonomy as well as legal personality of the fetus.[245] The question put forward would be, should there be a balance struck between these concepts or should it be determined on a case-by-case framework, which concept would take precedence over the other.

In *Barkhuizen v Napier* the court interpreted the concept of autonomy as "the ability to regulate one's own affairs, even to one's own detriment" and as "the very essence of freedom and a vital part of dignity".[246] This understanding of autonomy is closely linked to the concept of legal personality, which in South African law refers to the recognition of an individual as a subject capable of bearing rights and duties. Legal personality begins at birth, and it is only once a person has been born alive that they are entitled to the full spectrum of constitutional protections. Autonomy, as a fundamental expression of legal personality, underpins key constitutional rights such as dignity (section 10), freedom, and bodily integrity (section 12(2)). Within the context of reproductive rights, this principle supports the legal position that affording a fetus full legal personality would compromise the autonomy of the pregnant person. If the fetus were to be recognized as a separate legal subject, it would create a direct conflict between the rights of the unborn and the constitutionally protected autonomy of the pregnant individual. Thus, the recognition of autonomy in *Barkhuizen* reinforces the view that legal subjectivity, and the rights that flow from it, must prioritize the rights of those who have been

[242] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).
[243] Pillay, R., 2010. The beginning of human personhood: is South African law outdated?. *Stellenbosch Law Review*, 21(2), pp.230-238.
[244] Moosa, N., 2016. An argument for foetal protection within a framework of legal abortion in South Africa. *Medicine & Law*, 35, p.605.
[245] Moosa, N., 2016. An argument for foetal protection within a framework of legal abortion in South Africa. *Medicine & Law*, 35, p.605.
[246] *Barhuizen v Napier* 2007 5 SA 323 (CC).

born and who can exercise personal agency under the law.

In order to determine the legal framework surrounding the fetus there needs to be an analysis of the concept of abortion and the right to terminate a pregnancy as well as whether such right would apply to AWT as is without any adaptations. The recognition of the fetus as encompassing legal personality or lack thereof would have a significant impact on the termination of pregnancy. The former would infringe upon the reproductive rights of women whereas the latter could allow for research on fetuses that have developed beyond the acceptable point and other arbitrary actions such as the termination of pregnancy to procure brain tissue from the fetus.[247] Therefore, it has been argued that although fetuses do not acquire any legal rights before birth, they should hold some value in terms of the Constitution.[248] Therefore there are limitations to the termination of pregnancy that relate to the development stages of the fetus.

6 Conclusion

The evolving concept of legal personality, rooted in Roman-Dutch law and adapted within the South African legal framework, plays a central role in shaping the discourse around reproductive autonomy, fetal rights, and emerging reproductive technologies such as AWs. Traditionally, legal personality has been anchored to the moment of live birth, reflecting both historical understandings of personhood and practical evidentiary requirements. However, the rapid advancement of biomedical technologies now challenges this longstanding threshold, particularly in cases involving ex utero gestation where the boundaries between birth, viability, and independent life become increasingly blurred. South African law currently maintains a clear distinction between fetuses and persons, affirming that a fetus does not possess legal personality and thus does not enjoy constitutional protections, except through limited legal fictions such as the nasciturus principle. At the same time, the Constitution guarantees reproductive autonomy under section 12(2), and case law such as *Barkhuizen v Napier* and Christian Lawyers Association v Minister of Health reinforces the prioritization of individual autonomy and dignity. Recognizing a fetus—especially one developing in an AW—as a legal

[247] Meyerson, D. (1999). "Abortion: The Constitutional Issues." *South African Law Journal*, 116(1), 50–59.
[248] Kruuse, Helena. "Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide." *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* (THRHR), vol. 72, no. 1, 2009, pp. 126–136.

subject would create a profound conflict with these protections, potentially restricting the rights of pregnant individuals and inviting new legal and ethical dilemmas.

Nonetheless, a complete denial of fetal legal recognition in the context of AWs could leave space for exploitation and ethical oversights in medical research and practice. This dilemma illustrates the urgent need for legal reform that reflects the dual realities of protecting potential life and upholding the autonomy and dignity of individuals. A rigid, birth-based conception of legal personality may no longer be adequate in an age of reproductive technologies that defy traditional legal categories. Rather than relying on binary classifications, South African law must begin to consider context-specific, ethically balanced approaches that protect both constitutional rights and the implications of technological innovation. A carefully calibrated legal framework that distinguishes between in utero and ex utero gestation—and acknowledges both the capabilities and limits of current science—is necessary to ensure that legal doctrine remains responsive, principled, and future-proof. The next chapter will focus on the current legal framework for the termination of pregnancy under South African law, and any potential conflict it may have with AWT.

Chapter 4 - The extant legal framework on the right to terminate pregnancy in South Africa

1 Introduction

The previous chapter looked at the development of the concept of legal personality and its application under South African law. Legal personality refers to the status of an individual as a rights bearer under law, and its beginning point marks the creation of legal personality under law. Historically, a fetus was not seen as a bearer of legal rights, and the moment of legal personhood was determined to be the moment at which an individual is born alive and separated from its birth mother in a living state. However, under some instances, a rule called the nasciturus fiction would permit a fetus to possess legal personality if this would be to its benefit. In South Africa, the applicability of the nasciturus fiction and the lack of legal personality of a fetus has been confirmed by the South African courts and forms a fundamental principle of the South African law of persons. Artificial wombs present a challenge to the concept of legal personality in that it becomes difficult to identify when a fetus would gain legal personality. If it is at the moment it is removed from the machine after completing gestation, then the legal status quo is maintained, and the fetus does not have legal rights while in the artificial womb. However, if it is at the moment that the fetus is removed from the womb of its mother, then that would mean that fetus is a rights bearer (legally speaking, a premature child) whilst in the artificial womb. This could potentially create complications with regard to the legal right to terminate pregnancies.

