FETICIDE: CREATING A STATUTORY CRIME IN SOUTH AFRICAN LAW

Georgia Alida du Plessis
LLB LLM
University of the Free State*

1 Introduction

In the South African case *S v Mshumpa*[1] ("*Mshumpa*") the East London High Court considered a set of facts both unique and controversial. A pregnant mother, Ms Shelver, and the father, Mr Best, consulted a gynaecologist. Ms Shelver was in her 38th week of gestation and the unborn was healthy. On their return from the gynaecologist, Mr Mshumpa shot Mr Best in the shoulder and Ms Shelver in the stomach. They both survived but the unborn died.[2] Mr Mshumpa later admitted that the primary purpose of shooting Ms Shelver was to kill the unborn, hence the shots through her stomach.[3] Furthermore, the father was involved in planning the shooting to cause the death of the unborn.[4]

The court stated:

> "The shooting of an unborn child in the mother's womb raises the vexing legal question of whether such a killing constitutes a separate crime of murder, besides the offence aimed at the mother carrying the unborn child."[5]

The High Court held that the accused could not be convicted of murder since (i) murder does not include the unborn;[6] (ii) development in this regard would offend the principle of legality as contained in section 35(3)(l)[7] of the Constitution of the Republic of South Africa, 1996 ("the Constitution");[8] (iii) the "born alive rule"[9] is still applicable in countries where murder is a common-law crime, nor have courts interpreted statutory homicide laws to

* The author would like to thank Prof Shaun de Freitas from the University of the Free State for his assistance

1 2008 1 SACR 126 (E)

2 133

3 141

4 127

5 133

6 149

7 S 35(3)(1) states:
"Every accused person has a right to a fair trial, which includes the right–
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted…"

8 *S v Mshumpa* 2008 1 SACR 126 (E) 149 Froneman J stated that he was not saying that "there is no merit in making the killing of an unborn child a crime" (152)…only that in his view "the legislature is, as the major engine for law reform, better suited to effect this radical kind of reform than the courts" (152)

9 The "born alive rule" will hereafter also be referred to as the "rule" Within the context of this article the "born alive rule" means an unborn first has to be born alive after the injury or harm has been inflicted and subsequently die to prosecute a third party for a crime committed against the unborn when the mother was still pregnant with him or her

do away with the "rule";[10] (iv) the Constitution does not provide the unborn with any fundamental rights;[11] and (v) an extended definition of murder presents certain difficulties: whether viability is relevant, whether it should be restricted to third parties and exclude the mother, and how it might fit in with the criminal offence and sanction for illegal abortion.[12] Subsequently, neither of the accused was convicted of murder.

Based on *Mshumpa*, this article will deal with the following issues: Firstly, as the death of an unborn caused by a third party is already punishable as a crime against the mother (*status quo*), an in-depth discussion is necessary to determine whether or not this *status quo* is sufficient. Secondly, the findings in part one will be substantiated in an elaborative discussion of the abovementioned issues in *Mshumpa*. Finally, the *status quo* is argued as being insufficient (in part 2) and the possibility of the statutory crime of feticide[13] is developed.

2 Is a crime of feticide necessary or is the *status quo* sufficient?

In the case of *Mshumpa*, Mr Best was sentenced to 21 years imprisonment. This included 20 years for attempted murder and six months for assault.[14] On the other hand, Mr Mshumpa was sentenced to fifteen years imprisonment, including fifteen years for the attempted murder of Ms Shelver and six months for assault on Ms Shelver.[15] Considering the gravity of the harm caused to Ms Shelver and the unborn, is the sentence of assault, assault with intent to do grievous bodily harm or attempted murder sufficient punishment? Are the mentioned years sufficient punishment in cases where not only "another person" (as contained in the definition of murder)[16] is involved, but also another entity (unborn) not recognised in South African law as having the right to life?[17]

In the common-law definition of murder, the phrase "another person" only refers to a living person.[18] Burchell and Milton state that the term "person" refers to "a living human being" and that "a living human being" is a person

---

10 *S v Mshumpa* 2008 1 SACR 126 (E) 150

11 130

12 130

13 According to Ballentine and Anderson feticide means:

> "The killing of a foetus or unborn child; a criminal abortion " JA Ballentine & WS Anderson (eds) *Ballentine's Law Dictionary* (1969) 483

For purposes of this article, the killing of the unborn by a third party is referred to as feticide Feticide only includes the killing of the unborn by a third party other than the mother It excludes lawful abortions as determined by the South African Choice on Termination of Pregnancy Act 92 of 1996

14 *S v Mshumpa* 2008 1 SACR 126 (E) 156

15 156

16 Murder is defined as the unlawful and intentional killing of another person JM Burchell & J Milton *Principles of Criminal Law* 3 ed (2005) 667; CR Snyman *Criminal Law* (2006) 423

17 This is the position of the unborn in both the definition of murder as well as women's right to abortion Women's right to abortion is regulated by the Choice on Termination of Pregnancy Act The court stated in *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T) that s 11 of the Constitution ("[e]veryone has the right to life") does not include the unborn (1121) Thus, the unborn does not have the right to life

18 J Milton *South African Criminal Law and Procedure II: Common-law Crimes* 3 ed (1996) 357-358

"who has been born alive and who is still alive when fatal conduct occurs".[19] This is important because if the killing occurs before birth, it is referred to as abortion. If the killing occurs after birth, it is referred to as murder.[20]

The argument goes that South African law does not consider the unborn as an entity worthy of protection and cases such as *Mshumpa* will only amount to a crime against the mother. The unborn will only be indirectly protected by South African law through the protection it grants to the pregnant woman. The question is: is this enough?

To determine whether sentences for crimes such as assault, assault with intent to do grievous bodily harm or attempted murder are sufficient punishment for cases such as *Mshumpa*, it is necessary to investigate these crimes and the severity of their sentences.

Common assault is the unlawful and intentional application of force to the person of another or inspiring belief in that other of an application of force to his person.[21] The main consideration in common assault and assault with the intent to do grievous bodily harm is the physical integrity of a person.[22] In other words, every person's body is inviolable. It derives from the law's concern to maintain law and order (prohibiting further violence and public disorder). The laws of assault aim to maintain public peace.[23] Punishment for assault depends on the type of assault and the circumstances. All circumstances must be "properly and judicially considered".[24] With regards to assault with intent to do grievous bodily harm, the accused does not have to cause the grievous bodily harm – the intent to cause such harm is sufficient. Such intent includes more than a want to inflict the casual and superficial injuries of common assault.[25]

In cases such as *Mshumpa*, the death of the unborn has already been considered as aggravating circumstances and forms part of the circumstances taken into account when determining the punishment of the accused. However, for several reasons stated below, this article argues that the crimes of assault, assault with intent to do grievous bodily harm and attempted murder of the pregnant woman are not sufficient to protect and maintain public order where the mother and the unborn are injured or killed. It involves more than mere infringement on the bodily integrity or life of the mother.

