

**THE DIFFERENCE BETWEEN A STILLBORN BABY AND A MEDICAL
WASTE FOETUS IN LIGHT OF THE CURRENT SOUTH AFRICAN LAW**

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'... every act of law should be judged, as to its goodness or badness, solely by reference to its consequences in terms of human happiness ...'

Harris (2004) *Legal Philosophies* (2nd ed.) p. 28

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ABSTRACT

South Africa's Constitution is the supreme law of the Republic and protects the rights of all people in South Africa. The right to inherent human dignity is guaranteed to 'everyone'. Therefore, the state has a duty to protect and promote the human dignity of everyone. The question arises, does the constitutional guarantee of human dignity extend to the yet unborn?

The thesis examines the South African position regarding the legal regulation of the burial of fetuses. The law states a fetus meeting with death before 26 weeks *intra uterine* may not be buried but should be disposed of as medical waste. This is in sharp contrast to the law which stipulates that a woman may no longer terminate her pregnancy 'on demand' once 20 weeks of gestation has been reached and may do so only for medical and other specified reasons after 20 weeks of pregnancy.

The above creates a paradox: once 20 weeks of gestation is reached, the fetus is not worthy of burial, but worthy of protection against being aborted. Put differently, after 20 weeks' *intra uterine* existence a fetus is given some measure of protection by the law; before 26 weeks' *intra uterine* existence has been achieved, nevertheless, the fetus is not worthy of burial.

This paradox forms the crux of the thesis. The South African legal position as well as that of selected foreign jurisdictions regarding the burial of fetuses are examined. Changes are proposed to the Registration of Births, Deaths and Marriages Act 51 of 1992 in order to afford parents of fetuses who meet with death before 26 weeks of gestation the option of affording the fetus a dignified burial.

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CHAPTER 1: INTRODUCTORY REMARKS, CONSTITUTIONAL IMPLICATIONS AND CHAPTER OVERVIEW

1.1 Preliminary remarks

Each country, state or other terrain is regulated by some form of a constitution, an act or different parts of legislation, regulations, policies and frameworks. Each jurisdiction has its own manner of making law, its own manner of thinking and approach to law which regulates all conduct, acts and omissions as it deems fit and proper. South Africa is no different than other jurisdictions. The South African legal system consists of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the South African Constitution) as our governing and foundational instrument, and our legal system further encompasses countless acts, regulations and other means of law including case law, common law and even customary law. All these different elements add up to complete our legal system – the legal system of the Republic of South Africa.¹

Therefore, it can be deduced that all occurrences, situations, actions and omissions should be provided for and determined by our legal system including, *inter alia*, the process to be followed, the documents required and any other relevant procedures. The author's study relates directly to the application of the term 'viability' in relation to foetuses under South African law

¹ South Africa is one of the hybrid systems of law, seeing that we have a supreme legal instrument, the South African Constitution, but also with constitutional controls (see discussion later in this chapter) which enables citizens to question the legality of law. It should be noted that for some time the South African Constitution was referred to as the Constitution of the Republic of South Africa, Act 108 of 1996, but in order to uphold the supremacy thereof, it was deemed necessary to refer to it as the Constitution of the Republic of South Africa, 1996 as this would set it apart from other legislative instruments. I will refer to it as the South African Constitution. This is due to the fact that comparative method will be used in this thesis which may cause confusion between the constitutions of the different jurisdictions.

and an acknowledgement of the intrinsic value of the foetus. Coupled to this is the right to human dignity of the parent(s) of the foetus.

It should be clearly understood that the thesis will deal only with the viability of a foetus as it relates to the burial thereof in terms of the Registration of Births and Deaths Act 51 of 1992. With the concept of the intrinsic value of the foetus I wish to indicate that, from conception the foetus is ethically considered to have intrinsic worth which is deserving of protection, although it is not afforded the right to life. The implications of the debate regarding the foetus's failure to be endowed with the right to life will be touched upon, but it is summited that the current legal position which does not afford the foetus a right to life is correct. During that discussion the beginning of legal personhood and aspects of the legal status of the foetus in South Africa will be discussed.

It is unclear what the ideal legal position regarding the foetus's status would be. In other words, the current legal position will be investigated in order to identify any possible injustices and to propose an ideal legal position in this regard. Different philosophical approaches to the law can have different outcomes relating to the above statement. In a positivist system, there would be no doubt as to whether the current legal position with regard to the burial of foetuses is correct, but when one applies natural law in this premise, the foetus may be endowed with moral and ethical value in the public's opinion. Therefore, one may find oneself in a situation where the existing legal position is outdated and out of keeping with the beliefs of society or the *boni mores*.²

² The reason for this is that in a positivistic system, one only regards the law as correct and true. Law reform does not really take place; the Legislature determines the law and the citizens of the country merely follow the law. If a natural law approach is followed, people are more forward-thinking and almost have a sense of rethinking everything in terms of the 'live and let live' principle. Both approaches has its positive and negative elements and therefore the author acknowledges an approach where one questions the law, but still respects the law. This would mean that law should be questioned without derogating its supremacy. This does not mean that if a legislative principle is against the *boni mores* one should ignore it, but it also does not mean that one has *carte blanche* to alter rules which would lead to havoc. The author feels that it is food to reason using the natural law approach, but that it should be used with caution not to cause damage to the legal system leaving us

1.2 Purpose of the study

There are numerous elements impacting on the burial rights of fetuses. The study affords much attention to the debate regarding the right to terminate a pregnancy and the subsequent finding in South African law that fetuses do not have the right to life and only limited rights in terms of the *nasciturus*-fiction. The purpose of this study, therefore, will not be to afford the foetus any human or constitutional rights, including the right to life

Therefore, the study rather focusses on legal reform with regard to the parents of the foetus as they already bearers of the right to life and several other rights relating to personhood. In this premise the purpose of this study is to afford the parents of a foetus meeting with death the discretion to bury the foetus without affording the foetus any rights. This approach, then, rather focusses on supporting and respecting the intrinsic value of the foetus at any gestational age as valued by the parent(s) of the foetus.

1.3 Setting

In 2012 there was a newspaper article published regarding the provisions of section 1 of the Registration of Births and Deaths Act³ where a woman had miscarried and was told that she could not bury the foetus as it was not considered a stillborn child.⁴ After reading the newspaper article and watching a television programme based on the newspaper article, the author decided to do some research into the matter in order to evaluate the assertions and statements made within the article and the programme.

with a lawless system where people do as they please as this will also not be a promotion of the human rights encapsulated in the South African Constitution.

³ Act 51 of 1992.

⁴ Swanepoel *Om afskeid te neem van 'n ongeboore kind*. Beeld 21 Mei 2012 [visited www.beeld.com on 13 November 2012 at 09:00].

Once all the assertions and statements were validated as the legally correct position within South Africa, the author decided to commence with a comprehensive study into the matter.

During the author's research into this matter over a period of five years, it became apparent that more and more parents are in the same situation as referred to above and therefore the need is definitely there for affording some sort of burial for the foetus. During the research period there has been more awareness regarding the effects of the burial of foetuses in South Africa and it would seem that although there is no legal development regarding this matter, there may be a way to interpret the current law to afford the parents the right to remove the foetus from the hospital and have it cremated after having a ceremony. Therefore it would seem that legal reform in this regard may be on the horizon.

On the topic of legal reform it should be noted that a Non-Profit Organization was formed to fight for the burial of foetuses, called 'The Voice of the Unborn'. This movement has submitted legal documents on 8 March 2017 challenging the current legal status. The author will discuss the motivations of this movement in more detail in Chapter 4 of this thesis.

1.4 Aims and justification of the thesis

The motivation for this thesis became apparent after a *lacuna* in the law was identified, a subject or topic capable of being reformed and refined to comply with the demands of the South African Constitution. Furthermore, it should comply with the demands of the general public and more particularly, the people affected not only directly by the current injustice in law, but legal minds craving reform and transformation of the law. The author will strive to go above and beyond normal law reform and instead thereof aim at constitutional and international transformation of the current South African legal position to fulfil the requirements of the South African Constitution, international law, foreign law and other legal opinions and instruments. The most important fulfilment however, in the opinion of the author, is the fulfilment of the

requirements set by the *boni mores*. What the greater community thinks is mostly the influential background of any legislative provision as the people are the eventual drafters of the South African Constitution and other legislative provisions.⁵

This thesis is aimed primarily at law reform, to add value to the legal system and to enable the law to move at the same rate and pace as medical development. The secondary aim of this thesis is to convince the reader to consider all the arguments and form an opinion regarding this topic. The reason for the latter is that law reform commences through citizens' opinions and, therefore, the secondary aim will assist in the achievement of the primary aim.

The author proposes a call for new legislation in order to provide the parents of foetuses meeting with death the choice to bury the foetus and in the same instance this will ensure that the foetus is treated with dignity after meeting with death.

As stated by Pickels,⁶ the mother and the foetus cannot be viewed as one, not as two and, therefore, we should view them as not-one-but-not-two. This will enable a middle ground for the promotion of the interests of the foetus and the right to bodily integrity of the mother as enshrined within the South African Constitution.⁷

1.5 Limitations and delimitations

(a) Limitations

⁵ Specifically the author refers to the manner in which legislation is passed in South Africa and the impact that the greater community can have on the provisions of certain legislation by way of public comment on white and green papers published.

⁶ Pickles *Approaches to pregnancy under the law: a relational response to the current South African position and recent academic trends* 2014 *De Jure* 20.

⁷ Refer to ss. 10 and 12(2)(b) of the South African Constitution.

The study is limited to an investigation of a single foreign jurisdiction for legal comparison purposes. For this purpose, the Canadian legal system was chosen, as there are similarities in the legal systems, similar wording of the respective constitutions and the similarity of the concept of the *boni mores*.

In only one instance in Chapter 4 mention will be made of the New-Zealand legal position to indicate that the legal principal encapsulated in the specific chapter is still in use elsewhere in the world.

(b) Delimitations

In order to clarify the issues and critically evaluate the situation, the study has been limited to only encompass the South African legal position with regard to legal personhood, burial of foetuses and termination of pregnancies.

The debate regarding the right to life of a foetus and the abortion-debate will not be argued in this thesis. Termination of pregnancies will only be discussed in regard to the viability of the foetus in terms of the Choice on Termination of Pregnancy Act 92 of 1996.

1.6 Methodology

The approach and methodology of the study are desk-top based, and consist of three methodologies, namely, a comparative approach, a constitutional approach and a critical approach.

Due to the nature of the study and the implications of the comparative and constitutional approaches, the author believes that a critical approach is necessary to evaluate the legal position found in the Canadian law against the South African Constitution.

In essence a comparative, critical study was done based on constitutional values. However, each of the elements (or methodologies) were used to

analyse the subject matter in order to draw inferences and make recommendations where necessary.

The comparative approach will encompass an analogy between the South African law and Canadian law to determine compatibility, possible reform and the extent and impact thereof. The Canadian law was selected for the following reasons:-

- (a) The similarities between the constitutions of South Africa and Canada are considerable. Seeing as a bill of rights or a constitution is usually informed by an objective normative value system which manifests as the *boni mores* in a community⁸ and therefore indicates that the communities have similar beliefs and values. This is an indication that the legislative principles of the one community would be easily adopted by the other community.
- (b) The author researched the burial of foetuses and found the ideal position within the Canadian law in that Part 7 of the Cemeteries Act⁹ states in section 65(1) that the Minister may make regulations pertaining to various aspects, including respecting the disposal of foetuses and the bodies of newborn infants.¹⁰ Following this section Regulation 8¹¹ was enacted stating:

In the case of the death of a foetus, the remains need not be disposed of as required by section 5 and 6 of the Act, but

- (i) the manner of disposition is subject to the parents' or guardians' request,
- (ii) the manner of disposition must not cause public offence; and
- (iii) where the foetus completed 20 weeks' gestation or weighed 500 grams or more, a burial permit must be obtained prior to any disposition of the remains.

The constitutional approach is paramount to any discussion of South African law because of the fact that the South African Constitution is the supreme law

⁸ Ellman *Now Without Hesitation* at www.nowwithouthesitation.blogspot.com/2009/06/where-does-objective-normative-value.html visited on 8 November 2013.

⁹ Consolidated Statutes of Alberta RSA 2000 cC-3.

¹⁰ S. 65(1)(oo) states that the regulations may pertain to: 'respecting the disposal of foetuses and the bodies of newborn infants who have died, subject in each case to the parents' or guardians' request, and defining newborn infant for the purposes of the regulations.'

¹¹ Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

of South Africa and any conduct or legislative provision inconsistent therewith is invalid.¹²

The use of the critical approach can be justified by the need for continuous legal reform to complement the breakthroughs within the medical field pertaining to viability and survival of foetuses. By critically evaluating the current legal position, it can be ensured that the law does not stagnate.

1.7 Definition of basic concepts

In this thesis certain basic concepts will be used in order to clarify terms that may have different meanings and therefore the following terms can be defined as follows:

Term	Definition
Burial	<i>Burial</i> in this thesis means the burial of a corpse in the ground of a person, which is said to include an adult, a child, a baby and a stillborn baby. ¹³
Foetus	<i>Foetus</i> in this thesis will refer to an unborn child whilst <i>in utero</i> for the nine months before birth or death <i>in utero</i> or <i>ex utero</i> . ¹⁴
Medical Waste	<i>Medical waste</i> will be defined as any healthcare waste to be disposed of by way of incineration. ¹⁵
Stillborn	<i>Stillborn</i> in this thesis will be defined as a foetus that had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth. ¹⁶

¹² S. 2 of the South African Constitution.

¹³ Derived from s. 1 of the Registration of Births and Deaths Act, 51 of 1992 – being the section containing the definitions of terms used in the Act.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ This definition is derived from the Registration of Births, Deaths and Marriages Act 51 of 1992 for the purpose of consistency. In Ch. 2 the discontent with the definition will be discussed by providing

Viability	<i>Viability</i> in this thesis will refer to 26 weeks <i>in utero</i> existence as derived from section 1 of Act 51 of 1992. ¹⁷
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1.8 Importance of the South African Constitution within this thesis – an overview of the applicability, constitutional values and fundamental rights

1.8.1 Constitutional Provisions

The main sections pertaining to the supremacy and impact of the South African Constitution¹⁸ are section 2, 7 and 8.