In terms of the legal framework in South Africa, abortion is governed by the Choice on Termination of Pregnancy Act 92 of 1996 (the Choice Act). This legislation governs the circumstances and conditions at which a pregnancy may be terminated. This chapter will focus specifically on the Choice Act and whether it would apply in the context of artificial womb technology. If it is construed that a fetus has legal personality from the moment it is removed from the body of the mother and placed in an artificial womb to complete the remainder of the gestational period, this would impact the rights that are envisaged in the Choice Act. For instance, should abnormalities arise in the fetus after it is transferred into an AW, would the woman/parents still have a right to terminate, as they would if there were serious medical

conditions and the pregnancy was in utero?

2 The Termination of pregnancy and women's rights

As previously stated, while the right to an abortion is not specifically supported by the Constitution, it is maintained that it is indirectly supported by other rights that may be construed to include the right to an abortion.[249] The aforementioned rights encompass the freedoms of equality (Section 9 of the Constitution), dignity (Section 10 of the Constitution), privacy (Section 14 of the Constitution), bodily and psychological integrity (Section 12 of the Constitution), access to healthcare (Section 27 of the Constitution), and life itself.[250] The Preamble of the Choice Act makes this clear by recognising these rights as essential elements for promoting reproductive rights and increasing the range of options for safe and early pregnancy termination services. In order for women to have the freedom to decide whether to terminate the pregnancy, the Choice Act ensures that all women are treated equally in a manner that does not limit their rights because of their biological differences. In order to deter discrimination and unequal treatment to pregnant women, the law should place these women in the position to make decisions regarding reproduction and the termination of pregnancy. This is as they are the individuals that have to endure all the risks and dangers that come with continuing the pregnancy therefore these women are best suited to make decisions.[251] This is provided for in the Preamble of the Choice Act.

Moreover, women ought to be considered as unique ends in and of themselves rather than as merely useful tools in the hands of others.[252] According to Section 10 of the Constitution, each and every person has an intrinsic right to dignity and the right to have that dignity upheld.[253] As per the ruling in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, respecting an individual's dignity necessitates, at minimum, appreciating their value and worth as constituents of the community.[254] The right to life and dignity holds the highest weight

[249] Choice on Termination of Pregnancy Act 92 of 1996 Section 9(1).
[250] *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) 549B.
[251] Birenbaum, J. 1996. Contextualising choice: Abortion, equality and the right to make decisions concerning reproduction. *South African Journal on Human Rights*, 12(3),488.
[252] O'Sullivan, M., 2013. Reproductive rights. *Constitutional Law of South Africa* (Juta Cape Town Revised Service 3 2011), pp.37-1.
[253] Constitution of the Republic of South Africa, 1996.
[254] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 28D-E.

among all human rights, in terms of *S v. Makwanyane*.[255] Recognizing that every person has the right to be treated with respect and consideration is the first step toward enshrining the right to personal dignity.[256]

The right to dignity in relation to women's rights have significantly impacted the manner in which the law views termination of pregnancies. According to legal interpretations, "equal concern and respect" and "self-actualisation" are both included in the right to dignity.[257] The former refers to the acknowledgment of another individual's capacity to act as an independent entity not just as an instrument to use which supports the idea that everyone, including women, has the formal right to be treated with the same attention and respect as another.[258] Regarding the latter, the space for self-actualisation is safeguarded by the right to dignity. Women should therefore be respected because they are capable of defining their own meaning and pursuing their own objectives.[259] These definitions apply specifically to those women and their reproductive rights and freedoms. As mentioned previously, Section 12(2)(a) and (b) of the Constitution entrenches the right to bodily and psychological integrity to all individuals. This includes the freedom to choose whether or not to reproduce as well as the right to physical security and autonomy. This acknowledges that physical oppression and exploitation related to sexuality and reproduction are socially established forms of physical subjugation.[260] Presumably, the explicit acknowledgment of reproductive liberty was intended to provide minimal flexibility for the judiciary to forbid pregnancy terminations. Furthermore, Section 2(1)(a) of the Choice Act protects a woman's right to independence and security of her body by giving her the option to determine whether to medically end her pregnancy. Just the woman's consent is needed, as she is the one in the greatest position to make that choice.

[255] *S v Makwanyane* 1995 3 SA 391 (CC) 329.
[256] Woolman, S. "Dignity." *In Constitutional Law of South Africa*, 2nd ed., edited by S Woolman and M Bishop, RS 4, 36-1 – 36-65. Cape Town: Juta & Co, 2012.
[257] Woolman, S. "Dignity." *In Constitutional Law of South Africa*, 2nd ed., edited by S Woolman and M Bishop, RS 4, 36-1 – 36-65. Cape Town: Juta & Co, 2012.
[258] Woolman, S. "Dignity." *In Constitutional Law of South Africa*, 2nd ed., edited by S Woolman and M Bishop, RS 4, 36-1 – 36-65. Cape Town: Juta & Co, 2012.
[259] Woolman, S. "Dignity." *In Constitutional Law of South Africa*, 2nd ed., edited by S Woolman and M Bishop, RS 4, 36-1 – 36-65. Cape Town: Juta & Co, 2012.
[260] Woolman, S. "Dignity." *In Constitutional Law of South Africa*, 2nd ed., edited by S Woolman and M Bishop, RS 4, 36-1 – 36-65. Cape Town: Juta & Co, 2012.

A further important constitutional right that can be applied to women and their right to terminate is the right to privacy that is protected in Section 14, which includes the freedom to be "left alone" and unhindered by the government.[261] The concept of what it takes to have one's own independent identity forms the basis of privacy. Personal-autonomy privacy rights, according to David McQuoid-Mason, are substantive privacy rights that allow people to make life decisions free from governmental intervention, so giving them the ability to exercise control over reproduction, contraception, and raising children.[262] The equality rights and the right to privacy should be combined. Restricting women's access to services for pregnancy termination on the grounds that abortion is a matter of personal choice makes it simpler to defend the practice, which eventually absolves the government of any obligation to finance the procedure or to step in and safeguard the rights of women.[263]