In the case of feticide, indirect protection would mean that the unborn would only be protected "indirectly" to protect the woman carrying the child. The fact that the woman was pregnant will only serve as aggravating circumstances in the penalty imposed in cases of assault. This article argues that cases such as *Mshumpa* should lead to multiple charges – one being assault, assault with intent to do grievous bodily harm or attempted murder (directly protecting the mother) and the second being *feticide* (directly protecting the unborn).

---

[19] Burchell & Milton *Principles* 670
[20] 670
[21] Milton *South African Criminal Law II* 406
[22] 407
[23] 407
[24] 435
[25] Burchell & Milton *Principles* 162

2 1 Personhood

Firstly, the fact that the unborn is not regarded as a human being does not mean it is not to receive any kind of direct protection. Regarding personhood, Wells and Morgan agree that there has been a misplaced preoccupation with the status of the unborn.[26] The continued emphasis on the unborn lacking personhood at injury (*in utero*) but not at death (*ex utero*) leads to a fine line being drawn.[27] In other words, the unborn does not have the attributes of personhood when injured *in utero* at 38 weeks (as in *Mshumpa*)[28] and dies *in utero*, but will have the mentioned attributes when injured *in utero* at 24 weeks, is born alive and dies *ex utero*. In both instances the unborn has the ability to survive outside the womb. The only difference between them is the fact that one is born before death and the other not, attributing the protection of the unborn to the personhood endowed at birth. The fact that an unborn at 38 weeks is not directly protected in cases of feticide just because it dies *in utero*, but an unborn at 24 weeks is protected in cases of feticide because it dies *ex utero*, renders arbitrary the requirement that an unborn must have personhood in order to be directly protected and obscures the purpose of protecting the unborn – against crimes by third parties – through technicalities. In such a case, birth is only a change of place and relationship to the mother and the surrounding world.[29]

This does not necessarily mean that the unborn should be granted the right to life, as this will create a dichotomy with regards to South African laws concerning voluntary abortion. It only implies that the requirement of being "born alive" is not necessarily the most sufficient and rational criteria when considering further protection of the unborn in cases of feticide. This is even truer in light of evidence that the "born alive rule" was not created to determine the personhood of the unborn, but was rather for evidentiary purposes.[30] It means, at least, that because South African law does not protect the unborn prior to birth, but only the mother *via* assault or assault with intent to do grievous bodily harm, it could create a very irrational and illogical situation such as the one described above – a situation that can be prevented by the direct protection of the unborn in cases of feticide. In the above scenario, the possibility exists that a 38-week old unborn is only indirectly protected but a 24-week old unborn is directly protected. It will be best to provide protection

---

[26] C Wells & D Morgan "Whose Foetus is it?" (1991) 18 *JL & Soc'y* 431 432 They further state that the assertion of a simple dichotomy between foetal and female interests are mistaken and that the use of personhood or status as a means of deciding the debate is misdirected and lacking in vision because, (since they advocate for the protection of the unborn in cases of feticide from the position of the mother's interests) there is a complex web of interdependence between a pregnant woman, the unborn and eventual newborn No woman has ever doubted that the unborn's personality towards her already emerges well before birth From the woman's perspective, it is irrelevant whether the unborn has obtained personhood or not (433)

[27] 438

[28] *S v Mshumpa* 2008 1 SACR 126 (E)

[29] SA de Freitas "A Critical Retrospection regarding the Legality of Abortion in South Africa" (2005) 30 *JJS* 118 140

[30] This is explained further in part 3 3

to the unborn irrespective and independent of its location or relationship to the mother.

2 2 Is viability viable?

Does this mean that viability should be the criterion for determining whether the unborn is to receive direct protection in cases of feticide? Will providing the unborn independent or direct protection in cases of feticide (from the period of viability) solve the abovementioned "location" problem?

Firstly, De Freitas states that although viability is very popular in the South African jurisprudence on the unborn, not much legal research has been done regarding the concept of viability.[31] This is because South African law blindly followed the United States approach of viability in the case of *Roe v Wade* ("*Roe*").[32] According to De Freitas, despite *Roe*'s emphasis on viability, there is nothing in the US Constitution that shows viability to be of any importance. Instead, the court confused a definition with a rationale. The court in *Roe* also never explained why life is less meaningful prior to viability.[33] For the same reasons, South African law on feticide should be very cautious when considering viability as the point of direct legal protection for the unborn.

There are several other arguments against drawing the line of protection at viability.[34] Often viability is used as the "compelling" point of the development of the unborn. However, viability becomes a vague and relative marker when one considers different circumstances,[35] for example whether we mean viability in an advanced neonatal Intensive Care Unit ("ICU") or viability in a remote rural area with limited medical resources. Viability lacks one of the key characteristics of a rational standard, namely that it identifies a conceptually distinct division point. Paediatric medicine has improved and the frontier of viability has moved backwards several weeks and may retreat further.[36] Singling out a specific stage as the stage where development

---

31 De Freitas (2005) *JJS* 136

32 410 US 113 (1973):

> "With respect to a state's important and legitimate interest in potential human life, the point at which its interest becomes compelling is at viability, because the fetus is then presumably capable of meaningful life outside the mother's womb" (154)
>
> "Prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated, from and after the end of the first trimester, and until the point in time when the foetus becomes viable, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health, from and after the point in time when the foetus becomes viable, the state may prohibit abortions altogether, except those necessary to preserve the life or health of the mother, and the state may proscribe the performance of all abortions except those performed by physicians currently licensed by the state" (148)

33 De Freitas (2005) *JJS* 137

34 Several of the arguments against viability have been used in the LLM of the author G Myburgh *Humanity and the Protection of the Unborn: A Jurisprudential Rationale for the Furtherance of the Anthropological Paradigm of International Law* LLM thesis University of the Free State (2008)

35 D Hope "The Hand as Emblem of Human Identity: A Solution to the Abortion Controversy based on Science and Reason" (2001) 32 *U Tol L Rev* 201 211

36 211 It has been reported that children are being born as early as 21 weeks and also survive Anonymous "World's Most Premature Baby Leaves German Hospital after Spending Easter at Home" (25-06-2011) *Huffpost World* <http://www huffingtonpost com/2011/04/25/worlds-most-premature-baby_n_853389 html> (accessed 14-09-2012)

is determinate enough for legal protection to start, must rest on convincing, objective grounds, otherwise it will be arbitrary and unacceptable.[37] Mary Anne Warren is also of opinion that viability is relative, among other things, to the medical care available to the pregnant woman and the unborn.[38] In other words, it seems to be a general rule that humanness according to Morowitz and Trefil and the ability to survive outside the womb develop at the same time.[39] There is no rational reason why the fact that the unborn is able to survive outside the mother's womb, should be the determining factor for protection of the unborn.

It is further argued by De Freitas that fertilisation, rather than viability, is a more rational argument to "separate legal protection for the foetus from the non-legal protection for the foetus".[40] Providing legal protection to the unborn in cases of feticide from the period of fertilisation adds sensitivity to the legal position of the unborn. This sensitivity is necessary because of the lack of agreement on the commencement of personhood regarding the unborn. The possibility that the unborn is a human being demands that the law be sensitive towards this possibility, since the unborn concerns the boundaries of life. Birth is only a change of place and relationship to the mother and to the surrounding world, and viability changes depending on circumstances.[41] Using the mere location or viability of the unborn to determine whether it receives direct or indirect legal protection is shown to be irrational for the abovementioned reasons.