Section 2 of the South African Constitution stipulates that the South African Constitution is the supreme law of this country and in the event that any legal prescript or conduct by any person is not in line with the provisions of the South African Constitution, said prescript or action is invalid. It further states that any obligations within the South African Constitution must be fulfilled. It should be noted that the Legislature did not indicate that the obligations should be fulfilled; it clearly stated that obligations must be fulfilled. This is a further indicator of the Supremacy of the South African Constitution.¹⁹

Section 7 and 8 of the South African Constitution²⁰ provides for the Bill of Rights and the application thereof. It is said that the Bill of Rights is the

constitutional imperatives and the opinions of academics as well as other sources to highlight the inadequacies of this definition.

¹⁷ This definition is not correct in the opinion of the author, but the reasoning thereof will be discussed in Ch. 2 by providing constitutional imperatives and the opinions of academics as well as other sources to highlight the inadequacies of this definition.

¹⁸ Chs. 1 and 2 of the South African Constitution.

¹⁹ S. 2 of the South African Constitution provides as follow:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

²⁰ Ch. 2 of the South African Constitution – the Bill of Rights. In ss. 7 and 8 it is stated that:

7. Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of **human dignity, equality** and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights...

cornerstone of democracy in South Africa and is mainly based on the rights of human dignity, equality and freedom. In the current study two of these cornerstone-rights become applicable, being the right to human dignity and the right to equality. Although it is stated that the State must respect these rights, it should be noted that in the private law sphere there have been cases where one person infringed another person's Constitutional Rights and damages were subsequently claimed.

The main application of this section for purposes of this study relates to the powers of the Legislature in promulgating legislative provisions that may be in contradiction with the rights of a certain class of persons within the Republic of South Africa.

This is where the Bill of Rights comes in. It binds *inter alia* the Legislature to respect, protect, promote and fulfil the rights encapsulated in the Bill of Rights of which the main right concerning this study is the right to human dignity. Of almost equal importance would be the possible application of section 12(2)(b) of the South African Constitution, relating directly to the right to make decisions concerning one's body, body parts and reproduction. The possible application in this instance relates to the possible right of the mother of the foetus to decide what happens to the foetus, like one would be able to exercise rights relating to the removal and disposal of any part of the human body.

1.8.2 South African case law

In *Affordable Medicines Trust v Minister of Health*²¹ it was noted that all public power, including the powers of the Legislature to promulgate

8. Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

... [own emphasis added]

²¹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at pars. 48 and 49.

legislation is subject to constitutional control. This means that any legislative provisions that are not in line with the South African Constitution are invalid. This case further strengthens the view that the South African Constitution is the supreme law of this country.²²

In *Democratic Alliance v President of the Republic of South Africa*²³ it was noted that ‘every citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation’. This provides for every person to question legislation and legal positions and to enable the Legislature to make informed decisions regarding the laws of the Republic.

1.8.3 Implication of the supremacy and applicability of the South African Constitution

The provisions in section 2²⁴ provides that in an instance where any legislative provision in South Africa pertaining to any subject is found to be in contradiction with any provision of the South African Constitution, such legislation or related instrument will be invalid and therefore not enforceable.

²² In *Affordable Medicines Trust v Minister of Health (supra)* it was noted that:

Our constitutional democracy is founded on, among other values, the ‘(s)upremacy of the Constitution and the rule of law.’ The very next provision of the Constitution declares that the ‘Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.’ And to give effect to the supremacy of the Constitution, courts must ‘declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency.’ This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.

The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’ In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

²³ *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) at par. 57.

²⁴ S. 2 of the South African Constitution providing that the Constitution is the supreme law of the Republic of South Africa and any legislation or conduct that is inconsistent with the provisions thereof is invalid.

The content of section 7²⁵ read together with section 8, places a direct obligation on the state, and specifically the legislature to respect, protect, promote and fulfil the rights in the Bill of Rights.

Therefore the provisions relating to the supremacy of the South African Constitution and consistency thereof to legislation can be applied to the legal instruments governing the disposal of foetal remains. This means that the legal position pertaining to the disposal of foetal remains must be in line with the South African Constitution.²⁶

Section 7 and 8 of the South African Constitution places an obligation on the Legislature to remedy instances where legislation does not comply with the provisions of the South African Constitution in general or infringes upon the rights encapsulated in the Bill of Rights.²⁷

The author is of the opinion that this study will conclude that the current legal position is not in line with the provisions of the South African Constitution and therefore the Legislature will be obliged in terms of the provisions of section 2 read together with section 7 and 8 to ensure that the specific legislation is brought into compliance with the provisions of the South African Constitution as it specifically relates to the disposal of foetal remains in South Africa.

In the case of *Affordable Medicines Trust*²⁸ the court noted that there are certain constitutional controls under the new constitutional model that reinforces the supremacy of the South African Constitution, like legality which implies that for a sphere of government to exercise a power, the exercise of the specific power should adhere to the South African Constitution. This entails that the Legislature's power to enact legislation is

²⁵ S. 7 of the South African Constitution providing that the Bill of Rights contained in the Constitution encompasses several rights and forms the cornerstone of our democracy.

²⁶ S. 2 read together with ss. 7 and 8 of the South African Constitution.

²⁷ The Bill of Rights is found in Ch. 2 of the South African Constitution.

²⁸ 2006 (3) SA 247 (CC) at par. 49.

subject to the South African Constitution and should therefore adhere to the controls thereof.

This also applies to the instance where legislation was enacted but currently does not comply with the provisions of the South African Constitution in as far as the Bill of Rights is concerned.²⁹ This legislation found not to comply must be rectified by the Legislature in terms of the provisions found in section 2 read together with section 7 and 8 of the South African Constitution. This is the 'tool' that rectifies injustices caused by legislative provisions not complying with the South African Constitution and confirms the existence of constitutional controls.³⁰

In the *Democratic Alliance-case*³¹ it was correctly noted that each and every citizen of the Republic should be concerned about constitutionalism and therefore the South African Constitution indirectly places a duty on all citizens to ensure that exercise of power by all spheres of government conforms to the constitutional controls. Therefore should we, the citizens of South Africa identify legislation that is inconsistent with the South African Constitution, we have a constitutional duty towards ourselves to raise our voices and make our concerns known. This confirms that we have an obligation to see that the injustice is remedied to ensure that the South African legal instruments conform to the South African Constitution. This is in line with the meaning of the term *boni mores* which means that the specific instance is what the greater community agrees upon and therefore supports.

We cannot have a democratic Republic if the voice of the people is not heard and therefore the people are the ones who need to remind the State of their opinions and beliefs in order to ensure that the Legislature complies with the *boni mores* and therefore ensures, promotes and protects the right to human dignity of the community.

²⁹ Ch. 2 of the South African Constitution.

³⁰ 2006 (3) SA 247 (CC) at par. 49.

³¹ 2012 (1) SA 417 (SCA) at par. 57.

It should be noted from the discussions above, that the South African Constitution has a vast impact on enacted and draft legislation in that should it not comply with the provisions of the South African Constitution,³² it would be considered invalid and unenforceable and would require the Legislature to amend the legislation in order to comply. With this discussion and the discussions to follow, the thesis will aim to correlate the legal position pertaining to the burial of fetuses with the right to human dignity of the parents of the specific foetus entrenched within the South African Constitution.

1.9 Chapter overview

In the chapters to follow, the legislation that is currently in force in South Africa regarding the burial of fetuses, the right of the parent(s) to elect the outcome of a pregnancy in relation to termination, the correlation of the two legislations and the anomalies that these entail, will be discussed. Further to the above, the Canadian legal position will be discussed and the crime of concealment of birth evaluated. The author will conclude with the legality of burial of fetuses in South Africa, the infringement upon the right to human dignity of the parent(s) in regard to burial of fetuses, the Canadian legal position and the applicability of the crime of concealment of birth.

Chapter 2 can be regarded as the foundational chapter of this thesis in that it forms the basis of the discussion and communicates the problem statement to the reader in greater detail. At the outset the commencement of a foetus will be discussed, which is when a woman falls pregnant. The thesis refers to the commencement of a foetus in order to illuminate the current status of the foetus in terms of the South African law, being not a person, but not a thing – something in between.

³² The provisions found in s. 2 read together with ss. 7 and 8 of the South African Constitution.

The second part of Chapter 2 will focus on the development of a foetus to determine the specific point of development at certain gestational ages. Reference will be made regarding medical advances and the determination of viability as viability is an essential part of the legal acknowledgement of the foetus.

The definition of a person will be conversed in relation to legal personhood and its effects on the foetus. This is where the author's remark regarding 'not a person, not a thing – something in between' comes in.

Furthermore, the intrinsic value of the foetus will be discussed and the applicability thereof on the foetus will be explored. With this discussion the thesis will indicate that although the foetus is not considered a person with legal subjectivity, the foetus has an intrinsic worth that should be protected. This discussion will aid the current statements and will assist later when the thesis discusses the implications of the Registration of Births, Deaths and Marriages Act, the Choice on Termination of Pregnancy Act as well the crime of Concealment of Birth. The reason for the emphasis on intrinsic worth of the foetus is to indicate that it is worth something and therefore deserves legal protection, especially in instances where it meets with death. It further emphasises the statement that a foetus is not a thing; it is something between a thing and a person. This does not mean that the thesis wants to assign certain rights to the foetus or is alluding that it currently possesses certain rights; it will merely aid the discussion regarding the intrinsic worth of the foetus to the parent(s) thereof and the protection of **their** right to human dignity.

The last part of this Chapter will contain a discussion relating to a possible crime applicable to the current instance where the existence of foetuses meeting with death before 26 week's gestational age is not recorded. The crime referred to is the Crime of Concealment of Birth. In this part of the Chapter, the thesis will discuss in great detail, the crime of concealment of birth as it could have a legal bearing on the thesis's proposed legal position as adopted from the Canadian law in that in some instances a burial order is

not required, which may be considered to be a concealment of the birth. This crime will be discussed in relation to the proposed legal position adopted from Canadian law in that the disposition of a foetus of less than 20 weeks or 500g may have an impact on this crime as no burial order is required.

In order to indicate that the crime is still in force, mention will be made of the provisions of the New-Zealand Crimes Act, not to introduce a new legal system into this thesis, but merely to emphasise that this crime is not outdated and still applicable in other jurisdictions.

The biggest discussion regarding the crime of concealment of birth, relates to the viability of a foetus. This links with the discussion in chapter 2 regarding the viability of a foetus. The thesis will touch briefly on the legality of this crime based on its applicability in modern day life with all the medical advances due to the fact that the basis of this crime relies on viability which is not an exact science.

The thesis will further discuss the possibility of this crime being committed more in the instance of foetuses meeting with death before being 'viable' due to the stringent provisions relating to the burial of foetuses as weighed up against the right to human dignity of the parent(s) and the normal process of grief almost forcing parent(s) of a foetus to commit a form of this crime to afford the foetus a proper burial.

In turn this will link with the State's obligation to promote and protect the right to human dignity of the parent(s) of the foetus in regard to the burial of foetuses.

In **Chapter 3** the thesis will discuss the Canadian legal position pertaining to the burial of foetuses meeting with death and the specific discretion pertaining thereto. This chapter forms an integral part of this thesis as it is the basis for the comparative study between the two legal positions.

During the discussion in this chapter, the thesis will refer to the provisions found within the Canadian legislation, statements conferred in case law and academic journals. The thesis will utilize these elements to introduce the reader to the ideal legal position with regard to burial of foetuses in the interest of the protection of the right to human dignity of the parent(s) as well as the acknowledgement of the intrinsic value of the foetus without providing the foetus with rights.

In the Canadian law³³ it is stated in that in the instance that a foetus of less than 20 weeks or 500g meets with death, disposal may be done without a burial order, but must not create a public nuisance. If a foetus meets with death later than 20 weeks or with a weight of more than 500g, a burial order is required to bury the foetus.

This position fits in with the stance in South Africa regarding a foetus not being a person, not consisting of the right to life and the promotion of the choice regarding reproduction of women.

In **Chapter 4**, the thesis will discuss the movement and non-profit company called 'The Voice of the Unborn' and the impact of their operations on the thesis. The discussion will especially be centred around their recent court application searching for the same relief for foetuses meeting with death before 26 weeks' intra uterine existence.

In **Chapter 5** the facts established and inferences drawn will be discussed as a whole and conclusions will be drawn with regard to the hypothesis and aims of the thesis to reach a certain decision with regard to burial of foetuses. In order to make an informed decision regarding the ideal legal position all of the arguments for and against the hypotheses will be considered and analysed in order to make an informed decision. The thesis

³³ Part 7 of the Cemeteries Act Consolidated Statutes of Alberta RSA 2000 cC-3. Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

hereby aims to transform the current legal position with a position that is based on the discretion of the parents or guardians of the foetus and not based on an outdated measurement of viability.

This chapter will contain the final conclusions and inferences drawn and will provide the reader with the recommended legal position. This legal position is the position that the author submits as the fair and equitable legal position, which in the view of the author should be adopted as the legal position within South Africa.

The biggest anomaly which will be discussed relates to the grey area regarding fetuses currently under the South African law, where the foetus at 20 weeks gestational age is something of worth that cannot be terminated without medical reasons, therefore something more than a thing. Furthermore, the foetus before 26 weeks gestational age is not a person and therefore can only be classified as something in between. Not a thing, something with more intrinsic worth, but not close enough to be regarded a person.

The author is of the opinion that the above 6 weeks leaves a grey area in the law, an area that needs to be attended to, either by amending the Choice on Termination of Pregnancy Act 92 of 1996 or by amending the Registration of Births, Deaths and Marriages Act 51 of 1992. The more sensible alternative, of course is to mainly make use of the discretion of the parents to bury the foetus as encapsulated in the Canadian law and amending the Registration of Births, Deaths and Marriages Act 51 of 1992 to include burial order for all fetuses or fetuses from 20 weeks or 500 grams. Another option would be to amend the Registration of Births, Deaths and Marriages Act 51 of 1992 to include special certificates for fetuses meeting with death before 26 weeks gestational age, therefore not re-classifying stillborn babies, but rather including burial orders for fetuses.

Creating this class of 'fetuses meeting with death before 26 weeks gestational age' together with leaving the definition of a stillborn baby as is,

would create a sense of acknowledgement of the intrinsic value of the foetus without affording it rights.