3 Termination of Pregnancy in South Africa – The Choice on Termination of Pregnancy Act 1996

Access to sexual and reproductive healthcare is not only a basic constitutional right, but it also forms part of the universal right to health. A significant step towards delivering comprehensive sexual and reproductive health care in an equitable and rights-based manner was taken in 1996 with the implementation of the Choice on Termination of Pregnancy Act (Choice Act), which repealed and replaced the Abortion and Sterilisation Act 2 of 1975 (Abortion Act).[264] This was necessary as the Abortion Act was restrictive and led to many women seeking unsafe abortion methods that endangered their lives as a result. Sections 3(1)(a) – (d) of the Choice Act stipulated that in the instance a woman requires an abortion, it may only be legally permitted in cases of rape or incest or if the ongoing pregnancy will create a serious risk to the women's physical or mental health.[265] In terms of the Choice Act Section 2(1)(b) and (c), there were further requirements for a medical practitioner to approve the termination and deem it necessary for certain circumstances. Unlike the Abortion Act, the Choice on Termination of

[261] Constitution of the Republic of South Africa, 1996.
[262] McQuoid-Mason, D.J. (2018). "Termination of pregnancy: Cultural practices, the Choice on Termination of Pregnancy Act and the constitutional rights of children." *South African Medical Journal*, 108(9), 721–723.
[263] McQuoid-Mason, D.J. (2018). "Termination of pregnancy: Cultural practices, the Choice on Termination of Pregnancy Act and the constitutional rights of children." *South African Medical Journal*, 108(9), 721–723.
[264] Kaswa, R., & Yogeswaran, P. (2020). Abortion reforms in South Africa: An overview of the Choice on Termination of Pregnancy Act. *South African Family Practice*, 62(1), e1–e5.
[265] Pickles, C. (2012). Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996. *Potchefstroom Electronic Law Journal*, 15(5), 403–434.

Pregnancy Act was implemented on February 1, 1997, and allows abortions to be done on a woman's request up until the first trimester of pregnancy without the requirement for permission from physicians, psychiatrists, or magistrates.[266] It supports the rights enshrined in Section 12(2) of the Constitution, and also other rights which encompass the right to life, dignity, privacy, bodily and psychological integrity, equality and access to information.[267] This helps to broaden reproductive autonomy and ensures that women are free to terminate their pregnancy in a safe manner that is the least harmful to both the woman and the fetus.

The Choice on Termination of Pregnancy Act is a fundamental statute established in post-apartheid South Africa which embodies a woman's right to choose whether to continue a pregnancy. The statement that "Every woman must have the right to choose whether or not to have an early termination of pregnancy according to her own beliefs," was included in the African National Congress's governing framework.[268] The Choice Act was introduced to advance many Constitutional rights that relate to reproductive autonomy, the freedom of choice as well as a women's right to make decisions regarding their own body which will be discussed further in this chapter.[269] However, the Choice Act attempts to balance the rights between the mother and the fetus, albeit in an indirect way. Under South African law the fetus does not qualify as a legal person and therefore does not acquire any rights or legal protection by the law, there are certain limitations relating to when and in what circumstances the termination of the pregnancy may occur in terms of Section 2(1) of the Choice Act. This is to prevent the arbitrary use of the Act. It also introduces the concept of viability and how it may affect whether the termination may be legally permitted.[270]

The *Christian Lawyer's* case constitutionally challenged the validity of the Choice Act.[271] It

[266] Guttmacher, S. et al (1998). Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act. *International Family Planning Perspectives*, 24(4), 191–194.
[267] Guttmacher, S. et al (1998). Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act. *International Family Planning Perspectives*, 24(4), 191–194.
[268] Klausen, S.M., 2023. Unfinished business: the feminist legal framework for abortion and ongoing struggle for reproductive justice in South Africa. *Research Handbook on International Abortion* Law (pp. 61-80). Edward Elgar Publishing.
[269] The scope of reproductive autonomy was discussed in chapter 2 of this dissertation.
[270] Pickles, C. (2012). Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996. *Potchefstroom Electronic Law Journal*, 15(5), 403–434.
[271] *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T)

was argued that the Act was constitutionally invalid as it violates the right to life of a fetus under section 11 of the Constitution which states that 'Everyone has the right to life'. The legal question before the Court was therefore, whether the reference to everyone in Section 11 included a fetus in utero. The court dismissed the argument and refused to recognize a fetus as a person and therefore cannot confer rights upon an entity that is not classified as such.[272] There was also an opposition to the ability of a minor to give informed consent to the termination of their pregnancy, and this was also dismissed by the court.[273]

Under the Choice Act, a termination of pregnancy may only be legally permitted in certain circumstances depending on the duration of the pregnancy. Section 2 of the Choice Act governs the conditions and circumstances in which a pregnancy can be legally terminated. During the first 12 weeks of the pregnancy, the women may terminate the pregnancy upon request, however after the 13th week and up to the 20th week of pregnancy, she must consult with a medical practitioner and he/she is of the opinion that should the pregnancy continue it would pose a serious threat to the women's mental and/or physical health, or there will be a significant risk to the fetus' by causing physical or mental abnormalities.[274] It could also be that the pregnancy resulted from either rape or incest or simply that the continuation of the pregnancy will affect the socio-economic status of the women.121 After the 20th week, a pregnancy can only be lawfully ended if the mother's life is in risk or if the fetus suffers a major deformity or injury.[275] This is how the termination of pregnancy is governed by South African law which apply to pregnant women that do not wish to continue the pregnancy. However, the provisions of the Act refer to a fetus that is still in the womb of the mother.

Section 1 of the Act provides key definitions relevant to its application. The term "gestation period" refers to the duration of a woman's pregnancy, calculated from the first day of her last menstrual period. The term "termination of a pregnancy" is defined as the separation and expulsion through medical or surgical means, *of the contents of the uterus of a pregnant woman*. These definitions explicitly refer to the natural process of pregnancy and the uterus, indicating that the Act pertains to pregnancies occurring within the human womb. Section 11

[272] Christian Lawyers Association of South Africa v Minister of Health (1998) 4 SA 111 3 (T)
[273] *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T)
[274] Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), Section 2(1)(b)
[275] Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), Section 2(1)(c)

of the Act affirms that its provisions apply throughout the entire national territory of the Republic. However, it does not address or extend its application to alternative reproductive technologies, such as artificial wombs, leaving a potential gap in the legal framework. From these excerpts it is clear that the scope of the Act is limited to a pregnancy that is in utero (inside a human womb). Therefore, it would not apply in the context of an artificial womb. While the artificial womb intends to function as a womb to allow a fetus to continue its gestation, it will not fall within the definitions and application of the CTOP Act.