2 3 Direct protection should be granted in cases of feticide because it is granted in other areas of law

If the *nasciturus* fiction in private law grants protection to the unborn, not creating a dichotomy with the situation in human rights law, why should the unborn not be protected in criminal law? Some protection for the unborn already exists in South African private law by way of the *nasciturus* fiction.[42] This fiction keeps the interests of the potential legal subject in abeyance and as soon as born alive, the benefit is conveyed to it. However, some say that the fiction does not confer legal subjectivity only at birth but already at conception. Viewed in this way it is no longer a fiction, but rather a rule.[43] This allows for some kind of advanced direct legal protection of the unborn. The United Kingdom ("UK") also provides for a form of legal protection to the unborn in areas other than criminal law. Regarding civil liability of actions towards

---

37 DW Jordaan "The Legal Status of the Human Pre-embryo in the Context of Genetic Revolution" (2005) 122 *SALJ* 237 244

38 MA Warren "The Moral Significance of Birth" (1989) 4 *Hypatia* 46 50

39 HJ Morowitz & JS Trefil *The Facts of Life: Science and the Abortion Controversy* (1992) 146

40 De Freitas (2005) *JJS* 140

41 140

42 This fiction was already part of Roman law and later became part of Roman-Dutch law It has especially been used in the law of succession CJ Davel & RA Jordaan *Law of Persons* (2005) 13 Furthermore, in *Pinchin and Another NO v Santam Insurance* 1963 2 SA 254 (W), the court stated:

> "Whether the foetus is a 'person' or not, seems to me to be irrelevant if the legal fiction applies that it is to be regarded as if it is already born whenever this should be to its advantage " (256A-B)

43 Davel & Jordaan *Persons* 14

the unborn by a third party, the Congenital Disabilities (Civil Liability) Act of 1976 contains certain provisions protecting the unborn. Section 1(1) of the Act states:

> "If a child is born disabled as the result of such an occurrence before its birth… and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child."

If some legal consequence can be attached to the unborn from the date of conception (without turning to any argument of personhood) when it is in the interest of the unborn, this should be possible in criminal law. There is no reason why, in cases of feticide, the unborn cannot receive certain interests, rights or legal protection against a third party causing harm to or killing the unborn, if such protection is already given in areas of private law.

2 4 Direct protection in cases of feticide is in line with other legal systems

In the UK, in the case *R v Tait*,[44] it had to be decided whether the threat towards the unborn was contrary to section 16[45] of the Offences against the Person Act 1861.[46] The court had to consider whether a threat to bring about the miscarriage of an unborn at whatever stage of development is an offence under section 16.[47] It stated that "nobody could doubt that conduct of this kind ought to be punished".[48] The court then stated that the words of the Act should not be strained to give them a broader meaning than they would ordinarily bear. For this reason it felt constrained to say that the unborn *in utero* was not "another person" distinct from the mother.[49] The court further held:

> "[I]n stating this conclusion we do not of course express any opinion on the complex legal issues not yet fully worked out, which concern the status of the unborn child in the community, and the obligation of the community and its members towards that unborn child. Nor do we enter into the debate about the respective rights (whatever precisely the term may mean) of the unborn child and the mother who carries it. This debate proceeds on ethical and social premises which have nothing to do with the present problems. We are here concerned only to interpret the Offences against the Person Act 1861. As we have said, we feel obliged to give it the limited meaning for which the appellant contends."[50]

The court did not extend personhood to the unborn in this specific case. It stated clearly that it was not in a position to decide on a complex issue concerning the unborn to take part in the ethical and social debates concerning the unborn. However, the court clearly admitted that there was no doubt that

---

44 [1989] 3 All ER 682

45 S 16 of the Offences against the Person Act states:
"A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years "

46 *R v Tait* [1989] 3 All ER 682 682

47 686

48 688

49 688

50 688

conduct of that kind could not go unpunished,[51] thereby not ruling out possible developments regarding the direct legal protection of the unborn in cases of feticide. This situation is similar to what we find in South Africa in that the court did not simply dismiss any possibility of development in issues of legal protection concerning the unborn.

In the case *Attorney General's Reference*[52] the House of Lords held that murder or manslaughter could be committed where unlawful injury was deliberately inflicted, either to a child *in utero* or to a mother carrying a child *in utero*, in circumstances where the child was subsequently born alive, enjoyed an existence independent of the mother and thereafter died, and where the injuries inflicted while *in utero* caused or contributed substantially to the death.[53] The court continued to support the "born alive rule"[54] without questioning its applicability for today.[55] Regarding the unborn as victim of murder, the judge stated:

> "I see no profit in an attempt to treat the medieval origins of this rule. It is sufficient to say that is established beyond doubt for the criminal law, as for the civil law (Burton v. Islington Health Authority [1993] Q B. 204) that the child en ventre sa mère does not have a distinct human personality, whose extinguishment gives rise to any penalties or liabilities at common law."[56]

In English law the development has been to largely avoid the matter of dealing with the unborn in cases of feticide, or to avoid in-depth investigation of common-law rules such as the "born alive rule". At least, in the case of *R v Tait*,[57] the possibility of future development was not excluded.

The US has no coherent and uniform approach concerning feticide laws. Although the majority of states in the US provide some form of legal protection

---

[51] 688

[52] (No 3 of 1994) [1997] 3 All ER 936 (HL) The facts are as follows: A young woman M was between 22 and 24 weeks of gestation If her baby, S, had been born at 22 weeks it would not have had any significant prospect of survival The pregnancy was proceeding normally, and the risk that it would fail was very small indeed The natural father B quarrelled with M and stabbed her in the face, back and abdomen with a long-bladed kitchen knife Thereafter S lived for 121 days until she succumbed to broncho-pulmonary dysplasia from the effects of premature birth After giving birth it was discovered that one of the knife cuts had penetrated S's lower abdomen The case for the Crown at the trial of B was that the wounding of M by B had set in train the events which caused the premature birth of S and hence her failure to achieve the normal prospect of survival which she would have had if the pregnancy had proceeded to full term (Paras 3 and 4) (Please note that the case as provided for on the UK Parliament's website does not contain any page numbers or paragraph numbers The author used the unofficial paragraph numbers as referred to on <http://www hrothgar co uk/WebCases/hol/reports/06/49 htm> (accessed 16-11-2010))

[53] *Attorney General's Reference* (No 3 of 1994) [1997] 3 All ER 936 (HL) para 52 See also G Barrie "Recent English Cases" (1996) 1996 *De Rebus* 658 658

[54] Please see n 9 for an explanation of the meaning of the "born alive rule"

[55] The court stated:

> "The foundation authority is the definition by Sir Edward Coke of murder by reference to the killing of 'a reasonable creature, in rerum natura':… The proposition was developed by the same writer into examples of prenatal injuries as follows: 'If a woman be quick with child, and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child; this is a great misprision, and no murder…' *It is unnecessary to look behind this statement to the earlier authorities, for its correctness as a general principle, as distinct from its application to babies expiring in the course of delivery or very shortly thereafter, has never been controverted*" *Attorney General's Reference* (No 3 of 1994) [1997] 3 All ER 936 (HL) para 20 (emphasis added)

See also *Vo v France* (2005) 40 EHRR 12 (ECtHR) for an indication of how the European Court of Human Rights dealt with a case of unintentional homicide of the unborn

[56] *Attorney General's Reference* (No 3 of 1994) [1997] 3 All ER 936 (HL) para 52

[57] [1989] 3 All ER 682

to the unborn, feticide statutes are[58] still not uniform in their treatment of who may be convicted of killing the unborn. Most states preclude the conviction of

[58] In Alabama, the term "victim" is defined to include "an unborn child *in utero* at any stage of development" (July 1, 2006 (HB 19) amended S 13A-6-1 of the Code of Alabama) In Alaska, the crime of "murder" encompasses acts causing the death of an unborn child at any stage of development In Arizona, the killing of a child at any stage of prenatal development is negligent homicide, manslaughter, second-degree murder, or first-degree murder Georgia: a person is guilty of feticide, feticide by vehicle, or voluntary manslaughter if they cause the killing of an unborn child "at any stage of development who is carried in the womb" (Official Code of Georgia Annotated, Ss 16-5-20, 16-5-28, 16-5-29, 16-5-80) Idaho: the term "murder" includes the killing of "a human embryo or fetus" under certain conditions Illinois: the killing of an "unborn child" at any stage of prenatal development is intentional homicide, voluntary manslaughter, involuntary manslaughter or reckless homicide Kentucky: the offence of "fetal homicide" protects "members of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency" (Ky Rev Stat § 507A 010 et seq (2004)) Louisiana: the killing of "any individual of the human species from fertilization and implantation until birth", is first-degree feticide, second-degree feticide, or third-degree feticide (La Rev Stat Ann §§ 14:32 5 – 14 32 8, read with §§ 14:2(1), (7), (11) (West 1997)) Michigan: actions that intentionally, or in wanton or wilful disregard for consequences, cause a "miscarriage or stillbirth" or cause "aggravated physical injury to an embryo or fetus", are classified as felonies (Mich Comp Laws Ann § 750 90a et seq) Minnesota: the killing of an "unborn child" at any stage of prenatal development is characterised as murder, manslaughter, or criminal vehicular homicide Mississippi: the term "human being" includes "an unborn child at every stage of gestation from conception until live birth and the term 'unborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb" (Miss Code Ann § 97-3-37) Missouri: the term "human being" includes an "unborn child" at any stage of prenatal development at least under the involuntary manslaughter and first-degree murder statutes Nebraska: the killing of an "unborn child" at any stage of prenatal development is murder in the first or second degree, manslaughter, or motor vehicle homicide North Dakota: the killing of an "unborn child" at any stage of prenatal development is murder, felony murder, manslaughter, or negligent homicide Ohio: the killing "of an unborn member of the species homo sapiens, who is or was carried in the womb of another" (Ohio Rev Code Ann § 2903 01 et seq (2002)), is aggravate murder, murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, negligent homicide, aggravated vehicular homicide, vehicular homicide, or vehicular manslaughter Oklahoma: "unborn offspring of human beings from the moment of conception" (House Bill 1686, signed into law on May 20, 2005) are considered unique victims of criminal activity Pennsylvania: the killing of "an individual organism of the species homo sapiens from fertilization until live birth" (Pa Cons Stat Ann tit 18 § 3203) is criminal homicide classified as murder in the first, second, or third degree, or voluntary manslaughter South Carolina: a "child *in utero*" (SC Code Ann § 16-3-1083) at any stage of development injured during an act of criminal violence is a separate victim of a separate offence South Dakota: the killing of an "unborn child" at any stage of prenatal development is fetal homicide, manslaughter, or vehicular homicide Texas: "an unborn child at every stage of gestation from fertilization until birth" (Tex Penal Code Ann § 1 07) is to be protected by the entire criminal code Utah: the killing of an unborn child at any stage of development is treated as any other homicide if the rest of the elements of that homicide are met Virginia: "any person who unlawfully, wilfully, deliberately, maliciously and with premeditation kills the fetus of another" is guilty of "homicide" (Va Code § 18 2-32 2 (2004)) West Virginia: "a pregnant woman and the embryo or fetus she is carrying in the womb constitute separate and distinct victims" (W Va Code § 61-2-30) for purposes of laws prohibiting crimes of violence Wisconsin: "whoever causes the death of an unborn child with intent to kill that unborn child or kill the woman who is pregnant with that unborn child" is guilty of homicide LM Milligan "A Theory of Stability: John Rawls, Fetal Homicide and Substantive Due Process" (2007) 87 *BUL Rev* 1177 1229-1230 Also see the following: Ala Code § 13A-6-1(a)(3) (LexisNexis 2006); Alaska Stat § 11 41 150 (2006); Ariz Rev Stat Ann § 13-1102 to -1105 (Supp 2006); Ga Code Ann §§ 16-5-8, 40-6-393 1 (Supp 2006); Idaho Code Ann § 18-4001 (2004); 720 Ill Comp Stat Ann 5/9-1 2, -2 1, -3 2 (West 2002); Ky Rev Stat Ann §§ 507A 010-060 (LexisNexis Supp 2006); LA Ref Stat Ann §§ 14:2(11), 14:32 5-14:32 8 (2007); Mich Comp Laws Ann § 750 14 (West 2004); Minn Stat Ann §§ 609 21, 266(a), 2661- 2665 (West 2003); Miss Code Ann § 97-3-37(1) (2005); Neb Rev Stat §§ 28-389(2), -391 to -394 (Supp 2006); ND Cent Code §§ 12 1-17 1-01 to -04 (1997); Ohio Rev Code Ann §§ 2903 01 to 06, 2903 09(A) (LexisNexis 2006); Okla Stat Ann title 21 §§ 652, 691, 713 (West Supp 2007); Okla Stat Ann title 63 § 1-730 (West 2004); 18 PA Const Stat Ann §§ 2603-2605, 3203 (West 1998); SC Code Ann § 16-3-1083 (2006); SD Codified Laws §§ 22-1-2(50A), 22-16-1 1, -15, -20, -41 (2006 and Supp 2007); Tex Penal Code Ann § 1 07(a)(26) (Vernon Supp 2006); Utah Code Ann §§ 76-5-201 to -209 (2003 and Supp 2007); Va Code Ann § 18 2-32 2(A) (2004); W Va Code Ann § 61-2-30 (LexisNexis 2005); Wis Stat Ann §§ 939 75, 940 01, 02, 05- 10 (West 2005); *State v Knapp*, 843 SW2d 345, 347-48 (Mo 1992) (en banc); *State v Holcomb*, 956 SW2d 286, 290 (Mo Ct App 1997)

the mother; however, there are states that do not.[59] Some statutes require that the defendant had knowledge that the woman was pregnant. In many states feticide is seen as a lesser form of homicide and is punished to a lesser degree.[60] The objective of some feticide laws may only be a secondary objective in a scheme to protect the pregnant woman, ie indirect protection. Legislative intent chiefly to promote the maternal interests *via* the feticide statute also surfaces in some legislative history.[61]