Another analogy can be drawn to explain the instance where something does not entirely comply with the definition thereof, but is so close it is important enough to be reported.

One such instance relates to the reporting of incidents in the workplace. Although this is far from the same as fetuses meeting with death and do not even relate to legal personhood, the author is of the opinion that this analogy will explain the need to report the death of a foetus and by implementing the intrinsic value of the foetus together with the right to human dignity of the parent(s) as encapsulated in the South African Constitution it would start to make sense that even the fetuses not fulfilling the requirements of a stillborn should be buried.

The analogy regards incidents in the workplace. In the Occupational Health and Safety law³⁴ regarding incidents, we have an instance where something happened, but also we have instances where something could have happened, being a near-miss. This would mean that an incident is where someone slipped and fell on a wet floor and a near-miss would be where someone slipped, but could regain their balance in order not to fall. Both are equally important and needs to be reported and prevented.

Therefore the incident needs to be reported to the Compensation Commissioner in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 in order to claim the benefits for the injured employee. This relates to the insurance side of the incident.

³⁴ This part specifically refers to the reporting of incidents in terms of the Occupational Health and Safety Act 85 of 1993 as amended and Regulations regarding incidents in the workplace. Read together with these provisions are the provisions found in the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

With regard to the Occupational Health and Safety Act 85 of 1993, section 24 determines that incidents must be recorded and reported. There is a specific form to complete. The importance of this discussion relates to the fact that whether someone got injured or not, the incident must still be reported in terms of section 24 in the prescribed manner. Therefore both incidents are equally important and needs to be reported in the same manner. Of course where there was an injury, more details are required than with a near-miss.

In this premise the author is of the opinion that one should be able to a 'near-miss birth' of some sort where foetuses not regarded as viable (stillborn babies)³⁵ can still be buried in the spirit of promotion of the right to human dignity of the parent(s) and the acknowledgement of the intrinsic value of the foetus.

In **Chapter 5**, the thesis will indicate that the discussions in the preceding chapters confirm that where parents or guardians are given the choice to bury the foetus or to have it disposed of by the hospital, most parents or guardians would make the choice to bury the foetus, affording it a proper burial service and also assisting the parents or guardians with the grieving process.

The position found in the Canadian law does not at any instance afford the foetus any rights, it only provides the parent(s) with the discretion to bury the foetus or to have it disposed of by the State.

This means that there is no limitation on any rights of any person and that although burial of foetuses less than 20 weeks do not require a burial permit, the law can be adapted to only providing the discretion and maintaining the other provisions with regard to burial orders and burial requirements.

³⁵ Stillborn babies are defined in s. 1 of the Registration of Births, Deaths and Marriages Act 51 of 1992 as a foetus that had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth.

The author will therefore propose that the position as found in the Canadian law should be applied in South Africa by way of amendment to the Registration of Births and Deaths Act³⁶ through the application of section 39(1)(b) of the South African Constitution.³⁷

Therefore, the author will propose that the legislature amend the provisions relating to the burial of foetuses to include the discretion of the parent(s) of the foetus and together with this provision, that all burials regardless of the age of the foetus requires a burial order as it would bring too much uncertainty in the instance that a burial order is required in some instances and not in others.

The author eagerly awaits the outcome of the recent court application of the movement called the 'Voice of the Unborn' and the impact thereof on the author's research and thesis. But even more so, to see if justice in fact will prevail or if the current injustice will continue without an amendment of the current legal status by the Courts and/or the Legislature. Let us hope that justice will prevail and that the intrinsic value of foetuses will be acknowledged to the extent that the parents will be afforded the right to bury such foetuses.

³⁶ Act 51 of 1992.

³⁷ S. 39(1)(c) of the South African Constitution, enables the use of foreign law when interpreting the Bill of Rights, e.g. s. 9. The right to equality should be interpreted as the right to equality before the law of all parents or guardians who lose foetuses, some at an earlier stage than others. Therefore by interpreting s. 9 to afford all parents or guardians the right to bury the foetus, s. 39(1)(c) allows for the consideration of foreign law. In light hereof the Canadian law position can be used to interpret s. 9 of the Constitution in a way that promotes the equality of persons and therefore being able to bury the foetus, regardless of the age of the foetus.

CHAPTER 2: PERSPECTIVES RELATING TO PREGNANCY, THE STATUS OF THE FOETUS AND THE BURIAL OF FOETUSES IN SOUTH AFRICA WITH CRITIQUE

2.1 INTRODUCTION

The discussion in this chapter pertains to the commencement of the existence of the foetus, namely pregnancy and accordingly the different stages of pregnancy will be analysed. The discussion of the stages of pregnancy and the development of the foetus is important in order to establish the point of development at certain gestational ages seeing as most legal principles in law are preoccupied with a certain gestational age. The most prominent in this is the stage at which a foetus can be classified as a stillborn in terms of the Registration of Births and Deaths Act³⁸. Furthermore the Choice on Termination of Pregnancy Act³⁹ refers to certain gestational ages.

The provisions of these two statutes render the determination of the limit of viability invaluable due to the fact that the limit of viability seems to shift between the two statutes leaving anomalies in the South African Law and causing legal uncertainty regarding the intrinsic worth of the foetus which impacts upon the right to human dignity of the parent(s) of the foetus.

Subsequent to the discussion regarding the development of the foetus in relation to the viability of a foetus at certain gestational ages, the author will assess the approaches to pregnancy under the law. The approaches to pregnancy will be discussed by differentiating between the single entities approach, the separate entities approach and the not-one-but-not-two approach. This will provide a better understanding of the manner in which the South African Law views the foetus and furthermore will aid the discussion of

³⁸ Act 51 of 1992.

³⁹ Act 92 of 1996.

legal personhood of the foetus and the status of the foetus under South African Law.

The next topic of discussion will relate to legal personhood in South Africa with specific reference to the commencement of legal personhood and how it interlinks with the development of the foetus and the limit of viability in South Africa.

Subsequent to the discussion of the commencement of legal personhood a discussion of the Choice on Termination of Pregnancy Act 92 of 1996 will follow to illuminate when a pregnancy may be terminated and the reasons for the termination. Following the discussion regarding terminations of pregnancy, the thesis will discuss the main legislative principle around which the entire discussion in this thesis revolves, namely the burial of foetuses in terms of the Registration of Births, Deaths and Marriages Act.⁴⁰

The Chapter will conclude with clarification of the current legal position in South African law which will in turn link with the discussion in the next chapter relating to the legal position in Canada which is the preferred position regarding burial of foetuses.

2.2 DEVELOPMENT OF THE FOETUS AND APPROACHES TO PREGNANCY UNDER THE LAW

2.2.1 Development of the foetus to aid in the discussion of the viability of a foetus

Before commencing with the discussion regarding the burial of foetuses, one should at least take note of the medical classification of a foetus with regards to the development thereof in order to comprehend the commencement of the

⁴⁰ Act 51 of 1992.

foetus before discussing the death thereof. The discussions will be limited to the weekly development of the foetus.⁴¹

The reason for the above is that the thesis is merely endeavouring to comprehend the determination of the viability of a foetus in relation to the criteria applicable to the determination of the viability of a particular foetus, or to classify the specific foetus as non-viable. As the author understands the literature, the development of a foetus is not a static process that can be used to indicate when exactly a certain development takes place. Factors impacting on the life of the mother of the foetus can have a distinctive influence at the stage of development of the foetus. This means that due to outside factors a certain foetus can be developed up to week 26 when it is only within 24 weeks of gestational age. The reverse is also true, a foetus can be 30 weeks, but developmentally it could have developed only to 24 weeks.

This can also be seen where children are alive. Not all children develop in the same manner or at the same tempo. This is the beauty of life and should not be tainted by limits of development and limits of viability. In the following paragraphs, the development of a foetus in weekly intervals will be discussed, but also in relation to the viability thereof. This means that firstly we will look at the development of the foetus in light of the viability thereof and only thereafter will the weekly development of the foetus be illuminated.

As stated previously, this is not to provide limits that a foetus must have developed this sense or that limb by a certain week, it is merely an indication of how foetuses in most instances grow over the 39-week period that most women are pregnant. The key to assessing the viability of a foetus, which will be discussed in more detail below, lies in the fact that one should be able to

⁴¹ The main reason behind the decision was the immense technicality of certain resources pertaining to the development of a foetus, coupled with the legal rather than medical background of the author. A legal mind with legal training trying to decipher medical terminology may only taint the position regarding the medical development of the foetus rather than explaining it to the reader. Therefore a simpler explanation of the development of the foetus was utilised in order to explain the development of the foetus in layman's terms.

compare the different stages of pregnancy in order to evaluate if the limit is reasonable.

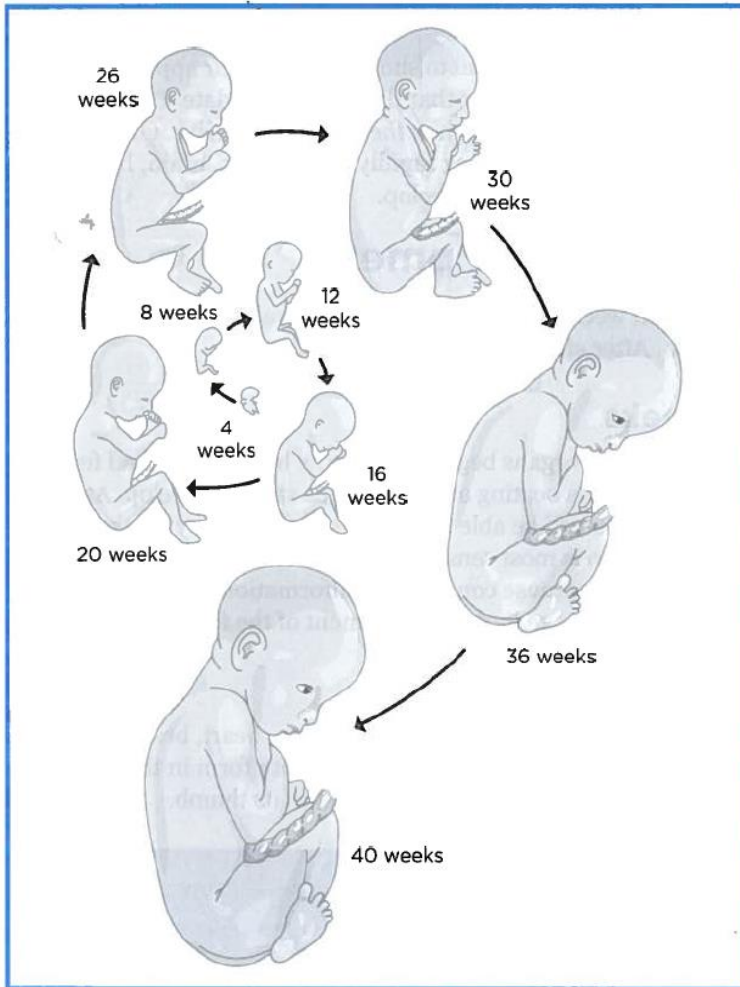
Should it be found that the limit of viability is not fair, the author would have to justify the decision that the limit is unfair and therefore the development of the foetus would be required to aid in this discussion. In order to ascertain the viability of a foetus, Bourquin at the outset distinguishes between a foetus and an embryo in indicating that the first eight weeks subsequent to the conception, the developing baby will be known as an embryo and thereafter it will be known as a foetus.⁴² Therefore the first eight weeks of pregnancy can be referred to as the embryonic stage and the subsequent period until birth can be referred to as the foetal stage.⁴³

The stages of development can be best described by way of an illustration of the growth of the embryo/foetus throughout the development process to birth. The image below indicates the growth of the embryo/foetus progressively.⁴⁴

⁴² Bourquin *The very practical pregnancy handbook* (2010) Ch. 5.

⁴³ This differentiation is not of utter importance, but aids the discussion and comprehension of the literature relating to the development of the foetus/embryo. For purposes of this study the author will continue to refer to the term foetus, keeping in mind that the gestational age of the foetus includes the embryonic period as well as the foetal period.

⁴⁴ Bourquin *The very practical pregnancy handbook* (2010) Ch. 5



Stages of development in the womb

From the above illustration one can note that during the embryonic stage the embryo does not possess the features of a child, but as time progresses and the foetus develops, the features of a child becomes eminent. As soon as 12 weeks, the foetus starts to take the form of the child and thereafter more and more so. This does not mean that the author is arguing that a foetus can survive at 12 weeks gestational age, but is merely commenting on the visual aspect found in the illustration.

The discussion of the developmental stages of foetal development will take the form of periods in which development is discussed and which also correlates with the weeks indicated in the above illustration. The illustration therefore serves as a guide to the developmental stages of the foetus.

The first period under discussion is the first 12 weeks of pregnancy, where the embryo's/foetus' 'gut and organs begin to form, the brain, limbs and features appear, the heart starts beating and eyelids start to develop.'⁴⁵ It is also stated that at the end of this period that the sex of the baby can be determined.⁴⁶ During this stage the embryo develops in the embryonic stage and passes through to the foetal stage and is thereafter known as a foetus. For clarification purposes, only the term foetus is used in this thesis providing for the period from conception to birth, therefore at any gestational age.

The second stage of pregnancy under discussion is week 12 to 16 where the baby's organs are formed, the eyes, heart, ears, brain, external genitalia, arms and legs are developing.⁴⁷ It is also stated that tiny teeth are formed in the gums and the foetus is said to be able to smile and suck its thumb. This is a clear indication that the foetus is taking on the form of a child.

The third period under discussion is the period between weeks 16 and 20 where the foetus will weigh around 250 to 300 grams. At this stage the fingers and toes develop and the eyebrows start to grow. At this stage in the pregnancy movement can be felt, which is also referred to as quickening.⁴⁸

The fourth stage of pregnancy that is of certain importance is the period between week 20 and 24, where the baby weighs around 600 grams and the eyes can open and close, the nervous system start to develop. It is also noted that the baby can hear and hiccough.⁴⁹

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* This stage of pregnancy is becoming important due to the fact that from this point the Choice on Termination of Pregnancy Act 92 of 1996 only applies in instances where there are medical reasons to terminate the foetus and no longer may it be done for social and economic reasons. Furthermore the weight of the foetus at this stage is more than the 500 gram threshold set by the provisions of the Canadian Law relating to the burial of foetuses with specific reference to the requirement of a burial order. This will be discussed in great detail later on in this chapter and in Ch. 5 of this thesis where the evaluation, analysis and conclusions will be done and inferences drawn. The

In the period between 24 and 28 weeks, the baby weighs around 1100 grams, the lungs start to function and the taste buds are forming. The biggest consideration for the limit of viability at 26 weeks gestational age can be found in this discussion as this is the stage in development where the lungs start to function. Therefore the reasoning behind the limit of viability relates to breathing. With under-developed lungs it would be hard for the foetus to breathe after birth.