4 Artificial wombs and the Termination of Pregnancy

The emergence of AWT represents a significant development in reproductive medicine, one that challenges longstanding legal and ethical assumptions concerning pregnancy and termination.[276] AWT introduces the possibility of ending a pregnancy without causing fetal death, offering women a novel reproductive option: extraction of the fetus for continued gestation ex utero. This development has substantial implications for South Africa's legal framework, particularly the Choice on Termination of Pregnancy Act (CTOPA). As the current law is premised on traditional conceptions of pregnancy termination as resulting inevitably in fetal death, legislative reform appears necessary to accommodate the new realities introduced by AWT. Artificial wombs, facilitating partial ectogenesis, allow fetuses to continue developing outside the human body after early extraction. Romanis argues that this technology could fundamentally shift perceptions of what risks in pregnancy are tolerable and what choices are available to pregnant individuals.[277] AWT offers a means for women to avoid the substantial physical and psychological burdens of pregnancy without having to choose between their own health and the survival of their future child. In particular, it would be empowering for women facing dangerous pregnancies, providing an alternative to the conventional choice between continuing a risky pregnancy and terminating fetal life.[278]

Despite these benefits, the current South African legal framework, like its English counterpart, is ill-prepared for this innovation. Romanis notes that laws governing termination of

[276] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review*, 28(2), pp.342-374.
[277] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review*, 28(2), pp.342-374.
[278] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review,* 28(2), pp.342-374.

pregnancy, including South Africa's Choice Act, are based on the outdated assumption that termination necessarily involves the death of the fetus.[279] The definitions of "miscarriage" and "termination" remain vague and conflate ending a pregnancy with ending fetal life. Consequently, it is unclear whether the removal of a fetus for continued gestation via an artificial womb would be treated as lawful under existing statutes. Romanis highlights that this legal ambiguity could expose women and medical practitioners to criminal liability even when the fetus survives the procedure.[280]

Moreover, the Choice Act, like the English Abortion Act 1967, narrowly restricts lawful termination to cases where serious risk to the life, physical health, or mental health of the pregnant woman can be demonstrated. As Romanis asserts, these grounds are inadequate in the context of AWT. Women may seek early termination of pregnancy for less severe medical concerns, personal circumstances, or social reasons, particularly if fetal death is no longer an inevitable consequence.[281] The current framework does not accommodate such motivations, thereby limiting women's reproductive autonomy in ways that may no longer be ethically justifiable. Romanis ultimately argues that decriminalization of pregnancy termination would be the most appropriate legal response.[282] In the South African context, reform of the CTOPA is imperative. Firstly, legislation should distinguish between ending pregnancy and causing fetal death, recognizing the independent significance of each act.[283] Secondly, the grounds for lawful termination should be expanded to encompass a broader range of risks and reasons, including social and psychological factors. Thirdly, criminal penalties associated with termination should be reconsidered to reflect the expanded range of medically and ethically acceptable practices in the era of AWT.[284]

AWT challenges the foundations of South African pregnancy termination law. The Choice Act,

[279] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review,* 28(2), pp.342-374.
[280] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review,* 28(2), pp.342-374.
[281] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review,* 28(2), pp.342-374.
[282] Hooton, V. and Romanis, E.C., 2022. Artificial womb technology, pregnancy, and EU employment rights. *Journal of Law and the Biosciences*, 9(1), p.lsac009.
[283] The decriminalization of fetal death as a result of terminations (in the United Kingdom) is outside the scope of this dissertation and will not be discussed further.
[284]

grounded in outdated medical assumptions, must be revised to ensure that the law supports rather than restricts women's autonomy in light of technological advancements. Failure to adapt the legal framework risks perpetuating injustices based on obsolete notions of pregnancy and termination.[285] It is therefore essential that South African law evolves to accommodate the expanded reproductive choices that AWT makes possible, thereby upholding principles of autonomy, dignity, and reproductive justice.

Artificial womb technology should not be considered as a means to eliminate terminations.[286] This means that artificial womb technology should not be harnessed as a means of eroding women's rights to terminate pregnancy under statutory law, which allows women to make these decisions free from any external influences since it is concerning their body. AWT may result in an impression being made that abortion will no longer be required as AWT will make it possible for a fetus to be removed from the womb of the mother and transferred to an artificial womb to continue gestation.[287] As Romanis contends, the woman's right to terminate the pregnancy should not be obstructed by the fact that artificial womb technology is available. The principle involved is still her autonomy and decision-making ability over her reproductive life. Therefore, even when the fetus is developing in an artificial womb, the law should still uphold her right to terminate the pregnancy.[288]

A problem arises with the right to terminate a pregnancy in the case of an artificial womb. In a scenario where ectogestation becomes possible and a woman who is 2 months pregnant is recommended by medical professionals to transfer the fetus to an artificial womb due to medical difficulties. They later discover that the fetus may be born with down syndrome and the women then decides to terminate the pregnancy in the 15th week of the pregnancy. Does the right to terminate still apply in terms of the Choice Act? This will create a legal anomaly

[285] du Toit-Prinsloo, L, Pickles, C, & Lombaard, H. (2016). Evaluating current knowledge of legislation and practice of obstetricians and gynaecologists in the management of fetal remains in South Africa. *South African Medical Journal*, 106(4), 403-406.
[286] Romanis, E.C., & Horn, C. (2020). Artificial Wombs and the Ectogenesis Conversation: A Misplaced Focus? Technology, Abortion, and Reproductive Freedom. *International Journal of Feminist Approaches to Bioethics* 13(2), 174-194.
[287] Moran, R. '(2023) Artificial wombs will change abortion rights forever, *Wired*. Available at https://www.wired.com/story/ectogenesis-reproductive-health-abortion/
[288] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review,* 28(2), pp.342-374.

in terms of the legal principles applicable to a termination of pregnancy that occurs in relation to a pregnancy that is within a human body, and one that is outside it. Under the context of South Africa's Choice on Termination of Pregnancy Act, this opinion contends that the Act would need to be amended in order to accommodate the advancements in reproductive technology while ensuring the rights of women are safeguarded. The Act, specifically, needs to declare that the availability of artificial wombs does not negate the right of a woman to termination even if the fetus can survive ex utero. Romanis's research highlights the need to harmonize legal measures with advancing medical technologies so that women's reproductive rights are not lost in the wake of scientific progress.[289] This requires the introduction of specific new legislation as the Choice Act does not apply in the context of AWT and new legislation would be needed to focus on possible termination where AWT is being used.