The most widely noted decision on homicide of the unborn child is the case of *Keeler v Superior Court of Amador County*[62] ("*Keeler*"). The court reasoned that the legislature had not intended feticide to be an offence under California law or within the meaning of "human being" under section 187[63] of the California Penal Code. Consequently, Keeler could not be charged with murder.[64] Throughout the case, the court assumed that the "born alive rule" was a substantive element at common law that designated the unborn child as non-human. The court refused to discard the common-law "rule". It fell to Justice Burke in defence to explain the evidentiary nature of the "born alive rule". He noted that the common law considered the unborn to be a human being but that the "born alive rule" had value in differentiating as accurately as was then scientifically possible, between life and non-life.[65] *Keeler* has since been overturned by legislation on viable unborn children.[66] In direct response to *Keeler*, the California legislature amended section 187 to include the term "fetus" within its definition of murder – believing that the legislature had already determined a 20-week-viability criterion for the state's interest in the protection of the unborn in the Therapeutic Abortions Act 1967 Cal Stat 1535.[67] Section 187 of the California Penal Code currently defines murder as the "unlawful killing of a human being, or a fetus, with malice aforethought". However, the Penal Code does not define the term "fetus", nor does it give any indication of any stage of development to be applied to the section.[68] In May 1994 the court departed from prior California laws in *People v Davis*.[69] The court held that

---

59 DM Burke "Unborn Victims of Violence Laws: Protecting Society's Most Vulnerable" (2008) 2008 *Defending Life* 195 198

60 MJ Davidson "Fetal Crime and its Cognizability as a Criminal Offense under Military Law" (1998) 1998 *The Army Lawyer* 23 26

61 JA Parness "Crimes against the Unborn: Protecting and Respecting the Potentiality of Human Life" (1985) 22 *Harv J on Legis* 97 149

62 2 Cal 3d 619, 470 P2d 617, 87 Cal Rptr 481 (1970)

63 S 187 provided:
"Murder is the unlawful killing of a human being with malice aforethought "

64 *Keeler v Superior Court of Amador County* 2 Cal 3d 619, 470 P2d 617, 87 Cal Rptr 481 (1970) 622-626

65 CD Forsythe "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" (1987) 21 *Val U L Rev* 563 604 Also see *Keeler v Superior Court of Amador County* 2 Cal 3d 619, 470 P2d 617, 87 Cal Rptr 481 (1970)

66 Forsythe (1987) *Val U L Rev* 603; Cal Penal Code § 187 (a) (West Supp 1986)

67 KB Folger "When does Life Begin…or End? The California Supreme Court Redefines Foetal Murder in *People v Davis*" (1994) 29 *USFL Rev* 237 244 The Therapeutic Abortions Act 1967 Cal Stat 1535, as originally codified, allowed abortion of a foetus at or prior to 20 weeks in development

68 SL Smith "Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application" (2002) 41 *Wm & Mary L Rev* 1845 1859

69 872 P2d 591 (Cal 1994)

the appellate court had been wrong in its interpretation of section 187 that the killing of a pre-viable foetus did not constitute murder.[70]

In 2002, Laci Peterson (eight months pregnant) went missing. Months later the bodies of mother and child were found ashore in the San Francisco Bay. Laci's husband was arrested and charged with two counts of first-degree murder under California law for the deaths of Laci and the baby. The state imposed the death penalty on the father. As a result, the Unborn Victims of Violence Act HR 503 107th Cong (2001) ("UVV" or "Laci and Connor's Law") came into force, recognising that when a criminal attacks a pregnant woman, and injures or kills both her and her unborn child, he has claimed two human victims.[71]

In sum, a major development in federal and state penal legislation has been to recognise the unborn as a unique being, and punish crimes against the unborn in a manner similar to crimes against born persons.[72] Some developments protect the unborn only after viability, some from earlier in the pregnancy, and others indirectly by protecting only the mother.

Canada shows similar developments concerning the unborn in cases of feticide. It is evident from section 223[73] of the Criminal Code of Canada (RSC 1985 c C46) that Canada supports the "born alive rule". This is clear especially when read together with section 238 of the Criminal Code of Canada.[74] Furthermore, the Supreme Court held in the case of *Tremblay v Daigle*[75] that a child's mother could not be compensated for the loss of her unborn child. However, some developments in favour of the unborn are developing in Canada. A private member's bill called The Unborn Victims of Crime Act (C-484) has passed Second Reading in Parliament. It will next go to the Standing Committee on Justice and Human Rights for review. The Bill would amend section 238 of the Criminal Code to allow separate homicide charges

---

70 599-560

71 National Right to Life Committee "Key Facts on the Unborn Victims of Violence Act" (01-04-2004) *National Right to Life* <http://www nrlc org/Unborn_Victims/keypointsuvva htmlhttp://www nrlc org/unborn_victims/keypointsuvva html> (accessed 14-09-2012) Also see The Unborn Victims of Violence Act HR 503 107th Cong (2001) Also see *State v Lamy* 158 NH 511, 969 A2d 451 NH, 2009, *Eric James Bullock v State of Arkansas* CR 01-884 111 SW 3d 380 and *People v Hall* 557 NYS2d 879 (App Div 1990) (*Hall II*), affirming 511 NYS2d 532 (Sup Ct 1987) (*Hall I*)

72 Milligan (2007) *BUL Rev* 1188

73 S 223 of the Criminal Code of Canada states:
"A child becomes a human being within the meaning of this Act when it has completely proceeded in a living state from the body of its mother, whether or not
(a) it has breathed,
(b) it has independent circulation, or
(c) the navel string is severed
(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being "

74 S 238 of the Criminal Code of Canada states:
"(1) Everyone who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life (2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of that child "

75 (1989) 2 SCR (3d) 530

to be laid for the death of a foetus when a pregnant woman is attacked.[76] Furthermore, the Bill proposes that section 238 be amended as follows:

> "(1) Every person who, directly or indirectly, causes the death of a child during birth or at any stage of development before birth while committing or attempting to commit an offence against the mother of the child, who the person knows or ought to know is pregnant, (a) is guilty of an indictable offence and liable to imprisonment for life and to a minimum punishment of imprisonment for a term of 10 years…"[77]

In the case of *R v Severight*[78] (Alberta Provincial Court) the Alberta Provincial Court also convicted the accused on an additional count of attempted murder of the unborn in the womb of the mother.[79] In this case the court stated that legal problems arose because section 223 of the Criminal Code and the Supreme Court of Canada's decisions previously referred to, produced a result whereby a child in the womb was not a "human being" or "person" for criminal law purposes. The court then asked whether that legal fact meant that the unborn was nothing and that this accused could not be found guilty of any crime against the unborn.[80] When the "born alive rule" was codified in the Criminal Code, there were good evidentiary reasons why a child who died in the mother's womb by the intervention of a third party could not be proved beyond reasonable doubt to be a living human being. Live birth was required to prove that the unborn child was alive in the mother's womb when the criminal act was committed. However, in the last 25 years, medical developments have changed the situation.[81] The court held that in the face of this evidence the "rule" had become a fiction and made the law look antiquated – frozen by the limitations of medical science prior to the invention of ultrasound:[82]

> "In its origin the 'born alive' rule was never intended to deny the humanity of the child in the womb. It was a matter of evidence and proof only."[83]

The court convicted the accused of attempted murder.[84]

From English law in *R v Tait*,[85] it can be seen that development in feticide laws is not necessarily excluded. In the United States and Canada there has been development in this regard. In some states, the unborn is only protected from viability or specific periods of gestation. In others it is seen as a lesser form of homicide, and in some instances different crimes are created as in the Unborn Victims of Violence Act.