The author agrees that this stage of the pregnancy is vital for viability, but on the other hand advances in medical technology has advanced to a point where even foetuses of 20 weeks have been saved and placed in incubators to further develop. Therefore, the author is of the opinion that 26 weeks is a good indicator of foetal viability, but should not be seen as the alfa and the omega with regard to viability. The law should progressively develop with medical and other sciences in order to stay relevant and not stagnate.

Subsequent to the limit of viability of the foetus, it is stated that at 27 to 32 weeks of pregnancy, the eyebrows and eyelashes are present, the lungs are maturing and the baby weighs around 1800 grams.⁵⁰ In the period between 32 and 40 weeks the development is completed and the baby weighs between 2200 and 3200 grams.⁵¹

In essence the development of a foetus can be summarized as follow:

WEEK	DEVELOPMENT/OTHER INFORMATION
Week 01 – 12	<ol style="list-style-type: none"> 1. Gut and organs begin to form 2. Brain, limbs and features appear 3. Heart starts beating 4. Eyelids start to develop

ideal position for the author and which is encapsulated in the Canadian Law relates directly to this stage of pregnancy.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

WEEK	DEVELOPMENT/OTHER INFORMATION
Week 12 – 16	<ol style="list-style-type: none"> 1. Organs are now formed 2. The eyes, ears, heart, brain, external genitalia, arms and legs start to develop 3. Tiny teeth form in the gums
Week 16 – 20	<ol style="list-style-type: none"> 1. Fingers and toes develop and eyebrows begin to grow 2. Kidneys are developing 3. The heart and brain is developed
Week 20 – 24	<ol style="list-style-type: none"> 1. The eyes can open and close 2. The muscular and nervous systems start developing
Week 24 – 28	<ol style="list-style-type: none"> 1. Lungs are functioning and the taste buds develop
Week 28 – 32	<ol style="list-style-type: none"> 1. Eyebrows and eyelashes are present
Week 32 – 40	<ol style="list-style-type: none"> 1. Development is completed and the baby prepares for the birth

From the above it can be stated that the reasoning behind the simple discussion concerning the development of a foetus was to understand the determination of the viability of a foetus in relation to the criteria required to determine the viability of a foetus. The author indicated that the biggest consideration for the limit of viability at 26 weeks gestational age can be found in the fact that at 26 weeks gestational age, the lungs start to function. Therefore the reasoning behind the limit of viability relates to the test of breathing. With under-developed lungs it would be hard for the foetus to breathe after birth.

The author agrees that this stage of the pregnancy is vital for viability, but on the other hand advances in medical technology have advanced to a point where even foetuses of 20 weeks have been saved and placed in incubators to further develop and there have been cases where the foetuses survived and the children have grown up normal. Therefore the author is of the opinion that 26 weeks is a good indicator of foetal viability, but should not be seen as the be all and end all with regard to viability. It can be concluded that the

foetus develops up to approximately 38 weeks of pregnancy, but that the foetus takes the form of a child from as early as 20 weeks.⁵²

Therefore it is stated that as early as 20 weeks the foetus takes the shape and form of a child and in the last 18 weeks of development the senses and features are finalizing development. When taking into account the rapid advances within the medical field, the author feels that the determination of viability should be determined, dependent upon these advances.

This would entail that the determination of viability cannot be static and applied for years and years as it would mean that the determination of viability would be ever-changing. The challenge that this entails is that it would lead to ambiguity regarding the determination of viability and therefore cannot be. To have a certain legal position that is not favourable is better than having an uncertain legal position that is ever-changing but fair.

The above demonstrates the complexity of this doctrine and in the following paragraphs, the author will explore this with reference to the determination of viability worldwide, the South African position as well as any challenges posed and solutions portrayed. Firstly the author will explore the different approaches to pregnancy under the law, whereafter the legal status of the unborn will be discussed.

2.2.2 Approaches to pregnancy under the law: the single entity, separate entity and the not-one-but-not-two approach

⁵² See the discussions regarding the development of a foetus above, where the weekly development is set out. It is said that between the between month 5 and 6 of pregnancy the foetus is practicing to breathe, it can grasp the umbilical cord and moves around more. In the last three months of pregnancy the eyeteeth are present the foetus can open and close its eyes. Four of the foetus' five senses being vision, hearing, tasting and touch are developed and the foetus can experience the moods of the mother. Extracted from National Right to Life *Fetal development – from conception to birth* <http://www.nrlc.org/abortion/facts/fetaldevelopmentmt.html> visited 22 January 2013.

Before commencing the discussion, it is necessary for the reader to acquaint themselves with the different approaches to pregnancy under the Law. Firstly there is the single entity approach where the mother and the foetus are viewed as ONE. Thereafter the separate entities approach views the mother and the foetus as TWO. Both of these approaches pose serious challenges with regard to legal implications and therefore it is submitted that the ideal position will become evident from the discussions below. This approach is called the not-one-but-not-two approach. This approach is focussed on the unique togetherness of the mother and foetus, rendering them not ONE, but also not TWO.

Currently under the South African Law, the single entity approach is followed with regard to the pregnancy, which views the pregnant woman and the foetus as ONE entity, which in turn renders the unborn a non-entity under the law.⁵³ Pickles states that the unborn is currently viewed as an entity under the law that requires its protection either as a legal person or as a subcategory of legal subjects.⁵⁴

The author will further continue with the single entities approach, subsequently discuss the separate entities approach and lastly the not-one-but-not-two approach which is according to the author the ideal position to describe the unique togetherness of the foetus and the pregnant woman.

2.2.2.1 The single entity approach to pregnancy

The single entity approach to pregnancy relates to a situation where the pregnant woman and the foetus are viewed as ONE entity and therefore the foetus is almost viewed as part of the woman's body like an organ or

⁵³ Pickles 2014 at p. 21. Rendering a foetus a non-entity under the law practically states that the foetus is of no intrinsic value whilst in the uterus of the mother. This is in contradiction with the belief of the greater community that a foetus has intrinsic worth. Further, by not acknowledging the intrinsic worth of the foetus, the right to human dignity of the mother is infringed as she may view the foetus as of utmost importance in her life.

⁵⁴ *Ibid.*

human tissue. This approach is the current approach in South Africa and is clearly embodied in the abortion legislation, which is encapsulated in the Choice on Termination of Pregnancy Act⁵⁵ which affords a pregnant woman the choice to terminate her pregnancy when certain criteria is met.⁵⁶

The reason for viewing the foetus as almost a part of the woman is to prevent a situation where the foetus and the pregnant woman have human rights. In this premise there would be conflicting rights and rights-infringements applicable to both the pregnant woman and the foetus in the instance that the pregnant woman decides to terminate the pregnancy in line with the provisions of the Choice on Termination of Pregnancy Act.⁵⁷

Therefore if the foetus and the pregnant woman is one entity, there will be no conflicting rights, especially in instances where pregnant women decide to terminate the pregnancy in line with the provisions of the Choice on Termination of Pregnancy Act.

The reason for viewing the foetus as a probable part of the pregnant woman is also found in the common law born-alive rule as well as the unclear definition of a child in the Constitution.⁵⁸ In the absence of section 28(3) of the Constitution defining the starting point for a child, the common law should be relied on and therefore the born-alive rule applies.⁵⁹

Apart from the rights-discussion, the application of the single entity approach is also found in the South African criminal law. This application takes place in the instance where a pregnant woman is assaulted and the

⁵⁵ Act 92 of 1996.

⁵⁶ The Choice on Termination of Pregnancy Act 92 of 1996 will be discussed in greater detail later in this Chapter and the section contained therein will be discussed and critiqued.

⁵⁷ Act 92 of 1996.

⁵⁸ The born-alive rule will be discussed in the part of this chapter relating to the legal status of the unborn.

⁵⁹ S. 28(3) of the Constitution only provides that a child is a person under the age of 18 years.

foetus does not survive the attack, or in the instance where there is third party violence against a foetus.⁶⁰

2.2.2.2 The separate entity approach to pregnancy

When taking a natural law approach to pregnancy, one starts to view a pregnancy as more than just a pregnant woman carrying a foetus. The differentiation and distinct uniqueness of the foetus comes to the fore and taking medical technology and science into account, it becomes clear that the foetus should be protected under law as one comes to think of a pregnant woman and a foetus as TWO entities and you do not view the foetus as another body part of a woman, but as an intrinsically valuable human being.

Although there have been favourable consideration of this approach, the author rejects this approach as a foetus cannot function separately from the body of the pregnant woman. Furthermore the approach poses several challenges as a separate entities approach would afford the foetus certain constitutional rights that would impact on and possibly limit the rights of pregnant woman. As an example if we acknowledged the foetus as a separate entity it would have legal personhood and therefore would be entitled to the right to life. If the foetus is afforded the same rights as the pregnant woman then this would lead to a conflict between rights when the pregnant woman decides to terminate the pregnancy or in an instance where the pregnant woman does something that could harm the foetus.

⁶⁰ This discussion does not relate in any manner to the Choice on Termination of Pregnancy Act 92 of 1996 as long as the provisions of this Act is followed in regard to terminations. This situation refers to a third person wanting to do harm to the pregnant woman and the foetus dies or wants to kill the foetus and by doing so assaults the pregnant woman. In this premise the pregnant woman did not elect to have the pregnancy terminated, a third person violently killed the foetus whilst it was still *in utero*. The discussion regarding third party violence against a foetus will be discussed later in this Chapter.

The author rejects affording the foetus constitutional rights as it would limit the rights of the pregnant woman and the author suggests that the foetus' intrinsic value should be acknowledged and the right to human dignity of the pregnant woman should be promoted with regard to the foetus. Due to this, the author is rejecting both the single-entities approach and the separate entities approach and is of the opinion that the not-one-but-not-two approach should be followed. This approach will be discussed in more detail in the paragraphs to follow.

2.2.2.3 The not-one-but-not-two approach

Whilst rejecting both the single entities approach and the separate entities approach, a midway had to be found to emphasise the intrinsic value of the foetus⁶¹ and still maintaining the constitutional rights of the pregnant woman. The ideal midway would be to find a hybrid position where the foetus and the pregnant woman are not a single entity, but also not separate entities. It entails the acknowledgement of the unique togetherness of the pregnant woman and the foetus and promotes both the intrinsic value of the foetus and the right to human dignity of the pregnant woman.

Seymour states that the not-one-but-not-two approach is a flexible midway to the single-entity and separate entity approach affording the pregnant woman her constitutional rights, whilst acknowledging the intrinsic value of prenatal life.⁶² This view is also described as a female view and MacKinnon provides us with a description of this approach:

More than a body part but less than a person, where it is, is largely what it is. From the standpoint of pregnant women, it is both me and not me. It 'is' the pregnant woman, in the sense that it is in her and of her and is hers

⁶¹ The South African Constitution states in s. 10 that 'everyone has inherent dignity and the right to have their dignity respected and protected.' Furthermore in s. 1 of the South African Constitution it is stated that the Constitution is found on the values of *inter alia* human dignity. Seeing as dignity is an inherent or intrinsic value that every person possesses, one can deduce that the intrinsic value of a person relates to human dignity and self-worth.

⁶² Seymour *Childbirth and the law (2000)* at p. 199 – 200.

more than anyone's. It is 'not her' in the sense that she is not all that is there. In a legal system that views the individual as a unitary self, and that self is a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her f[o]etus with her.⁶³

This approach embodies the following elements:

- (a) united needs;
- (b) interconnectedness;
- (c) mutuality; and
- (d) reciprocity.⁶⁴

This means that this approach views the foetus as an entity with intrinsic value separate from the pregnant woman, but at the same time acknowledges the togetherness of the foetus and the pregnant woman. Therefore the approach acknowledges the interest of the foetus and indicates that the interests should be promoted in a way that acknowledges and does not limit woman's rights.⁶⁵

Seymour's threefold view entails the following and is supported by the author:

- (a) The approach acknowledges the value in the unborn, but denies the separateness of the foetus and the pregnant woman;
- (b) The approach further enables women's rights to be included and considered; and
- (c) The approach sets the scene for the protection of the unborn under the law when threatened by a third party, but it may produce a different outcome when the foetus' rights are threatened by the pregnant woman, especially in relation to termination of pregnancy.⁶⁶

Other than the approaches to pregnancy under the law, one should also focus on the current law relating to the commencement of personhood and

⁶³ MacKinnon 'Reflections on sex equality under law' 1991 *Yale LJ* 1316.

⁶⁴ Seymour (2000) at p. 190.

⁶⁵ *Id.* at p. 200.

⁶⁶ *Id.* at p. 201 – 202.

legal subjectivity. Having intrinsic value is a great start, but without legal subjectivity one cannot be classified as a person. In order to determine the extent of the legal subjectivity of the foetus, one needs to evaluate when personhood begins and other instances where foetuses consist of legal subjectivity.

2.3 THE CRIMINALITY OF THIRD PARTY VIOLENCE AGAINST A FOETUS

The criminality of third party violence against a foetus is regulated by the provisions of section 239(1) of the Criminal Procedure Act 51 of 1997. Application of this procedure is found in case law and will be discussed below.

2.3.1 Provisions of the Criminal Procedure Act⁶⁷

Section 239(1) of the Criminal Procedure Act⁶⁸ states that in the instance where an accused is charged with the killing of a newborn baby, it should be proved that the child breathed before being killed, otherwise the accused cannot be prosecuted for the death of the baby. It is further stated that in this premise it is not necessary for the child to be completely separated from the mother.

A link can therefore be made to the limit of viability at 26 weeks gestational age and the test to determine if a newborn baby was killed and therefore if the accused can be charged with murder or if it is merely assault on the pregnant woman. Without developed lungs, it would be less likely that the foetus breathed before being killed.