5 Conclusion

It is clear from the current South African legal system that the Choice on Termination of Pregnancy Act 92 of 1996 (Choice Act) only applies to pregnancies that take place inside a human womb. The Act's provisions are inextricably linked to in utero gestation, and it defines termination specifically as the removal of a pregnant woman's uterus contents. Therefore, the legal and definitional parameters of the Choice Act do not apply to artificial womb technology (AWT), which enables gestation outside of the human body. The Act will not apply to a fetus that has been removed from the uterus and kept alive in an artificial womb, and the termination of such a pregnancy would not be covered by the rules or protections outlined in the Act. Furthermore, the Act's application becomes even more problematic in situations where the fetus continues to live and develop outside of the womb because it equates termination with the end of fetal life. The potential for maintaining fetal life apart from the expectant mother further distinguishes AWT from the conventional abortion paradigm governed by the Act. As a result, situations involving artificial womb technology would not be covered by the Choice Act as it currently stands. For the rights to autonomy, dignity, and reproductive freedom to be upheld even as the limits of pregnancy and termination change, legislative reform is desperately needed to address the new realities brought about by reproductive technologies.

[289] Romanis, E.C., 2020. Artificial womb technology and the choice to Gestate ex utero: is partial Ectogenesis the business of the criminal law?. *Medical Law Review,* 28(2), pp.342-374.

Chapter 5 – Conclusions and Recommendations

1 Introduction

In the previous chapters of this dissertation artificial womb technology, reproductive autonomy of women and how this would impact the artificial womb was discussed. This was followed by an analysis of the fetus itself and how this new reproductive technology would affect the legal personhood of the fetus and how it is viewed in the eyes of the law as well as whether it would also affect the point of viability. Furthermore, the aim of this dissertation was to consider the Choice on Termination of Pregnancy Act and analyze it in order to determine whether artificial womb technology will impact on the legislated right to terminate a pregnancy. Therefore, the Choice Act was analysed in terms of women's rights and the limitations that are in place to protect both the fetus and women's rights. This dissertation is important in this current era where technology is dominating most of the world and our law must be analysed in order to determine whether it significantly covers new reproductive technologies and whether any fundamental human rights would be affected as a result of these technologies. Artificial womb technology as analysed in the previous chapters, assists women who cannot complete the entire gestational period of 9 months and it can provide the fetus with an environment that can perform the functions of the womb. It is designed to provide an alternative environment for the fetus to complete gestation where it is not medically possible for them to remain in utero. Now that the fetus is in the artificial womb, what needs to be considered is what is the existing legal framework regarding the termination of pregnancy in South Africa and how would this impact a women's right to terminate if the fetus is developing in the artificial womb.

In order to determine where South African law stands to impact AWT and the termination of pregnancy, it was important to analyse reproductive autonomy as well as legal personality. Reproductive autonomy within South African courts have been looked at from a progressive perspective as discussed in the *AB* case.[290] In this case the High Court recognized that reproductive autonomy is deeply connected to the constitutional rights to dignity, privacy, and bodily integrity. Although the Constitutional Court later overturned some aspects of the High Court's ruling, it still acknowledged the centrality of reproductive autonomy within South

[290] *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

Africa's constitutional framework. This approach reflects a broader judicial trend to prioritize individuals' freedom to make reproductive choices, which could be crucial when interpreting how new reproductive technologies like artificial wombs interact with existing abortion laws and the right to terminate a pregnancy.

In South African law, a fetus does not acquire legal personality until it is born alive, in line with the common law "born alive" rule. This principle was affirmed in *Christian League of Southern Africa v Rall*, where the court held that while a fetus may have moral value, it does not have legal subjectivity until birth.[291] The nasciturus fiction, as seen in *Ex Parte Boedel Steenkamp*, allows a fetus to be treated as born only when it benefits the fetus, such as in inheritance cases—but this does not amount to full legal personality.[292] Granting fetal rights before birth could undermine reproductive rights protected under the Choice on Termination of Pregnancy Act 92 of 1996. This legal position will be critical in evaluating how emerging technologies like artificial wombs interact with existing rights frameworks.

In this dissertation, three research questions were drawn from a main research question about artificial womb technology and the right to terminate pregnancy were taken into consideration and examined in light of South African law and the body of current literature.

2 Research Questions

The main research question that was analysed in this dissertation was how will artificial womb technology impact on the right to terminate a pregnancy as recognized in the context of reproductive autonomy in South Africa.

The main question was further divided into the following sub-questions -

1. What is the scope of reproductive autonomy in South African Law?
2. What is the extant legal framework for termination of pregnancy in South African law?
3. How does Artificial Womb Technology stand to impact on the right to terminate pregnancy?

[291] *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O).
[292] *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 (O).

3 Summary of Findings

The dissertation was structured into 5 chapters. Chapter 1 introduced the research and its focus. The development of reproductive technologies and their effects on national and international legal and ethical frameworks were the main topics of Chapter 1, with a focus on the South African context. Recent developments have increased the options available to people for exercising reproductive autonomy, from IVF and surrogacy to the new artificial womb technology (AWT). In particular, AWT presents urgent ethical and legal issues while potentially providing a remedy for complicated pregnancies and premature births. The Choice on Termination of Pregnancy Act 92 of 1996 further regulates the right to end a pregnancy, which is based on Section 12(2) of the Constitution, which safeguards physical and mental integrity. However, AWT challenges traditional notions of pregnancy and viability, raising uncertainty about whether the Act still applies when gestation occurs ex utero. The legal personality of the fetus, typically acquired only upon live birth under South African common law, may need re-evaluation in the context of partial or complete ectogenesis. Internationally, instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), CEDAW, and the Maputo Protocol support reproductive autonomy and may influence how states interpret and apply legal protections in the context of emerging technologies. These instruments emphasize the importance of dignity, equality, health, and personal freedom in reproductive decisions. With AWT advancing rapidly, there is a growing need to assess whether South Africa's existing legal frameworks adequately protect reproductive rights while addressing the evolving legal status of the fetus.