---

[76] Abortion Rights Coalition of Canada "Talking Points against the 'Unborn Victims of Crime Act'" (06-05-2008) *ARCC* <http://www arcc-cdac ca/action/unborn-victims-act htm> (accessed 14-09-2012) The Bill aims to amend s 238 by adding the following after subs 2: "(3) [t]his section does not apply to a person to whom section 238 1 applies"

[77] Bill C-484 3

[78] (1993), 154 AR 51, 31 CR (4th) 45 (Prov Ct)

[79] Para 23

[80] Para 14

[81] Para 20

[82] Para 21

[83] Para 21

[84] Para 23

[85] [1989] 3 All ER 682

3 The issues raised in *Mshumpa*

It has been argued that direct legal protection of the unborn is justified in cases of feticide. Based on these findings, it is necessary to deal with several controversial issues raised in *Mshumpa* before offering possible suggestions on how to develop the legal protection of the unborn in cases of feticide.

3 1 Murder does not include the unborn

The fact that the common-law definition of murder does not include the unborn does not necessarily mean that the unborn cannot receive any protection in cases of feticide (as argued in parts 2 and 2 1 above). However, this article is not advocating for an extension of the common-law definition of murder. One of the reasons for this is that extending the common-law definition of murder would offend the principle of legality.

3 2 Development of the common-law definition of murder in this regard would offend the principle of legality

Section 35(3)(l) of the Constitution states:

> "Every accused person has a right to a fair trial, which includes the right- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted…"

Based on this, the court in *Mshumpa* stated that the development of the common law of crimes must be done "incrementally and cautiously"[86] in accordance with the dictates of the Constitution. This development should not have retrospective effect to deal with the past, but is competent to effect the development prospectively to operate in future.[87]

In the Constitutional Court decision of *Masiya v Director of Public Prosecutions, Pretoria*[88] the court held that the lower court incorrectly extended the common-law definition of rape to include penetration per anus. The court ruled that retrospective extension of the definition of rape would offend the principle of legality and that the extension of the definition of rape be applied only to cases arising after this judgment had been handed down:

> "It would be unfair to convict an accused of an offence in circumstances where the conduct in question did not constitute the offence at the time of the commission."[89]

It would have been unconstitutional and contrary to the principle of legality to develop the common-law definition of murder in *Mshumpa*. This article, for reasons discussed in part 2, argues for the creation of a statutory crime of feticide.

---

[86] *S v Mshumpa* 2008 1 SACR 126 (E) 130
[87] 150-151
[88] 2007 5 SA 30 (CC)
[89] 31

3 3 The "born alive rule" is still applicable in countries where murder is a common-law crime, and courts have not interpreted statutory homicide laws to do away with the "rule"

It has been mentioned[90] that the "rule" means an unborn first has to be born alive after the injury or harm has been inflicted and subsequently die to prosecute a third party of a crime committed against the unborn while the mother was still pregnant with it. Some common-law sources and modern-day authors indicate that the "born alive rule" has not been used to determine the "personhood" of the unborn, but rather for evidentiary purposes. In other words, the viewpoint is that historical medical technology was so poorly developed that the only way to determine that the unborn died because of the injuries caused by a third party (or sometimes even that the mother was pregnant at the time of the harm or death caused) was through the unborn first being born alive and then passing away as a result of the harm caused to the unborn – thus indicating that only born children possess "personhood" or the "right to life". This "rule" is explained by Edward Coke in The Third Part of the Institutes of the Laws of England.[91] Andrew Horne also adopted the "rule" in *The Mirrour of Justices*, written in the early 1300s.[92] Staunforde wrote that causing the death of the unborn was not a felony because "the thing killed has no baptismal name; second, because it is difficult to judge whether he killed it or not, that is, whether the child died of the battery of its mother or through another cause".[93] In English law, the first reported case concerning the "born alive rule" was that of *Trespasse and Assault v Sims*.[94] The King's Bench held the defendant not liable for the death of a woman's unborn child "for if it be dead born it is no murder, for non constat,[95] whether the child were living at the time of the batterie or not".[96] Furthermore, the court stated that "when the child is born living, and the wounds appear in his body, and then he dye, the batteror shal be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not…".[97] The requirement that the unborn had to be born alive was to determine whether the unborn was alive at the time of the crime. Faced with these uncertainties, the law chose to

---

90 See n 9

91 Coke states that:

> "If a woman be quick with childe, and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive " E Coke *The Third Part of the Institutes of the Laws of England Cap 7* (1644) 50; 2

92 Forsythe (1987) *Val U L Rev* 581 Horne states:

> "As to an infant who is slain we must distinguish whether he is slain en ventre sa mere or after birth, for in the former case there is no homicide, for no one can be adjudged an infant until he has been seen in the world so that it may be known whether he is a monster or not and as to infants slain in their first year, this belongs to the cognisance of the church " A Horne *The Mirrour of Justices* (1895) 139

93 W Staunforde *Les Plees Del Coron Cap 13* (1971) 21

94 75 Eng Rep 1075 (1600)

95 In UK legal context the Latin term *non constat* means "it is not certain" Clickdocs "Legal Glossary" *Clickdocs* <http://www clickdocs co uk/glossary/non-constat htm> (accessed 17-09-2012)

96 *Trespasse and Assault v Sims* 75 Eng Rep 1075 (1600) 1076

97 1077

view the foetus as an undistinguishable part of the mother with no separate protection unless it was born alive. "It made perfect sense at the time", says Clarke Forsythe, who has studied the legal treatment of the foetus throughout history:

> "There was no medical technology, no way to envision life in the womb. How could they know whether the fetus was alive or dead when the injuries took place?"[98]

In 1872 a New York court described the evidentiary function of quickening in the case of *Evans v People*[99] as adopted by common law:

> "But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for this reason that the foetal movements are the first clearly marked and well defined evidences of life."[100]

Medical advances have made those uncertainties vanish. Foetal monitoring and surgery, even foetal autopsies, have given prosecutors the tools they need to prove the elements of a crime.[101] Contemporary modern medicine such as ultrasound, foetal heart monitoring, in vitro fertilisation, foetoscopy and the use of sophisticated forensic techniques, has greatly enhanced our understanding of the development of unborn children.[102] Doctors can now determine with relative accuracy the exact stage of foetal development and even whether the foetus dies as a direct result of harm inflicted by third parties.[103] The "born alive rule" was possibly for mere evidentiary purposes but is now irrelevant in the light of modern medical technology.