The author's stance towards this particular section and the application thereof in the discussed case law will follow at the end of this discussion.

⁶⁷ Act 51 of 1997.

⁶⁸ *Ibid.*

2.3.2 Impact of the decision in *S v Mshumpa*⁶⁹ on the South African legal position

The case of *Mshumpa*⁷⁰ deals with both the South African criminal law with regard to third party violence against a foetus as well as the court's constitutional duty⁷¹ to develop the common law. Further to the above development, the need may arise for statutory criminalization of third party foetal violence.⁷²

The facts of this case can be summarized as follow: Ms Shelver, who was 38 weeks pregnant with the daughter of Mr Best (Accused no 2) suffered two gunshot wounds to the abdomen, causing the foetus to be stillborn.⁷³ Although Accused no 1, Mr Mshumpa shot Ms Shelver, Mr Best was the conspirator instigating the shooting and therefore was also charged.⁷⁴

The applicable legal question in this instance relates to the ambit of the common law crime of murder. In the first instance the court needed to determine whether the conduct of the two accused persons fell within the ambit of murder and secondly, could the court develop the common law to include termination of prenatal life as a result of third party violence to be included in the definition of murder.⁷⁵

⁶⁹ *S v Mshumpa* 2008 (1) SACR 126 (E).

⁷⁰ *Ibid.*

⁷¹ See s. 39 of the South African Constitution regarding the constitutional duty of the courts to interpret the Bill of Rights and to ensure that law reform takes place.

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

⁷² Pickles *S v Mshumpa: a time for law reform* (LLM Thesis University of Pretoria) (2010) at p. 11.

⁷³ 2008 (1) SACR 126 (E) at par. 2 to 8.

⁷⁴ *Ibid.*

⁷⁵ *Id.* at par. 4.

Some of the arguments made by the state will be discussed in the following paragraphs to indicate the reasoning for petitioning the court to develop the common law crime of murder to include a foetus. Both accused had the intention to kill the foetus and indicated that they consider their actions to fall within the ambit of murder.⁷⁶

The state further argued that the born-alive principle or rule is outdated and that the common law should be developed to comply with the convictions of the community.⁷⁷ In order to strengthen the view of the state with regard to the born-alive rule, the state obtained medical evidence to indicate that the foetus was alive in the womb, and further that was it not for the shooting, the foetus would be born alive and able to survive.⁷⁸

The medical expert further provided oral evidence with regard to the pain experienced by the foetus during the shooting and indicated that it is a normal reaction when one experiences pain to breathe more in order to obtain more oxygen and deal with the pain being suffered. In this premise amniotic fluid was found in the foetus' lungs due to the fact that the foetus could not breathe air, but only the amniotic fluid and some of her own blood. Therefore the foetus was medically alive and breathing at the time of death although still *in utero*.⁷⁹

⁷⁶ *Id.* at par. 49.

⁷⁷ *Id.* at pars. 50 to 52.

⁷⁸ *Id.* at par. 48.

⁷⁹ *Ibid.* See also Pickles 2010 at p. 13 to 14. The Medical Expert provided the following with regard to the pain experienced by the foetus:

Her reaction to the pain inflicted upon her by the two bullet wounds that entered her body caused a reaction that would normally manifest only itself in normal birth, upon being expelled from the womb, by a baby inhaling air. When a living person is shot and experiences great blood loss one of the compensatory mechanisms of the body to cope with this crisis is accelerated breathing in an effort to obtain more oxygen. The same happened to the baby in Ms Shelver's stomach. In reaction to the pain caused by the bullets she tried to breathe, but obviously she was unable to breathe in oxygen. Instead, the evidence of her attempt at breathing was the fact that amniotic fluid and red blood cells were found in her lungs afterwards - it meant that in her distress caused by the pain of the bullet wounds she inhaled some of her own blood. In medical terms she was alive in the womb of her mother and died there as a result of the gunshot wounds to her body. Medically speaking, her life and death inside the womb did not differ in nature from life and death of a normal person living in the outside world, but only in the location where that life and death occurred.

The court's decision not to develop the common law to include the foetus in the definition of murder was largely based on the Constitutional Court's decision in *Msiya v Director of Public Prosecutions*.⁸⁰ In relation to the decision in *Msiya*⁸¹ the court in *Mshumpa*⁸² stated the following:

[D]evelopment of the common law of crimes must be done incrementally and cautiously in accordance with the dictates of the Constitution ... that the development should not have retrospective effect, dealing with the past, because that would offend the principle of legality, but that it is competent to effect the development prospectively, to operate only in future.⁸³

The court further noted that:

It is one thing to develop the common law in civil matters to eradicate patterns of unequal personal, social and economic domination on the ground that these patterns offend against the foundational values of the Constitution, but it is quite another thing to bring about this development in the face of the legality principle explicitly recognised as a fundamental right itself in s 35(3) (l) of the Constitution.⁸⁴

The court reiterated the contention in the South African law that courts have never held that an unborn child that was not born alive could be the bearer of any rights.⁸⁵

In giving effect to the convictions of the community the court stated that:

Failure to develop the law in order to include the killing of an unborn child as murder will not leave such an act unpunished and thus bring the law into disrepute. The act may still be punished as part of the offence committed against the mother, whether that may be murder, attempted murder or any other kind of assault upon the mother. The aggravation of the assault on the mother, in the form of harm to the foetus in her stomach, may suitably be taken into consideration at the sentencing stage.⁸⁶

⁸⁰ *Msiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC).

⁸¹ 2007 (5) SA 30 (CC).

⁸² 2008 (1) SACR 126 (E).

⁸³ *Id.* at par. 60.

⁸⁴ *Id.* at par. 55.

⁸⁵ *Id.* at par. 56. See also *Road Accident Fund v Mtati* 2005 (6) 215 SA (SCA).

⁸⁶ *Id.* at par. 58.

The court in its judgment decided against developing the common law to include the foetus in the definition of murder retrospectively and prospectively.⁸⁷ The court concluded its judgment by indicating:

I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the legislature is, as the major engine for law reform ... better suited to effect that radical kind of reform than the courts.⁸⁸

Therefore, the single entity approach to pregnancy under the South African law merely renders the foetus part of the pregnant woman's body equal to an appendix, liver, kidney, and other organs. The only difference is that the woman can survive without the foetus and therefore the foetus is equivalent to a parasite living off the body of the pregnant woman until such a time as it is ready to exist on its own. The approach has one positive side, not affording the foetus the right to life, protects the constitutional rights of the pregnant woman carrying the foetus. This basically means that a foetus is not distinct from the pregnant woman and in this premise does not need to be afforded protection, especially in relation to criminal law as it is protected as part of the pregnant woman. As with all legal principles there are certain exclusions or special circumstances where the foetus is afforded protection, especially in the private law sphere with regard to succession in terms of the *nasciturus* fiction.

As pointed out above, legal personality commences at birth, but there is a concept that favours the foetus or *nasciturus*, which is referred to as the *nasciturus* fiction. This fiction entails that should a benefit accrue to an unborn child or *nasciturus*, the rights of entitlement (usually in regards to succession) are kept in abeyance until such time as the *nasciturus* is born alive.⁸⁹

⁸⁷ *Id.* at par. 63.

⁸⁸ See *Msiya* 2007 (5) SA 30 (CC) at par. 33, where the Constitutional Court refers to *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) 2002 (1) SACR 79 (CC) (2001 (4) SA 938).

⁸⁹ Cronjè & Heaton (2008) *The South African Law of Persons* 3rd Edition at p. 11.

There are two requirements in order for the *nasciturus* to benefit from the fiction, namely:

- (a) The foetus must have been conceived at the time that the benefit accrued; and
- (b) The foetus must be born alive. Should the foetus not be born alive, it would be considered as if the foetus was never conceived, in regards to the benefit.⁹⁰

In *Ex Parte Boedel Steenkamp*⁹¹ the court confirmed the application of the *nasciturus* fiction in instances where the *nasciturus* is entitled to a benefit while *in utero* and is subsequently born alive. The Court in *Chisholm v East Rand Propriety Mines Ltd*⁹² held that in respect of a maintenance claim the child had a separate right of action against a person who killed his father, even whilst the child was at the time of death of the father still a foetus. In *Pinchin v SANTAM Insurance Co Ltd*⁹³ the court held that a child upon birth has a right of action against a person causing injury whilst the child was still a foetus.

This clearly shows that the foetus is viewed as part of the woman's body and not a distinct being before live birth and therefore is not afforded direct protection under the law. It is therefore very clear that in the South African Criminal Law, the single-entities approach with regard to the foetus is followed as the foetus is viewed as part of the pregnant woman.

2.4 LEGAL PERSONHOOD AND THE FOETUS

In order to fully comprehend the above approaches in light of the South African legal position the author will discuss legal personhood in light of the born alive rule in order to establish the status of the unborn under South African Law and the extent of legal personhood of them foetus.

⁹⁰ *Ibid.*

⁹¹ *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 (O).

⁹² *Chisholm v East Rand Propriety Mines Ltd* 1909 TH 297.

⁹³ *Pinchin v SANTAM Insurance Co Ltd* 1963 (2) SA 254 (W).

2.4.1 What is a Person?

When determining what constitutes personhood, one should commence the study with the definition of a person. The term 'person' is a complex term, especially with regard to law as it is defined as 'something that can have legal rights and duties'.⁹⁴ Therefore it can be deduced that a person is a human being that has certain legal rights and duties conferred upon him or her and it can be accepted that a person needs certain capabilities to exercise these rights and duties.

2.4.2 The beginning of legal personality

In order for a person to exercise these rights and duties, the personhood should have a commencement date otherwise the rights and duties cannot be fulfilled. With regard to a person it is stated that the legal personality commences at birth. In this premise it should be noted that a foetus therefore cannot be seen as a legal subject, but should rather be regarded as an integral part of the mother.⁹⁵ When being regarded an integral part of the pregnant woman during the time *in utero* the foetus can rely on the human rights of the pregnant woman against third parties. This gives the foetus a sense of security. With regard to legal personhood and in explaining the fact that a foetus does not consist of legal subjectivity, the requirements for legal personality can be listed as the following (born-alive rule):

- (a) The birth must be fully completed, that is, there must be a complete separation between the body of the mother and the *foetus*. For the birth to be completed it is not required that the umbilical cord be severed.
- (b) The child must live after the separation even if only for a short period. A stillborn *foetus* or a *foetus* which dies during birth does not acquire legal personality.⁹⁶

⁹⁴ du Bois (*et al*) (2007) *Wille's Principles of South African Law* 9th edition as referred to in Barratt (ed) (2012) *Law of Persons and the Family* at p. 7.

⁹⁵ Cronjè & Heaton (2008) *The South African Law of Persons* 3rd Edition at p. 7. See also *D* 25.4.1.1, 35.2.9.1

⁹⁶ *Ibid.* See also *D* 25.4.1.1, 35.2.9.1; C6.29.3; Voet 1.5.5; *D* 50.16.129.

2.4.3 Viability of a foetus in relation to the born-alive rule

2.4.3.1 Viability in relation to legal personhood

As stated above, the born-alive rule vests legal personality and therefore a foetus needs to be removed from the body of the pregnant woman and should breathe to be considered a person. In her research, Pillay indicated that the basis for the formulation of the born-alive rule related to proving viability and therefore the child needed to be separated and should have lived independently from the mother.⁹⁷

This means that there have been problems in the past in determining if a foetus will be viable and will eventually be born alive and therefore the born-alive rule was implemented. As mentioned previously it is better to have a rule in place that is not as favourable as a rule that creates legal uncertainty.

Pillay further argues that due to medical advances and technology, the evidentiary difficulties experienced with the determination of viability have nearly ceased to exist, seeing as the technology and advances places us within the foetal environment and thereby proves life even before birth.⁹⁸

When the author interprets the above statement of Pillay, it is clear that viability in this day and age is no longer a guessing game, but rather a scientific determination. It is common knowledge anything can happen in a pregnancy within a few days and the viable foetus could die, but we see

⁹⁷ Pillay *The Beginning of Human Personhood: Is South African Law Outdated?* (2010) 21 Stel LR 230. This was discussed above with regard to the development of the foetus and the 26-week viability rule where the lungs of the foetus only develops around 26 weeks and therefore a foetus can only be seen as viable if it has the capacity to be removed from the body of the pregnant woman and thereafter being able to breathe. Without any lung function it would be impossible for the foetus to take a breath.

⁹⁸ *Id.* at p. 230 – 232.

this even with healthy babies born and after a few days meet with death for unexplained reasons such as Sudden Infant Death Syndrome.⁹⁹

Medical technology have proved that there is life before a foetus is born, the only uncertainty which remains, relates to the legal recognition of the foetus.¹⁰⁰ The entire rights-debate relates to affording the foetus rights that may impact on the rights of the pregnant women carrying the foetus. The court stated that:

Section 12(2) provides that everyone has the right to make decisions concerning to reproduction and to security in and control over their body. Nowhere are a woman's rights in this respect qualified in terms of the Constitution in order to protect the foetus.¹⁰¹

This means that the rights of the pregnant woman cannot be limited for 9 months in order to afford the foetus certain rights. At best the author submits that by proving a foetus is viable, it contains a certain intrinsic worth that should be protected under law in the interests of the right to human dignity of the pregnant woman.

2.4.3.2 Foetal viability in South Africa

Cohen and Sayeed state that lately there has been a tendency to attach foetal viability to a certain number of weeks' gestational age.¹⁰² Meyerson indicates that section 2(1)(c) of the Choice on Termination of Pregnancy Act is justified by the constitutional value of human dignity and therefore a

⁹⁹ Payne-James et al *Simpson's Forensic Medicine* 13th Edition (2011) at p. 68 and 69. The authors explain that Sudden Infant Death Syndrome or more commonly known as SIDS occurs in 1 in 2000 births worldwide. SIDS has been defined as 'the sudden unexpected death of an infant <1 year of age, with onset sleep, that remains unexplained after a thorough investigation, including the performance of a complete autopsy and a review of the circumstances of death and the clinical history.' It is said that there is usually no explanation of the death, the infant is a perfectly well child who is put to bed at night only to be found dead the next morning.

¹⁰⁰ *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T) at 1120-1122.