Chapter 2 focused on the intersection between international human rights law and reproductive autonomy, examining how global legal instruments such as the UDHR, ICCPR, CEDAW, the Maputo Protocol, and others collectively affirm the right to make informed and autonomous reproductive choices. These instruments emphasize access to safe abortion, family planning, and gender equality as key components of reproductive rights. The chapter also analyzed the AB v Minister of Social Development case, which underscored South Africa's constitutional commitment to reproductive autonomy and aligned domestic law with international human rights standards. This case highlighted the importance of protecting personal decision-making in reproductive matters, a principle that could guide future legal interpretations involving

technologies like artificial wombs. Finally, the chapter considered how South Africa's Choice on Termination of Pregnancy Act (the Choice Act) may need to evolve in light of such technologies, ensuring that reproductive rights are not constrained but rather supported through legal reform consistent with both constitutional and international obligations.

Chapter 3 explored the evolving concept of legal personality in South African law and its implications for reproductive autonomy and emerging technologies such as AWs. Traditionally, legal personality is only granted at live birth, with the fetus lacking independent legal status unless protected through limited doctrines like the nasciturus fiction. However, advancements in ex utero gestation challenge this binary framework. The chapter analyzed how South African case law—particularly *Christian Lawyers Association v Minister of Health*—prioritizes individual rights and dignity over fetal recognition, aligning with constitutional protections under section 12(2). Yet, the lack of legal recognition for a fetus in an AW raises ethical concerns around vulnerability and possible exploitation. This tension underscores the need for a nuanced, context-sensitive legal framework that balances reproductive rights with evolving biomedical realities, moving beyond rigid birth-based definitions of personhood to ensure ethical coherence and legal adaptability in the face of innovation.

Chapter 4 examined the limitations of the Choice Act in the context of AWT. It found that the Act, as it stands, applies exclusively to pregnancies occurring in utero, with termination defined as the removal of contents from the uterus. This definition excludes scenarios involving ex utero gestation, such as those enabled by AWT, creating a significant legal gap. Since the Act does not contemplate the continuation of fetal life outside the womb, it fails to provide legal clarity or protection in cases involving AWT. This legal void challenges current understandings of termination, viability, and reproductive rights, and highlights the urgent need for legislative reform to ensure that reproductive autonomy and dignity are upheld amid advancing reproductive technologies.

Chapter 5 concludes the thesis by summing up major findings and a discussion of major and subsidiary research questions. This finalizes the reproduction autonomy based in South African law that derives from Sections 12(2) and 27 of the Constitution and supplemented through international human rights documents, even though the judiciary interprets this right to some

extent, especially in relation to new reproductive technologies such as AWT. The legal framework for abortion, as created in the Choice Act, is only relevant to pregnancies developing in a woman's body and assumes that abortion results in fetal death. AWT, in enabling ex utero gestation, challenges these assumptions and creates legal ambiguity. The study concludes that AWT does not infringe on the legal right of a woman to abort under the Choice Act, as the Act does not apply to pregnancy carried outside the human body. Nevertheless, the absence of control of AWT demonstrates a very significant legislative gap. The chapter concludes that while the current law does not restrict women's rights in the context of AWT, it is ill-equipped to address the legal, ethical, and medical issues of this technology. Therefore, the dissertation recommends amending the Choice Act to explicitly include AWT provisions and enacting new legislation on the status of ex utero pregnancies, legal certainty for medical providers, and preserving reproductive control in the face of advancing technology. Furthermore, courts must implement a broader method of constitutional rights interpretation to maintain alignment with evolving reproductive realities and safeguard gender equality.

4 Answering the research questions

From the analysis undertaken in the dissertation chapters, the research questions can be answered as follows:

4.1 What is the scope of reproductive autonomy in South African Law?

In South African law, reproductive autonomy is derived from Section 12(2)(c) of the Constitution. Therefore, Chapter 2 provided an in-depth study as to how the right to reproductive autonomy is interpreted in our courts and to what extent it protects the right to freedom of choice regarding reproduction. Section 12(2) of the Constitution, which safeguards men’s and women’s reproductive rights, deals with reproductive rights. This encompasses the choice of starting a family or not. It has been contended, therefore, that the protection of an individual's rights under Section 12(2) is applicable in situations when the individual's own body is at issue.[293] The Choice Act's application will be impacted by reproductive technologies like artificial wombs because the Act has always been related to an individual's own body. The scope of reproductive autonomy in South African law is grounded in both constitutional

[293] The South African Constitution of 1996, Section 12.

protections and international human rights standards, but its application remains limited and sometimes inconsistent, particularly in light of advancing reproductive technologies. Reproductive autonomy includes the right to make informed and voluntary decisions about one's reproductive health, including the right to access contraception, terminate a pregnancy, and form a family. These rights are protected under Section 27 of the Constitution, which guarantees access to healthcare services, as well as Section 12(2), which protects bodily integrity. However, courts have often narrowly interpreted reproductive rights, requiring direct impact on a person's body for such rights to be infringed. This poses challenges in applying reproductive autonomy to emerging technologies like artificial wombs, where gestation may occur outside the pregnant individual's body.

Legislation like the Choice Act represents a significant legal mechanism to advance reproductive autonomy by allowing access to safe abortion under specific conditions. Nonetheless, its focus on in utero pregnancies limits its applicability in scenarios involving artificial womb technology, creating a legislative gap. Additional barriers such as restrictive abortion timelines, unequal access to contraception, gender-based violence, lack of education, and discrimination against marginalized groups further hinder the full realization of reproductive autonomy. International legal instruments—including the UDHR, ICCPR, CEDAW, the Maputo Protocol, and others—reinforce South Africa's obligation to uphold reproductive rights by emphasizing bodily autonomy, access to reproductive healthcare, and gender equality. Cases like *AB v Minister of Development* reflect a shift towards interpreting reproductive autonomy more expansively, suggesting a growing willingness in South African jurisprudence to align with these international norms and accommodate technological developments.