3 4 The Constitution does not provide the unborn with any fundamental rights

Personhood, the right to life or other human rights are not the only prerequisites for the legal protection of the unborn in cases of feticide.[104] Human rights are not the only requirement for any development in a statutory crime of feticide. The concept of human rights as we know it today is a relatively new[105] one that has influenced and shaped law within a short period of time. It has also become the authoritative language of law. We have come to

---

98 T Mauro "Abortion Battle, Medical Gains Cloud Legal Landscape" *USA Today* (12-12-1996) 1A

99 49 NY 86 (1872)

100 90

101 Mauro *USA Today* (12-12-1996) 1A

102 ME Barrazoto "Judicial Recognition of Feticide: Usurping the Power of a Legislature?" (1986) 24 *J of Fam L* 43 43-45

103 A Tsao "A Novel Charge Exposes the Illogic of Abortion Law" (1998) 20 *Alberta Report Newsmagazine* 22-23

104 The arguments regarding the right to life have been drawn from the unpublished LLM thesis of the author Myburgh *Humanity and the Protection of the Unborn*.

105 Although the development of rights started more than 50 years ago, its current day application, interpretation and influence have only become popular within the last 50 to 60 years and it is considered to be a "new" concept Also, although human rights are very prominent in international law at present, this was not the case in the past International law only concerned itself with states, but after the atrocities of the Second World War human rights became internationalised (MA Ritter "'Human Rights': Would You Recognize One if You Saw One? A Philosophical Hearing of International Rights Talk" (1997) 27 *Cal W Int'l LJ* 265 268) and resulted in international respect for the human rights of the individual being the one most influential idea of the UN (269)

understand what law means in terms of human rights – what law is and should be these days.[106] With "human rights" being such a new concept (and also ideologically influenced, as argued later)[107] this article contends that the right to life is not the only way in which the unborn can be accommodated within the common-law definition of murder.

John Finnis rejects the solitary use of rights for the determination of the legal position of the unborn. He criticises Judith Thomson's playing-off of the "right to life" and the "right to decide what happens in and to one's body",[108] stating that expressing the argument for or against abortion on the grounds of human rights unnecessarily complicates this issue. He believes that it is inappropriate and inconvenient to express the moral permissibility of a type of action such as abortion in terms of "rights".[109] It is not the fundamental rationale or reasoning behind the judgment that killing another person is impermissible.[110] He does not state that rights play *no* role in determining the position of the unborn; he merely states that it should not be elevated as the ideology with the only influence on the legal protection of the unborn, to the exclusion of other arguments and ideologies. Finnis states that the real need for speaking of "rights" is to make the point that the basic human values have to be realised in the lives and well-being of others.[111]

Ritter[112] mentions that some moralists reject the "golden mean" and elevate a single ideology, social or personal value such as human rights to a level where governing authority is given to that value, making it the sole measure of virtue or law. Baxi states that human rights discourse is intensely partisan and fails to exist outside "the webs of impassioned commitment and networks of contingent solidarities, whether on behalf and at the behest of dominant or subaltern ideological practice".[113] Hare states that the rights theory is unhelpful at the moment because nobody has yet proposed a plausible account of how we might argue conclusively about rights.[114]

This is also relevant for feticide. It is not justified to refuse the unborn any protection in cases of feticide merely because the right to life is absent, if no conclusive argument about the right to life exists. The right to life of the unborn and the right to privacy of the mother are far more complicated than abortion jurisprudence has declared it to be, as human rights are not constitutive of only one ideology, interpretation or viewpoint. For example, it has been stated that sometimes the human rights concept is used in its strict sense of the right holder being entitled to something with a correlative duty in another and also that human rights views change as time and social

---

[106] 266
[107] See discussion below
[108] J Finnis "The Rights and Wrongs of Abortion: A Reply to Judith Thomson" (1973) 2 *Philosophy and Public Affairs* 117-145
[109] 130
[110] 130
[111] 130
[112] AP Rubin *Ethics and Authority in International Law* (1997) 10
[113] U Baxi "Voices of Suffering, Fragmented Universality, and the Future of Human Rights" in BH Weston & SP Marks (eds) *The Future of International Human Rights* (1999) 101 106
[114] RM Hare "Abortion and the Golden Rule" (1975) 4 *Philosophy and Public Affairs* 201 202

structures and society change.[115] This is different from the western liberalistic approach of human rights. Ritter comments that the "Western Grammar of Rights Talk" suggests that the essential characteristic of being human is constituted as the pre-communal autonomy of the abstract individual, in which the abstract individual becomes itself precisely by virtue of being itself, namely autonomous. Consequently, the central and controlling issue for the abstract autonomous individual becomes: "how to protect and promote one's autonomy. For modernity, autonomy is preserved through two fundamental complementary rights: the right to privacy, and the right to self-development".[116]

This atomistic interpretation of human rights has been presenting an ideological, exclusive[117] and one-sided view of human rights jurisprudence connected to the protection of the unborn and mother.[118] Apart from this, there are also other interpretations of "human rights", such as the modern theories of "rights based on natural rights", rights based on justice" (Rawls), "rights based on reaction to injustice", "rights based on dignity", "rights based on equality of respect and concern" and the "theory based on cultural relativism (versus universalism)".[119] Renteln states that, for the most part, there is a lack of agreement on the meaning of a right.[120] In other words, there are different interpretations of what a single human right may be – for example, the right to life. For some, the right to life includes the right not to receive the death penalty and for others it excludes a right in opposition to the death penalty. For some the right to life includes the unborn and for others it does not. Not only is there no plausible account of how we might argue about rights, but there is also no plausible account of the scope and content of "life".

---

[115] See for example the *African Charter on Human and Peoples' Rights* (1981) OAU Doc CAB/LEG/67/3/ rev 5, 21 ILM 59 (1982) However, the African Charter is different from other international legal instruments in various aspects M Mutua "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Va J Int'l L* 339 341 Firstly, the African Charter is different in that it provides for *group*/*collective rights* (*peoples' rights*), for example the right to self-determination Mutua (1995) *Va J Int'l L* 340 This is contrary to an individualised, Western approach The current human rights movement portrayed as the western liberal idea must be understood as only a piece of the whole Mutua (1995) *Va J Int'l L* 344

[116] M Ritter "Universal Rights Talk/Plurality of Voices: A Philosophical-Theological Hearing" in MW Janis & C Evans (eds) *Religion and International Law* (1999) 417 428

[117] According to Baxi, "[s]laves", "heathens", "barbarians", colonized peoples, indigenous populations, women, children, the impoverished, and the "insane" have been, at various times, thought unworthy of being bearers of human rights These discursive devices of Enlightenment rationality were devices of exclusion The "Rights of Man" were the human rights of all men capable of autonomous reason and will Baxi "Voices of Suffering, Fragmented Universality, and the Future of Human Rights" in *Future of International Human Rights* 110