¹⁰¹ *Ibid.*

¹⁰² Cohen & Sayeed *Fetal Pain, Abortion, Viability and the Constitution* (2011) 36 JLME 235 at p. 236.

foetus is viable when it reaches 20 weeks gestational age.¹⁰³ Sarkin-Hughes argued that due to the fact that a foetus is viable at 22 weeks gestational age due to viability that vests together with brain birth¹⁰⁴ and the determination of gestational age has a 2 week margin of error and therefore the 20 week gestational age was used to limit opted terminations.¹⁰⁵

There has been different opinions and references to gestational ages within the South African Law, but there is mainly two that stand out. The first is the 26 weeks gestational age, found within the Registration of Births and Deaths Act and the second is the 20 weeks gestational age found within the Choice on Termination of Pregnancy Act. These conflicting gestational ages will be discussed in greater detail later on when the Choice on Termination of Pregnancy Act is evaluated and analysed in line with the Registration of Births and Deaths Act.¹⁰⁶

2.5 STATUS OF A FOETUS UNDER SOUTH AFRICAN LAW

As stated in the preceding discussions the foetus is not a person under the law, but should be afforded protection due to its intrinsic value and the protection and promotion of the right to human dignity of the pregnant woman carrying the foetus. The author does not seek to afford rights to the foetus in this premise, but requires the law to acknowledge the unique togetherness of the pregnant woman and the foetus, especially in relation to the provisions of the Registration of Births and Deaths Act¹⁰⁷. In the next part, the burial of fetuses under South African Law will be discussed in order to establish the

¹⁰³ Meyerson *Abortion: The Constitutional Issues* (1999) 116 SALJ 50 at p. 57.

¹⁰⁴ Sarkin-Hughes *A perspective on Abortion Legislation in South Africa's Bill of Rights Era* (1993) 56 THRHR 83 at p. 87 to 89. Also see Powell et al *Decisions and Dilemmas Related to Resuscitation of Infants Born on the Verge of Viability* (2012) 12 NAINR 27 at p. 29 where it is stated that the determination of viability is dependent on the gestational age where all critical organs can sustain life.

¹⁰⁵ *Ibid.*

¹⁰⁶ Act 51 of 1992 and Act 90 of 1992 respectively.

¹⁰⁷ Act 51 of 1992.

reasoning for affording the foetus certain protection or rather to acknowledge the intrinsic value of the foetus.

2.6 BURIAL OF FOETUSES UNDER SOUTH AFRICAN LAW

As an introduction to this section the author would like to discuss the applicability of national legislation within the legal framework of the South African Law. This entails an understanding of the different types of law within the South African legal framework and the hierarchy of legal instruments. Once this is understood the discussion of the supremacy of the South African Constitution will make more sense and assist the reader in comprehending the hierarchy of legal instruments. As stated above the Constitution¹⁰⁸ is the supreme law of this country in terms of section 2.¹⁰⁹ Other legal instruments that are included within the South African legal framework are legislation, case law, journals, treaties and more.¹¹⁰

This entails that legislation and other legal instruments are valid and part of the legal system of South Africa,¹¹¹ subject to the consistency thereof with the Constitution.¹¹² Therefore it can be stated that as long as legislation is consistent with the provisions of the Constitution¹¹³, it applies within the South African Law, unless amended by the Legislature.

¹⁰⁸ The South African Constitution.

¹⁰⁹ Refer to the discussion on supremacy of the South African Constitution in Ch. 1 of this thesis.

¹¹⁰ Other sources, which feature below legislation and case law within the legal framework, include academic opinions, foreign law and international law. The application of international law and foreign law within the South African legal framework will be discussed in the next chapter as provided for within the South African Constitution.

¹¹¹ Although legislation can be enacted and decisions made in case law, the drafters of the South African Constitution incorporated an automatic review system, when it was stated that any legislative or other prescript that is inconsistent with the provisions of the South African Constitution is invalid and should be amended or discarded. This does not mean, however that a *lacuna* should be left within the law, there should always be legal certainty.

¹¹² S. 2 read together with ss. 7 and 8 of the South African Constitution.

¹¹³ S. 2 of the South African Constitution.

It follows that the existence of legislation is important to regulate certain areas of the Law and to prescribe certain legal positions. In these discussions the main legislation to be discussed is the Registration of Births and Deaths Act.¹¹⁴ The position with regards to the terms viability, stillborn and burial are described within this piece of national legislation and will be discussed in detail below. The discussions will be critical in nature in order to assess the consistency of the legislation with the provisions of the Constitution.¹¹⁵

2.6.1 Legislative prescripts

The legislative prescripts applicable to the current problem statement, as mentioned above, are found in the Registration of Births and Deaths Act.¹¹⁶

These provisions will be quoted below, in order to establish the current legal position within the South African legal framework, pertaining exclusively to legislation. Section 1 of this Act¹¹⁷ contains definitions of terms used within the Act¹¹⁸, which is fundamentally important when interpreting the provisions of this Act.¹¹⁹

In relation to the commencement of life, birth in relation to a child, means the birth of a child born alive.¹²⁰ As soon as a child is born, the birth needs to be registered with the authorities, in the case of South Africa, the Department of Home Affairs. This registration, in relation to a birth or a death, means the registration thereof mentioned in section 5.¹²¹ When a child is still-born, the

¹¹⁴ Act 51 of 1992.

¹¹⁵ S. 2 of the South African Constitution.

¹¹⁶ Act 51 of 1992.

¹¹⁷ The Registration of Births and Deaths Act, 51 of 1992.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* The importance of the definitions within s. 1, can be explained by way of a very simple analogy: when reading a map, the ledger should always be consulted to determine the meaning of signs and symbols on the map. The same principle applies to the interpretation of statutes, the definitions are used to interpret the different sections of the legislation.

¹²⁰ S. 1 of the Registration of Births and Deaths Act 51 of 1992.

¹²¹ *Ibid.*

definition of stillborn in relation to a child, means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth, and still-birth, in relation to a child, has a corresponding meaning.¹²²

Section 2 of this Act¹²³ contains the provisions regarding the application thereof and provides that:

The provisions of this Act shall apply to all South African citizens, whether in the Republic or outside the Republic, including persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.

As stated within the definitions quoted earlier, the birth of a child relates to the applicable provisions found in section 9(1) and 9(4), and states that any parent of the child or another person having charge of the child must register the birth within 7 days of the birth. With regard to children dying within days after the birth, it is provided that a birth will not be registered if the child died before the birth was registered.¹²⁴

Chapter III of this Act¹²⁵ relates to the registration of deaths. Section 18 deals with the registration of still-births in conjunction with the definition of still-birth. This section provides that a death certificate will be issued when a still-birth occurs.

Section 20 relates to the burial order that needs to be obtained in order to have permission to bury a dead body. This section provides in subsection (1) that: No burial shall take place unless notice of death or still-birth has been

¹²² *Ibid.*

¹²³ Act 51 of 1992.

¹²⁴ Ss. 9(1) and 9(4) of the Registration of Births and Deaths Act 51 of 1992 provides as follow:

- (1) In the case of any child born alive, any one of his parents or, if neither of his parents is able to do so, the person having charge of the child or a person requested to do so by the parents or the said person, shall within seven days after the birth give notice thereof in the prescribed manner to any person contemplated in section 4.
- (4) No registration of birth shall be done of a person who dies before notice of his birth has been given in terms of subsection (1).

¹²⁵ Refer to ss. 14 – 22 of the Registration of Births and Deaths Act 51 of 1992.

given to a person contemplated in section 4 and he has issued a burial order.

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These above provisions are applicable to the discussions around the problem statement and will be discussed in great detail in the section that will follow, in order to determine the extent and application thereof. It will also highlight the possible challenges that these provisions face practically.

2.6.2 Discussion of the current legal position in South Africa with regards to the viability of fetuses

The current legal position in South African in regard to viability of fetuses comes into force mostly when a foetus meets with death and therefore this instance is regulated by the Registration of Births and Deaths Act as these fetuses need to be disposed of and this Act provides for when and how bodies are disposed of.¹²⁷

The applicable definitions above emphasized that for a child to be born, it must be born alive. This means that birth certificates cannot be issued for any foetus that meets with death before it has survived independently from the mother. The applicable section stipulates that the baby should at least be alive by the time it is registered or it would have no purpose to register. Such stone cold words for the grief a family suffers.

¹²⁶ The notice of death relates to the death certificate and a person contemplated in s. 4 includes any duly authorised person, whether or not he is in the service of the state, an officer, an employee in the Public Service.

¹²⁷ The applicable ss. were ss.1, 4, 18 and 20 of the Registration of Births and Deaths Act 51 of 1992. As mentioned above, the provisions of the South African Constitution should be compared to the current legislative and other prescripts in order to establish there are discrepancies. The discrepancies identified should either be amended or new legislative and other prescripts should be enacted to fill the legal *lacunas* identified and created by the unconstitutionality of certain provisions.

Chapter III of this Act¹²⁸ relates to the registration of cases of death, in order to amend the status of the person if needed. Section 18 deals directly with the registration of still-births in conjunction with the definition of still-birth. This section provides that a death certificate will be issued when a still-birth occurs. When the definition of a still-birth is taken into account, it becomes apparent that the foetus, when meeting with death, should have had at least 26 weeks of *in utero* existence. This does not mean that a birth certificate is issued due to the fact that section 9(4) provides that no birth can be registered if the death occurred before the registration thereof. In this instance of a stillborn child, the registration relates to the death and not the birth enabling the parent(s) of the foetus meeting with death to bury it during a burial service in the same manner as for a person who has lived, died.

It can therefore be deduced that for a foetus to be considered viable in the South African Law, with specific reference to the Registration of Births and Deaths Act,¹²⁹ it should have had at least 26 weeks of *in utero* existence. Therefore no death certificate or certificate of stillbirth can be issued by the attending physician if the foetus meets with death before the 26th week of *in utero* existence. In the absence of a death certificate, the burial order, provided for in section 20 of the Act¹³⁰ cannot be issued, which means that an undertaker cannot bury or cremate the body.

This forms the essential core of the current discussion. This encompasses the great inconsistency within the law. Practically this would mean that any foetus that meets with death before it reached the *in utero* age of 26 weeks could not be buried and the remains would have to be disposed of. The disposal of the remains takes the form of incineration, together with other pieces of medical waste, such as needles, bloody gauze and swabs and other materials.

¹²⁸ Ss. 14 – 22 of the Registration of Births and Deaths Act 51 of 1992.

¹²⁹ Act 51 of 1992.

¹³⁰ *Ibid.*

Therefore, the life created within the womb of a woman, a mother, is incinerated as if it was of no importance and as if it could not bring great sadness and grief to the parents and loved ones. It can therefore be said that practically these provisions pose serious challenges with regards to the human rights enshrined within the Constitution, especially with regard to the State's obligation to protect and promote the right to human dignity.¹³¹

2.6.3 Observations

The current South African legal position can accordingly be summarized as follows:

- (a) A foetus that meets with death before being detached from the mother, or after being detached from the mother, but before being registered cannot be issued with a birth certificate;
- (b) Death certificates can only be issued in instances where people who were born alive meets with death;
- (c) For a foetus to qualify as a still-born it should have had at least 26 weeks of *in utero* existence before meeting with death. In this instance a certificate of still-birth shall be issued;
- (d) If a foetus have not had 26 weeks of *in utero* existence, a certificate of still-birth cannot be issued;
- (e) If no death certificate or certificate of still-birth can be issued, no subsequent burial order can be issued;
- (f) Without a legal burial order the remains of the deceased cannot be buried or cremated by an undertaker.

From the above it becomes apparent that the current legal position within the South African law does not provide any legal recognition for a foetus that meets with death before reaching 26 weeks of *in utero* existence. It is neither

¹³¹ Chs. 1 and 2 of the South African Constitution, with specific reference to the provisions of ss. 2, 7, 8 and 10; with s. 2 relating to the supremacy of the Constitution, s. 7 introducing the Bill of Rights, s. relating to human dignity being a value that the Constitution is founded upon and s. 10 directly relating to the right to human dignity.

a child nor a still-born in terms of the provisions of the Registration of Births and Deaths Act.¹³²

The practical implication is that the body of the foetus cannot be buried, cremated or mourned over. This interrupts the natural mourning and healing process and has severe consequences for the promotion and protection of human rights, especially the right to human dignity encapsulated in section 10 of the South African Constitution.

In the following section the Choice on Termination of Pregnancy Act¹³³ 1996 will be discussed in order to evaluate when a pregnant woman can exercise the right over control of her body and terminate the pregnancy.¹³⁴

2.7 THE CRIME OF CONCEALMENT OF BIRTH

2.7.1 The possible application of the Crime of Concealment of Birth on the disposal of non-viable foetuses

When considering the main problem statement within this thesis, the author decided to explore another angle of incidence. In all instances one should not only look at the procedures to be followed, but should also consider the possibility that there may be an infringement that might occur. In this premise, with reference to the burial of foetuses, the crime of concealment of birth was identified as a possible crime applicable to the disposal of a non-viable foetus. In order to determine if this crime is applicable in this instance the author will commence the discussion with an overview of the enabling section. Specific reference will be made to each of the elements to clarify their meaning and determine the limits of the applicability of this crime.

¹³² Act 51 of 1992.

¹³³ Act 92 of 1996.

¹³⁴ The right to control over one's body is found in s. 12(2)(b) of the South African Constitution and is the founding provision for the Choice on Termination of Pregnancy Act 92 of 1996.

Furthermore, the author will apply the provisions of the mentioned crime to determine if criminal liability in respect of the treating physician and the parent(s) of the foetus exist. The chapter will be concluded with remarks regarding the elements, applicability and extent of this crime. The goal of the classification as a crime would be to try and compel the Legislature to amend the definition of a stillborn baby to include all foetuses.¹³⁵

Further to the above, the Canadian proposed position identified in Chapter 3 will be evaluated to determine the impact of this crime to the proposed position and identify any possible exceptions that may exist.

2.7.2 The Legislative Basis of this Crime

In order to establish the elements and all other related provisions of this crime, the purpose and ambit of the crime of concealment of birth of a child will be discussed. The reason being that it is apparent from the Roman-Dutch Law, that there were provisions for exposure and abandonment of children, but no specific regulation of the situation where a child's body is disposed of with the intent to conceal the birth of the child.¹³⁶ This appears to be the position before 1845 in the Republic of South Africa.