In conclusion, while South African law provides a foundational recognition of reproductive autonomy, its scope remains constrained by statutory definitions and judicial interpretations. To remain responsive to evolving reproductive realities, including technologies like artificial wombs, the legal framework must expand to protect reproductive choices beyond traditional paradigms and ensure equitable access to all individuals. *Based on the analysis of reproductive autonomy under international and national law we can conclude that reproductive autonomy is interpreted broadly enough to embrace the use of AWT.*

4.2 What is the extant legal framework for termination of pregnancy in South African law?

The dissertation considered a comprehensive study of the legal framework for termination of pregnancy in South Africa. Chapter 3 started by providing a brief history into the laws of termination of pregnancy and how they have evolved over the years to include new technologies and reproductive methods. This was done in order to establish whether these laws could be applicable to artificial womb technology should the mother decide to terminate the pregnancy and also whether there would be any impact on the women's right to terminate with the introduction of artificial womb technology. The Abortion and Sterilisation Act 2 of 1975 (Abortion Act) was repealed and replaced in 1996 with the Choice on Termination of Pregnancy Act (Choice Act), marking a significant step towards providing comprehensive sexual and reproductive health care in an equitable and rights-based manner. This was required as the Abortion Act imposed restrictions that drove many women to seek unsafe abortion methods, endangering their lives in the process. According to Sections 3(1)(a) through (d), a woman may only be legally entitled to an abortion in circumstances of rape or incest, or if the woman's continuing pregnancy poses a substantial risk to her physical or mental health. In addition, a medical professional had to authorise the termination and determine that it was required in certain situations. Unlike the Abortion Act, the Choice on Termination of Pregnancy Act came into effect on February 1, 1997 and allows for the termination of a pregnancy to be done on a woman's request up until the first trimester of pregnancy without the requirement for permission from physicians, psychiatrists, or magistrates.

The Choice Act makes an effort to strike a balance between the fetus's and mother's rights. There are restrictions on the conditions and timing of pregnancy terminations, even though the fetus is not considered a legal person and is not granted any rights or protections under the law. This is to stop the Act from being used arbitrarily. Additionally, it presents the idea of viability and how it could influence whether or not the termination is allowed by law. The Choice Act guarantees that every woman is treated equally and that her rights are not restricted due to her biological differences, allowing her the freedom to choose whether or not to end her pregnancy. Pregnant women should be given the legal capacity to make decisions about reproduction and pregnancy termination in order to prevent discrimination and unfair treatment towards them.

This is because these women are the most qualified to make judgements because they are the individuals who are directly affected by all the risks and hazards associated with carrying the pregnancy throughout the term. The Choice Act's Preamble makes provisions for this.

An important case that was discussed in light of the termination of pregnancy and the law in South Africa, was the *Christian Lawyers* case.[294] This case looked extensively at the right of a women concerning the termination of pregnancy and considered Section 5 of the Constitution. The court held that with respect to minors, they would encompass the right to terminate the pregnancy as well as the capacity to give informed consent. This is a reflection of Sections 12(2)(a) and (b), 10, 14 as well as 27(1)(a) in which the right to terminate emanates from the core constitutional right to self-determination. Thus far, South African courts did not have to consider artificial womb technology and the right to terminate pregnancy, therefore certain provisions within the Constitution are viewed from a restrictive perspective in order to avoid the arbitrary use of the law. An example would be the previously mentioned AB case and where a rather narrow interpretation of Section 12(2) was employed by the majority. This can be compared to artificial womb technology where in both cases the fetus is not in the womb of the prospective mother. *It is clear that the current legal framework for termination of pregnancy in South Africa adequately regulates the termination of pregnancy within the legal limits defined by the Choice Act.*

4.3 How does Artificial Womb Technology stand to impact on the right to terminate pregnancy?

Artificial Womb Technology (AWT) significantly complicates the legal and ethical framework surrounding the right to terminate a pregnancy in South Africa. By enabling the extraction of a fetus for continued gestation ex utero, AWT challenges the foundational assumption in the Choice Act that termination necessarily results in fetal death. This creates legal ambiguity: it is unclear whether such a procedure would be classified as a lawful termination under existing law, potentially exposing women and healthcare providers to legal risks even when fetal life is preserved. While AWT offers an empowering alternative for women with high-risk pregnancies by separating pregnancy from fetal death, it also risks being misused to restrict abortion rights. There is concern that AWT could lead to the argument that abortion is no longer

[294] *Christian Lawyers Association of South Africa v Minister of Health* (1998) 4 SA 111 3 (T).

necessary, which may erode women's rights to make autonomous reproductive decisions—particularly if society begins to morally pressure women into choosing ectogenesis over termination. This could severely undermine bodily autonomy, especially for women who seek abortion to avoid biological motherhood entirely, not just to avoid gestation.

Moreover, if AWT advances fetal viability to earlier stages, this could necessitate a revision of the CTOPA's timeframes and criteria for lawful termination, creating a legal anomaly between pregnancies carried in utero and those sustained ex utero. It may also prompt reconsideration of fetal personhood, potentially shifting the legal balance between fetal rights and women's rights in ways that threaten reproductive freedom. Based on the anslysis of the right to terminate pregnancy under SA law, we can conclude that the current legal framework which sets out the legal parameters for terminations will not apply in the context of AWT. This is because the CTOP Act clearly determines its application to a pregnancy that is inside a human female body, whereas AWT envisages a pregnancy inside a mechanical apparatus. *Therefore, that framework does not apply and AWT will not disrupt any rights that women under the current South African regulatory framework for termination of pregnancy.*

4.4 The main research question of 'How will artificial womb technology impact on the right to terminate a pregnancy as recognized in the context of reproductive autonomy in South Africa?', can therefore be answered as follows:

Based on the findings of the sub-questions, and as illustrated in the discussion above, we can conclude that *AWT will not impact on any right to terminate pregnancy that women have under the existing legal framework for termination of pregnancy in SA.* However, the study exposed the need for dedicated legislation that would apply in the context of AWT.