[118] Tharoor states that some philosophers have objected to the anthropocentricity (a human-centred view of the world) of human rights – an individualistic view of man as autonomous being whose greatest need is to be free from interference by the state (right to private property, freedom of contract, and the right to be left alone) S Tharoor "Are Human Rights Universal?" (1999) 16 *World Policy Journal* 1 1-6

[119] JJ Shestack "The Philosophic Foundations of Human Rights" (1998) 20 *Hum Rts Q* 201 215-233 Another theory that has played a commanding role in political and moral philosophy is utilitarianism Utilitarianism is a maximising and collectivising principle that requires governments to maximise the total net sum of the happiness of all their subjects This principle is in contrast to natural rights theory, which is a distributive and individualising principle that assigns priority to specific basic interests of each individual subject Shestack (1998) *Hum Rts Q* 213

[120] AD Renteln "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 *Hum Rts Q* 514 514-540

Warren uses the example that most of us know what a lion is but very few could formulate a precise and substantive definition that will be sufficient to settle all questions regarding the species *Panthera leo*.[121] The reasons for this difficulty are cultural differences, subjective views on a concept, lack of adequate research, lack of debate that is constructive, well-researched and informed in nature and discussion platforms on *Panthera leo*, and the vast variety of opinions on its definition. The same applies to the concept of life. Due to subjective views, cultural relativism and lack of constructive debate, no precise and substantive definition can be given of the concept "life". Most of us will recognise life when we see it, but very few of us can give a definition of life that will be sufficient to answer all questions concerning life – such as instances of feticide. There are also different viewpoints on why life is important and what makes it meaningful.[122] More importantly, to talk of the rights of persons presupposes that one knows what counts as a person.[123] Yet, we do not find jurisprudential clarification of concepts such as "person", "life" and "human". In the South African Constitution and also around the world the "right to life" is granted to "human beings" or "persons". Yet, neither the term "life" nor "human being" has been rationally defined, attempted to be further understood or given universal meaning.[124]

Human rights have become the single ideology elevated above other methods of legal protection regarding the unborn in general. To be inclusive and rational regarding feticide arguments, it is necessary to expand the argument to more than human rights (although it is not intended to exclude "human rights"). An approach that is holistic, rational and researched is necessary in cases of feticide. It is necessary to consider human rights, the interests of the public, science, rationality, the protection of the mother against third party perpetrators and the protection of sentient beings among other things.

---

[121] MA Warren *Moral Status: Obligations to Persons and Other Living Things* (1997) 27

[122] There are various divisions and interpretations as to life's meaning and its existence The great divide is between supernaturalist and naturalist conceptions of life's meaning Supernaturalism is the view that one's existence is meaningful only if one has a certain relation with some purely spiritual realm Naturalism denies that life's meaning is dependent on the existence of a purely spiritual order T Metz "Recent Work on the Meaning of Life" (2002) 112 *Ethics* 783

[123] HT Engelhardt "The Sanctity of Life and the Concept of a Person" in LP Pojman (ed) *Life and Death: A Reader in Moral Problems* 2 ed (2000) 77 77-83

[124] CI Lugosi "Respecting Human Life in the 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death" (2005) 20 *Issues L & Med* 211 211 In the case of *Attorney General's Reference* (No 3 of 1994) [1997] 3 All ER 936 (HL), Lord Mustill stated that murder is widely thought to be the gravest of crimes and because of this "one could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base This is not so in England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning" (para 2) It confirms that even in England the crime of murder has not been rationally defined with a set of principles applicable in all instances

3 5 An extended definition of murder presents certain difficulties: whether viability is relevant; whether it should be restricted to third parties and exclude the mother; and how it might fit in with the criminal offence and sanction for illegal abortion

As mentioned, this article does not advocate for an extension of the common-law definition of murder but rather for the creation of a statutory crime of feticide by the legislature, restricted to third parties and excluding the mother in cases of voluntary abortion. Also, the creation of a statutory crime of feticide will not grant the unborn the right to life and therefore be in conflict with abortion laws. As already stated,[125] the right to life is not the only method of protection that can be granted to the unborn. The issue of viability is also discussed in part 3 2.

4 The way forward

Based on the arguments above[126] as to the necessity of further development for the direct legal protection of the unborn in cases of feticide, this article advocates the creation of a separate statutory offence of feticide. This will also be in line with developments concerning feticide in foreign jurisdictions (as indicated above).

Although it is not within the scope of this article to discuss each element of such a crime in detail,[127] the result of the above argumentation is that a statutory definition of feticide will be as follows: The unlawful and intentional or negligent[128] causing of the death of an unborn by a third party and without the consent of the pregnant woman bearing the unborn. Very important here is the fact that it must occur without the consent of the pregnant woman. Furthermore, the actions of the third party must have caused the death or miscarriage of or harm to the unborn.

5 Conclusion

The aim of this article is to serve as a starting point for urgent legal discourse and development regarding the position of the unborn, mother and public at large in cases of feticide. It is argued that in South African law the unborn should receive direct statutory protection from the moment of conception. The arguments include the following: (i) personhood and human rights are not necessary for direct legal protection in South African law; (ii) viability is an arbitrary criterion to determine the period from which the unborn should receive direct protection in cases of feticide, and this should be conception; (iii) there are statutory developments regarding the direct protection of the unborn in cases of feticide in other legal systems; and (iv) the "born alive

[125] See part 3 4
[126] See part 2 of this article
[127] It is hoped that such discussions will be developed and debated in subsequent articles
[128] There is much controversy about intent and negligence concerning feticide A detailed discussion of this issue falls outside of the scope of this article It is hoped that this will lead to further discussion and development of the possible statutory crime of feticide

rule" is no longer applicable. A few arguments raised in *S v Mshumpa*, possibly hampering such discourse or statutory development, have also been discussed. It demonstrates that such issues will not necessarily hamper any statutory development regarding the direct legal protection of the unborn. It is an opportune time for South African law to pursue statutory development in this regard, even more so in light of the statement by Kruuse that we need to have a theoretically unified approach to the issue of foetal rights in the context of feticide (and perhaps wider), using *Mshumpa* as an appropriate point of departure.[129]

SUMMARY

In the South African case *S v Mshumpa* 2008 1 SACR 126 (E) the court considered a set of facts where a third party had been responsible for the death of an unborn during the 38th week of gestation. It is commonly referred to as a case of feticide. The court held that the common-law crime of murder did not include the unborn and it was the responsibility of the legislature to develop the common law. This article aims to investigate the development of a statutory crime of feticide for the protection of the unborn. Some arguments are given as to why the situation of the unborn is different in cases of feticide than in abortion cases. Furthermore, American, English and Canadian jurisprudence is researched in order to compare it with the South African position to assist the legislature in taking urgent action in furthering South African jurisprudence on feticide.

[129] HJ Kruuse "'Fetal Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 71 *THRHR* 126 136