2.7.2.1 Historic overview of the Crime of Concealment of Birth

Since 1845 there were statutes that introduced this principle into the South African Law.¹³⁷ These statutes were mainly influenced by the equivalent English legislation pertaining to this crime. The reason being that South Africa was under English Command for a long period of time,

¹³⁵ The reason is that currently the Registration of Births and Deaths Act 51 of 1992 defines a stillborn baby as a child that: '*has had at least 26 weeks of in utero existence, but showed no sign of life after complete birth.*' Therefore foetuses under the *in utero* age of 26 weeks are disposed of as medical waste.

¹³⁶ *R v Oliphant* 1950 1 SA 48 (O) at p. 50.

¹³⁷ Hoor & Carnelley *The Purpose and Ambit of the offence of Concealment of Birth* 2012 Obiter 732 at p. 732.

up to 1961 where South Africa became a Republic. It should be noted that the principle was introduced into the South African legal system from 1845, but as early as 1623 the concealment of birth of a child was considered a crime in England.¹³⁸

The first English Statute¹³⁹ providing for the concealment of birth related mostly to children that were labelled 'bastard'. In these instances it was a shame to bring such a child into the world and therefore as soon as the child is born, the parent(s) or other family members would murder the child and bury it in order to conceal the birth of the child. In this premise the persons accused of this crime would receive the death penalty due to the murdering of the child. There was one exclusion, however, where the parent of the foetus had a witness stating that the foetus was born lifeless and thereafter buried.

This Act was found to be contrary to the principle of being considered innocent until proven guilty, as the onus for a Mother to be acquitted on the charges were to prove that the child/foetus was indeed born dead.¹⁴⁰ The Courts interpreted this statute to the favour of the mother, in that numerous loopholes and precautions were used in order to acquit the mother of the charges.¹⁴¹

¹³⁸ The first English statute which codified this crime was 21 Jac I c 27 (1623) as cited in Hoctor & Carnelly 2012 732 at p. 732.

¹³⁹ *Ibid.* This Act provided that:

WHEREAS many lewd Women that have been delivered Bastard Children, to avoid their Shame, and to escape Punishment, do secretly bury or conceal the Death of their Children, and after, if the Child be found dead, the said Women do alledge, that the said Child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child or Children were murdered by the said Women, their lewd Mothers, or by their Assent or Procurement: II. For the Preventing therefore of this great Mischief ... That if any Woman ... be delivered of any Issue of her Body, Male or Female, which being born alive, should by the Laws of this Realm be a Bastard, and that the endeavour privately, either by herself or the procuring of others, so to conceal the Death thereof, as that it may not come to Light, whether it were born alive or not, but be concealed: In every such case the said Mother so offending shall suffer Death as in the case of Murder, except such Mother can make Proof by One Witness at least, that the Child (whose Death was by her so intended to be concealed) was born dead.

¹⁴⁰ *Id.* at p. 431. The principle of being innocent until proven guilty still resides in the South African law and is now encapsulated in s. 35 of the Constitution of the Republic of South Africa, 1996.

¹⁴¹ *Id.* at p. 434. The referral to precautions before sentencing correlates with the current provisions in the South African law regarding criminal procedures. Refer to s. 35 of the Constitution of the Republic of South Africa, 1996.

The House of Commons rejected the repeal of this law in 1770.¹⁴² In 1803, this law was amended in order to be in line with the general principals of English Criminal Law.¹⁴³

Subsequent to the 1803 amendment, there were several other amendments to this law.¹⁴⁴ The first introduction into the South African Legal System was in 1845, and subsequently it was introduced into all provinces, differing somewhat.¹⁴⁵ In several instances the South African version of this law was equivalent to the English Law version, but differed somewhat from province to province.¹⁴⁶ These provisions were united into the statute that presently regulates the position.¹⁴⁷

¹⁴² *Id.* at p. 430. The author agrees that the statute should not have been repealed and is in favour of the subsequent amendment of the law.

¹⁴³ *Id.* at p. 436. It should be noted that South Africa became a Republic in 1961 and thereafter no longer simply applied the English Law, instead the South African law was developed and other jurisdictions were used to obtain a position that was in line with the *boni mores*. With regard to the Law of Evidence, however we still see the English Law as a great inspiration of this doctrine and in this premise one would note that the similarities between the Crime of Concealment of Birth in England and South Africa does not differ greatly.

¹⁴⁴ Hoctor & Carnelley 2012 at p. 733 - 734. The several amendments relate to legal reform and points to a fair and healthy legal system. Due to the fact that amendments are allowed, it can be stated that the Legislature of England consists of forward-thinkers that do not merely support the positivistic approach to the law, but captures the natural law principle of trial-and-error in the instance that a law is applied and anomalies found, amendments are made.

¹⁴⁵ *Id.* at p. 734. Before 1961 when South Africa became a Republic and even before 1910 when South Africa became a Union, the different provinces operated almost as different countries, all under the influence of England. This is the reason that the provisions of the same act differs in the respective provinces.

¹⁴⁶ *Ibid*, where it is stated that:

The South African statutory provisions were similar in many respects. The *actus reus* of the crime was described as the secret burial or otherwise disposing of the body of a dead child. The crime could under most circumstances only be committed by the birth mother. There were two exceptions: In the Transvaal the offender could only be an unmarried or deserted birth mother; but under the Transkeian Code the crime could be committed by any person. In all but one statute, it was legislated that it was not necessary to prove whether the child died before, during or after birth. The original Orange Free State ordinance did not include this provision, although it was contained in the later Wetboek.

¹⁴⁷ After South Africa became a Union in 1910 and power was centralised for the country and not decentralised per province anymore, the statue adapted from the English Law was captured in one act and applied as such throughout the entire South Africa.

The General Law Amendment Act¹⁴⁸ currently provides for the statutory crime of concealment of birth. Furthermore the Registration of Births, Deaths and Marriages Act¹⁴⁹ defines a stillborn child and provides for the burial thereof. These two pieces of legislation will form the basis of the current discussion regarding the burial of foetuses meeting with death.

The use of the applicable provisions within the national legislation sources mentioned is that the problem within this thesis is impacted by sections 1 and 18 of the Registration of Births and Deaths Act¹⁵⁰ and a possible crime is provided for in section 113 of the General Law Amendment Act¹⁵¹.

2.7.2.2 Section 113 of the General Law Amendment Act

Before embarking on a discussion of section 113 of the General Law Amendment Act 46 of 1935, it should be noted that the provision before the amendment also did not refer to a viable foetus. It merely stated that the concealment of birth relates to the burial of a child to conceal its birth, irrespective if the child died before, during or after birth.¹⁵²

¹⁴⁸ S. 113 of Act 46 of 1935. In the relevant application of this Act (through case law) it was found that a foetus is deemed to be viable at 26 or 28 weeks gestational age. This will be discussed in case law later on in this Chapter.

¹⁴⁹ Ss. 1 and 18 of Act 51 of 1992. This Act fixed the limit of viability in the definition of a stillborn and therefore the limit of viability is 26 weeks gestational age. After this crystallization the medical technology has developed greatly, but there has been no amendment of the limit of viability since crystallization in 1992.

¹⁵⁰ Act 51 of 1992. ss. 1 and 18 relates to the definition of a stillborn child and the registration of its birth and issuing of the birth certificate.

¹⁵¹ Act 46 of 1935. This is the s. and act in which the Crime of Concealment of Birth is provided for.

¹⁵² The original version of this section. (S. 113 of the General Law Amendment Act 46 of 1935) provided as follows:

(1) Any person who disposes of the body of any child with the intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding three years. (2) Whenever a person disposes of the body of any such child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed of such body with intent to conceal the fact of the child's birth, unless it is proved that he had no such intent.

Section 113 of the General Law Amendment Act¹⁵³ as amended states that:

Concealment of birth of newly born child –

- (a) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.
- (b) A person may be convicted under subsection (1) although it has not been proved that the child in question died before the body was disposed of.
- (c) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction.

Therefore the elements of section 113¹⁵⁴ are:

- (a) No legal burial order;
- (b) Disposal of a body;
- (c) Intent to conceal the fact of birth; and
- (d) Any new-born child.

In this premise it should be noted that nowhere in its current form does section 113 of the General Law Amendment Act¹⁵⁵ make any mention of viability or the limit thereof. It was clearly the intention of the Legislature to

(3) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.

In Hoctor & Carnelley 2012 at p. 734, it is stated that:

This S. departed from the usual presumption of innocence principle as the accused bore the onus to prove the lack of intent to conceal the child's birth(in terms of s 113(2)). ... This S. was amended in 2008 by deleting the offending provision, ensuring constitutionality. ... (s 113 of the General Law Amendment Act 46 of 1935 as amended by S. 1 of the Judicial Matters Amendment Act 66 of 2008).

¹⁵³ Act 46 of 1935.

¹⁵⁴ The General Law Amendment Act 46 of 1935.

¹⁵⁵ Act 46 of 1935.

ensure that no foetal remains are disposed of in a manner that renders the fact that the foetus was born to be concealed.

This adds to the argument that a foetus consists of intrinsic worth as the death thereof at any stage may not be concealed and should be taken note of, should be mentioned and subsequently acknowledged in some manner or form. The limit of viability therefore was implemented in the application of this provision and throughout the years seemed to have remained constant and have not developed in line with the advances in medical technology.

2.7.3 Provisions of the Criminal Procedure Act¹⁵⁶

In section 239(2) of the Criminal Procedure Act¹⁵⁷ it is provided that at the trial of a person charged with the crime of concealment of birth of a child, it is not necessary to prove whether the child died before, during or after birth. In light of this, the fact whether the child died before, during or after birth, will not be discussed as an element of this crime, as this is not to be proved at the trial.

This further adds to the intrinsic value of the foetus in not prescribing all sorts of tests and other means to determine live birth before death in order to apply this crime.

2.7.4 Discussion of the elements of the crime of concealment of birth

It should be noted that the discussion below have been greatly influenced by the provisions of the Registration of Births, Deaths and Marriages Act.¹⁵⁸ This means that the discussion regarding the elements of the crime of

¹⁵⁶ Act 51 of 1977.

¹⁵⁷ *Ibid.*

¹⁵⁸ Act 51 of 1992.

Concealment of Birth is not as it was provided for in the General Law Amendment Act 46 of 1935, but relates to the current position. The author will conclude upon the indifferences created by this at the end of this Chapter.

2.7.4.1 First element: not being in possession of a legal burial order

In accordance with section 18 of the Registrations of Births, Deaths and Marriages Act¹⁵⁹ only in instances of stillbirth as stated in section 1 of the same Act, a legal burial order can be obtained. The implication of the above is that for all fetuses under the intra-uterus age of 26 weeks, no burial order can be obtained and therefore the fetuses cannot be buried legally.

Without taking into account the current practice of incinerating the fetuses meeting with death before 26 weeks gestational age, it would seem that all fetuses meeting with death before this threshold cannot be buried legally and therefore falls within the ambit of the provisions of the crime of concealment of birth.

2.7.4.2 Second element: The disposal of a body of a child meeting with death

In accordance with section 1 of the Registration of Births and Deaths Act,¹⁶⁰ the burial of a body implies the burial in the ground, cremation or any other mode of disposal. When this definition is taken into account the incineration of a foetus together with other medical waste can be seen as the disposal of a body, but the definition of a body in terms of the Registration of Births and Deaths Act¹⁶¹ provides that it is only the body of a dead human being or a stillborn baby. When a human body is taken into account scientifically, a foetus should also qualify as a human being and

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Id.* as per s. 1.

therefore the term 'body' in relation to the Registration of Births and Deaths Act¹⁶² should not pose any difficulty, but the definition of a stillborn baby clearly excludes all fetuses under 26 weeks gestational age.

2.7.4.3 Third element: Intent to conceal the fact of birth by way of disposal

One cannot directly state that the incineration of a foetus as part of medical waste by a hospital is with the intent to conceal the fact of birth. The intent to conceal the fact of birth is rather implied by the lack of documentation stating that the foetus was indeed born, either naturally or by way of a caesarean. The fact that after the foetus is no longer part of the body of the mother, there is no tombstone, death certificate or any other remembrance of the foetus except for a note on the mother's medical records, which seems futile.

Furthermore, medical records are protected by way of legal privilege and therefore not easily accessible. This would mean that the concealment may not be with intent, but the manner in which records are kept may lead to a definite concealment. Furthermore in instances where records sometimes get lost it would cause problems with regards to this element.

2.7.4.4 Fourth element: the element of the newly born child

A newly born baby in this situation is open for interpretation, but taking into account the fact that it does not matter that the child died before, during or after birth, one can assuredly accept that a foetus qualifies as a human being and therefore a newly born child.

It was noted that the fact that the child died before, during or after birth is irrelevant and therefore the foetus meeting with death before 26 weeks gestational age would qualify as a newly born child.¹⁶³

¹⁶² Act 51 of 1992.

2.7.5 South African Case Law and the Effect on the Interpretation of the Elements of the Crime of Concealment of Birth

Further to the above, it should be noted that in the South African legal system legislation is interpreted by the Courts in case law and aids in the application thereof. In this section of the current chapter Case law will be taken into account in order to ascertain the practical implication of the crime of concealment of birth. Both a South African Case as well as a Canadian Case will be discussed in order to manifest the interpretation of the provisions of the statutes relating to this crime.¹⁶⁴

2.7.5.1 South African Case Law and relevant discussions

As mentioned above, case law is utilised in order to explain the practical application of legislation by the Courts. The main case to be focussed on in this part of the chapter is *S v Molefe*¹⁶⁵ which encompasses several principles from other cases that lays down certain applicable principles. The issue before the Court in *S v Molefe*¹⁶⁶ related to a special review from the Magistrate's Court of Bloemhof, which related to the conviction of the accused for the crime of concealment of birth in terms of the provisions of section 113 of the General Law Amendment Act¹⁶⁷. The accused in this matter was an adult female, who pleaded guilty to the charge of concealment of birth of a child.

¹⁶³ S. 239(2) of the Criminal Procedure Act 51 of 1997 provides that at the trial of a person charged with the crime of concealment of birth of a child, it is not necessary to prove whether the child died before, during or after birth.