5 Conclusions and Recommendations

This research is important as it provides insight into the extant law concerning new reproductive technologies more specifically partial ectogenesis and its potential impact on the right to termination of pregnancy in South Africa. To date there has been little to no research that has been initiated to determine how artificial womb technology can be accommodated by South African law and furthermore how it would affect the extant laws that are in place. Artificial womb technology or partial ectogenesis is not expressly mentioned in our law, as

emerging technology, however its inception stands to bring to the fore various questions regarding fetal rights, the termination of pregnancy and reproductive autonomy. Artificial womb technology is an important technology in the context of prenatal care as it provides controlled and monitored environment for fetal development which could allow for a more precise observation and intervention in instances where prenatal issues are detected in the early stages of the pregnancy. An important observation by researchers is that artificial womb technology could potentially extend the viability of the fetus ex utero that would allow for the possibility of sustaining life during earlier stages of gestation. This could save the lives of many fetuses that would otherwise perish due to an intolerable environment in utero. It may offer a better option than carrying a pregnancy to term in cases of problems or health risks for the mother. This could lower risks to the mother's health that come with specific illnesses or pregnancy-related issues. It might allow people greater freedom and options when it comes to reproduction.

In this dissertation, the aim was to analyze artificial womb technology and the implications it may have on the Choice on Termination of Pregnancy Act and the right to terminate. An important deduction was made in South African courts in the *AB* case where the majority ruled that Section 12(2) of the Constitution should be depicted in a manner that views reproductive autonomy as a concept that affects an individual's bodily and psychological integrity and not just one or the other. This would mean that in terms of artificial womb technology, since the fetus would no longer be in the body of the woman, therefore any potential rights considerations would not interfere with their bodily integrity rights. This is a legal complexity that must be addressed before human trials on this technology are initiated.

This dissertation has examined the implications of Artificial Womb Technology (AWT) for South African law, with a particular focus on reproductive autonomy, legal personality, and the right to terminate pregnancy. A series of conclusions and recommendations may be drawn and made at this point. South African law currently offers strong protection for reproductive autonomy, particularly through constitutional guarantees and progressive judicial interpretation. Notably, the *AB v Minister of Social Development* case illustrates the courts' willingness to uphold individual reproductive choice in alignment with evolving technologies. Given this trend, it is likely that the use of AWT would fall within the existing scope of

reproductive autonomy. Accordingly, no immediate legal reform is necessary in this area. In contrast, the concept of legal personality, rooted in traditional understandings of in utero gestation and childbirth, faces conceptual challenges when applied to AWT. The question of when legal personality begins—either upon removal from the woman or after full gestation in the artificial womb—remains unresolved in both jurisprudence and academic discourse. Further research is necessary to clarify this threshold in the context of AWT. The analysis of the right to terminate a pregnancy reveals a substantial legal gap. The Choice on Termination of Pregnancy Act is predicated on traditional gestation and does not accommodate scenarios in which a fetus continues to develop outside the body. This legal void creates uncertainty for both pregnant individuals and medical practitioners, particularly in cases involving fetal abnormalities. It is therefore recommended that new legislation be introduced to address the unique legal and ethical considerations raised by AWT, ensuring clarity and continued protection of reproductive rights. In sum, while South African law appears ready to support the integration of AWT under reproductive autonomy, significant reform is required to address unresolved issues concerning legal personality and termination of pregnancy. Proactive legislative and scholarly engagement will be essential to ensure that the legal system evolves in step with technological advances, preserving autonomy, dignity, and reproductive justice

It is recommended that new legislation be introduced to directly regulate Artificial Womb Technology (AWT) and its implications for the termination of pregnancy. This legislation should address several key issues to ensure legal clarity and the continued protection of reproductive rights. First, it must define when legal personality begins in the context of AWT—whether at the point of extraction from the pregnant individual or upon removal from the artificial womb at the end of gestation. Second, the law should establish a legal definition of "birth" as it applies to AWT in order to determine when full legal rights accrue to the fetus or neonate. Third, the legislation should outline specific conditions under which termination may be lawfully carried out after transfer to an artificial womb, including cases involving fetal abnormalities, maternal health concerns, or a change in the individual's reproductive intent. In addition, clear procedural and ethical safeguards should be provided, such as informed consent requirements, independent medical review, and access to counselling services. Crucially, the law must also explicitly affirm that the availability of AWT shall not be used as a tool to coerce individuals into continuing pregnancies they would otherwise choose to terminate; the right to abortion must remain protected regardless of technological advancements. In sum, while South

African constitutional and legal principles strongly support reproductive autonomy, a tailored legislative response is necessary to address the novel challenges introduced by AWT and to ensure that reproductive rights are upheld in a technologically evolving landscape. Artificial womb technology will also create legal complexities around the legal status of the fetus as it will no longer be in the womb. The definition of birth also warrants reconsideration. Since the Choice Act has only been interpreted to conventional pregnancies with the viability threshold that considers only pregnancies in the womb of the mother, it cannot apply to artificial womb technology. The provisions put in place that considers when a termination may take place, is restrictive in the sense that it only applies to women who are physically carrying the fetus and not those in the artificial womb as the latter does not affect the women's' bodily integrity as it is not their own body that will be affected. This means that artificial wombs will not affect the rights of pregnant woman in terms of the Choice Act. Hence, in the circumstance where the termination of a fetus in an artificial womb is desired at a later stage of the pregnancy, the Choice Act will not be applicable. It is uncontested that the rights entrenched in Section 12 of the Constitution are not eroded or diminished as the courts in South Africa tend to uphold the bodily and psychological integrity of individuals. However, the law would need to employ new legislation to accommodate artificial womb technology and amend the extant legal framework regarding reproductive autonomy to prevent a narrow interpretation that does not allow for the inception of new reproductive technologies such as artificial womb technology.

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HSSREC applicationThe implications of artificial womb technology on the right to terminate pregnancy., (Balmint, Akeera (219077853)

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Type of ethics review: HSSREC application

Title: The implications of artificial womb technology on the right to terminate pregnancy.

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