¹⁶⁴ South African and Canadian Case Law is taken into account to determine the similarities and differences in the approaches to the position. As mentioned in Ch. 1 of this thesis the Canadian Law is the author's choice for comparative study due to the similarities in the constitutions of the two countries which confirms similarities in the *boni mores* of the two countries and therefore legal positions can be adapted more easily.

¹⁶⁵ 2012 (2) SACR 574 (GNP).

¹⁶⁶ *Ibid.*

¹⁶⁷ Act 46 of 1935.

Testimony indicated that the accused denied to a sister at the clinic that she had given birth and after the police confronted her she showed them the body as it was not yet disposed of. Her intent was formed by the fact that she denied giving birth.¹⁶⁸

There were certain arguments with regards to the verbal authorization of the prosecution by the Director of Public Prosecutions and not written authorization as required by section 113.¹⁶⁹ This is not in essence applicable in the current situation as its implications are more technical in nature; therefore the discussion with regards hereto will not form an integral part of this chapter.

On Appeal, the conviction of the accused by the *court a quo* was set aside based firstly on the technicality of the authorization by the Director of Public Prosecutions and secondly on the basis that the element of 'disposal' was not entirely adhered to.

With regards to the disposal of the foetus, the element cannot be adhered to in that the disposal of the body, as stated in the testimony of the accused, never indeed took place. The reason for this can be found in the provisions relating to disposal in the Registration of Births, Deaths and Marriages Act¹⁷⁰ where disposal relates to the burial in the ground or to the cremation of the body.

In *R v Dema*¹⁷¹ Pittman JP discussed the element of disposal as being an act that involves a measure of permanence and not simply placing the

¹⁶⁸ 2012 (2) SACR 574 (GNP) at par. 2 (1 – 2).

I am voluntarily pleading guilty to the charge to me attempt to conceal birth, Act 46 of 1935. On or about 3 – 4 October 2009 at Bloemhof, I unlawfully and with the intent to conceal the fact of the birth of a child denied to a sister at the clinic that I had given birth to a dead child. I had not yet disposed of the dead child's body and when I was confronted by the police I went to show the police the body in a bucket in my house. The child was prematurely born and was dead at birth.

¹⁶⁹ S. 113 of the General Law Amendment Act 46 of 1935.

¹⁷⁰ Act 51 of 1992.

¹⁷¹ 1947 (1) SA 599 (E).

body on something. From this it can be derived that the act of disposal should be something like burial or incineration. Placing the body in a container and not permanently destroying the container or throwing it in a mass of water, etc. would not satisfy the element of permanent disposal.

With regards to the viability of a foetus in order to qualify as a child, the Zimbabwean/Rhodesian judgements of *S v Jasi*¹⁷² and *S v Madombwe*¹⁷³ were referred to; as well as the Venda judgment of *S v Manngo*.¹⁷⁴

The court referred to the case of *S v Jasi*¹⁷⁵ and stated that: '*... the child (fetus) have the potential of being born alive, in other words, being a viable child.*'¹⁷⁶ Further the court referred to the case of *S v Madombwe*¹⁷⁷ and stated that: 'a child must be regarded as one whose birth is required to be registered in terms of the Births and Deaths Registration Act ...'¹⁷⁸ and that: '*... a foetus of less than 28 weeks should not be regarded as a child...*'¹⁷⁹ with regards to the provisions found within the statute regulating the crime of concealment of birth.

The Court in *S v Muguti*¹⁸⁰ noted that even in instances where the intent was clearly there, but the body buried in such a manner that it may be found could render a criminal innocent on technical grounds.

¹⁷² 1994 (1) SACR 568 (ZH).

¹⁷³ 1977 (3) SA 1008 (R).

¹⁷⁴ 1980 (3) SA 1041 (V).

¹⁷⁵ 1994 (1) SACR 568(ZH).

¹⁷⁶ A quote from *S v Molefe* 2012 (2) SACR 574 (GNP) at par. 10.

¹⁷⁷ 1977 (3) SA 1008 (R).

¹⁷⁸ A quote from *S v Molefe* 2012 (2) SACR 574 (GNP) at par. 12.

¹⁷⁹ *Ibid.*

In my opinion, the nature of the crime, the secretive manner of its commission, the time lag (sic) that lapses before the crime is detected and the body exhumed for the post mortem to be conducted, the vast geographical area over which the limited logistics and human resources are to be deployed for the purpose militate against the adoption of the separate existence in regard to the enforcement of the provisions of the Act, as obviously guilty accused may escape conviction on technical grounds.

¹⁸⁰ [1998] JOL 2684 (ZH) at par. 14.

Furthermore it was held that unifying the approaches of the concealment of birth offence and the legislation pertaining to the registration of births and deaths would lead to legal certainty.¹⁸¹

This has the effect that there is contrasting reflections within the Zimbabwean Law, one being a specific term and the other being a general remark with regard to the probability of life.

In *S v Manngo*¹⁸² van Rhyen CJ agreed with the learned authors Milton and Fuller, who were cited in order to express the view that the offence of concealment of birth can only be committed in relation to a viable foetus, therefore a foetus which would possibly be born alive. In conclusion Rabie J and Jordaan J concurred that for a conviction in the form of the crime of concealment of birth, the foetus in question should be viable in the sense that it would be able to be born alive.

When considering the content of the case law mentioned above and the difference in provisions between the South African Law and the Zimbabwean/ Venda Law, it becomes apparent that viability is an issue that requires further discussion. The reason for this statement is that the South African Law governing the burial of a person determines a stillborn baby at 26 weeks, and the case law from Zimbabwe and Venda (above) mentions 28 weeks in order for a foetus to be viable. This creates uncertainty with regard to the viability of a foetus and the decision by the Court in *S v Molefe*¹⁸³ stating that if a child has the ability to be born alive this crime is applicable. In order to try and determine an approach with regard to the viability of a foetus for the purposes of the crime of concealment of birth, it seems appropriate that the jurisdiction where this crime is derived from is consulted.¹⁸⁴

¹⁸¹ *S v Muguti* [1998] JOL 2684 (ZH) at par. 15.

¹⁸² 1980 (3) SA 1041 (V).

¹⁸³ *S v Molefe* 2012 (2) SACR 574 (GNP).

¹⁸⁴ In this premise the English Law will be consulted in order to obtain clarity regarding the current status of the crime of concealment of birth as well as the limit of viability in this jurisdiction.

In this regard section 60 of the Offences against the Person Act of 1861 finds application in that it determines that a distinction should be made between a child and a premature miscarriage¹⁸⁵ on the basis that the child 'must be so far developed that in the ordinary course of events it would have a fair chance of life when born.'¹⁸⁶ Therefore the criterion in the English Law is that 'it must have reached a period when, but for some accidental circumstances, such as disease ... it might have been born alive.'¹⁸⁷

In *R v Matthews*¹⁸⁸ it was found that a foetus cannot be classified as a child 'unless it has reached a stage of development sufficient to have rendered its separate existence apart from its mother [on] a reasonable probability.' Further in this case, the judge was of the opinion that where the law does not impose a requirement to report the death, there cannot be concealment of birth.

This expands the limit of viability to include the advances in medical technology, but at the same time creates even more confusion and frustration as this would mean that viability should be determined on a case-to-case basis and the different opinions of different specialists would render this exercise futile. It would also lead to legal uncertainty.

2.7.6 Concluding Remarks

The first question that arose was to establish if the crime of concealment of birth is still applicable in the South African legal system. The answer to this question is simply that it is still applicable, not only in the South African legal

¹⁸⁵ Lord Hailsham of St Marylebone (ed) *Halbury's Laws of England Vol 11(1) 4ed (re-issue)* (1990) par 467.

¹⁸⁶ *R v Berriman* (1854) 6 Cox CC 388.

¹⁸⁷ *Ibid.*

¹⁸⁸ 1943 CPD 8 9 as cited in Hoor & Carnelley 2012 at p. 736.

system, but also in other jurisdictions. This confirms that the Law views the foetus as having intrinsic value and the provision of the crime of concealment of birth does not limit the viability of the foetus. The only issue identified is that when the provisions of the General Law Amendment Act¹⁸⁹ is read together with the provisions of the Registration of Births, Deaths and Marriages Act¹⁹⁰ the issue of viability comes into play and the advances in medical technology and science are not acknowledged.

It would therefore seem that the issue regarding viability of the foetus does not lie in the General Law Amendment Act¹⁹¹, but rather in the Registration of Births, Deaths and Marriages Act.¹⁹² This would enable the Legislature to amend the injustice regarding the burial of foetuses by amending one single piece of legislation.

Further to the above, it was necessary for the author to investigate whether the crime of concealment of birth could be applied to instances that foetal remains are disposed of as medical waste. This cannot be proved due to the fact that the element of intent cannot be satisfied. Although there are several technicalities that could render the intent-element to be satisfied, all the evidence would be circumstantial and at most negligence would be proved. The author is not of the view that direct intent can be proved in such an instance.

The important principle that the author would like to illuminate in this instance is that a foetus at all gestational ages are viewed as of importance and that even before the 1900's South African Law viewed the foetus at any gestational age as of importance to the effect that in an instance where the death was concealed, a person concealing the death would be sentenced to imprisonment even if the foetus died before birth.

¹⁸⁹ Act 46 of 1935.

¹⁹⁰ Act 51 of 1992.

¹⁹¹ Act 46 of 1935.

¹⁹² Act 51 of 1992.

2.8 CHOICE ON TERMINATION OF PREGNANCY ACT 92 of 1996

The Choice on Termination of Pregnancy Act¹⁹³ was assented to on 12 November 1996 and commenced on 1 February 1997 and was amended by the Choice on Termination of Pregnancy Amendment Act¹⁹⁴, Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁹⁵ and the Choice on Termination of Pregnancy Amendment Act.¹⁹⁶ This act recognizes the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism as well as the advancement of human rights and freedoms which underlie a democratic South Africa.¹⁹⁷

In the parts to follow the provisions of the Choice on Termination of Pregnancy Act¹⁹⁸ will be discussed and critically evaluated. For purposes of this discussion termination of pregnancy will be defined as in section 1 of the Act¹⁹⁹ as: *'the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman'*.

Section 2 of the Act²⁰⁰ provides for the circumstances in which and conditions under which pregnancy may be terminated:

- (1) A pregnancy may be terminated –
 - (a) upon request of a woman during the first 12 weeks of the gestation period of her period;
 - (b) from the 13th up to and including the 20th week of gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that –
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or

¹⁹³ Act 92 of 1996.

¹⁹⁴ Act 38 of 2004.

¹⁹⁵ Act 32 of 2007.

¹⁹⁶ Act 1 of 2008.

¹⁹⁷ Preamble to the Choice on Termination of Pregnancy Act 92 of 1996.

¹⁹⁸ Act 92 of 1996.

¹⁹⁹ The Choice on Termination of Pregnancy Act 92 of 1996.

²⁰⁰ *Ibid.*

- (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife or registered nurse is of the opinion that the continued pregnancy –
- (i) would endanger the woman's life;
 - (ii) would result in a severe malformation of the foetus; or
 - (iii) would pose a risk of injury to the foetus.
- (2) The termination of a pregnancy may only be carried out by a medical practitioner, except for pregnancy referred to in subsection 1(a), which may also be carried out by a registered midwife or registered nurse who has completed the prescribed training course.

Section 7 provides for notification and recordkeeping as follow:

- (1) Any medical practitioner, or a registered midwife or a registered nurse who has completed the prescribed training course, who terminates a pregnancy in terms of section 2(1)(a) or (b), shall record the prescribed information in the prescribed manner and give notice thereof to the person referred to in subsection (2).
- (2) The person in charge of a facility referred to in section 3 or a person designated for such purpose, shall be notified as prescribed of every termination of a pregnancy carried out in that facility.
- (3) The person in charge of a facility referred to in section 3 shall, within one month of the termination of a pregnancy at such a facility, collate the prescribed information and forward it by registered post confidentially to the relevant Head of Department: Provided that the name and address of a woman who requested or obtained a termination of pregnancy, shall not be included in the prescribed information.
- (4) The Head of Department shall –
 - (a) keep record of the prescribed information which he or she receives in terms of subsection (3); and
 - (b) submit to the Director-General the information contemplated in paragraph (a) every six months.
- (5) The identity of a woman who has requested or obtained a termination of pregnancy shall remain confidential at all times unless she herself chooses to disclose that information.

Section 10 of the Act provides for offences and penalties in terms of this Act²⁰¹ as follow:

(1) Any person who –

- (a) is not a medical practitioner, or a registered midwife or a registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2(1)(a);
- (b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c);
- (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or
- (d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in term of section 3(1) or not contemplated in section 3(3)(a),

shall be guilty of an offence and liable on conviction of a fine or to imprisonment for a period not exceeding 10 years.

(2) Any person who contravenes or fails to comply with any provision of section 7 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

Van Oosten²⁰² in his comments on the Choice of Termination of Pregnancy Act²⁰³ indicated certain challenges faced with the application of this Act²⁰⁴ especially with regard to section 10 which provides for the offences and penalties imposed when the provisions of the Act²⁰⁵ is infringed upon. The main commentary made by Van Oosten relates to abortion after 12 weeks. It appears from the above that section 10 does not criminalize a contravention of section 2(1)(b) and (c). Section 10 provides for a situation where a person who is not suitably qualified performs the termination.

²⁰¹ *Ibid.*

²⁰² Van Oosten (1999) *The Choice on Termination of Pregnancy Act: Some comments* South African Law Journal 60 at p. 73.

²⁰³ Act 92 of 1996.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

Section 2(1)(b) and (c) provide for the circumstances under which a termination may be done in the second and third trimesters, but should the termination be performed by a suitably qualified person on a ground not listed, the termination would be a contravention of the specific section but would not be a criminal offence.

It can be observed from the above that a pregnancy can be terminated for any reason up to twelve weeks, in certain circumstances thereafter, which includes a woman's financial and social position up to 20 weeks of pregnancy. Although there are some challenges with the offences and penalties within this Act²⁰⁶ the main focus of the author in this instance is the provisions of section 2(1)(b) and (c). If a termination cannot be performed after 20 weeks of pregnancy, the question arises why it could not be done, seeing as the Registration of Births and Deaths Act²⁰⁷ indicates viability from 26 weeks of pregnancy. Another important aspect relating to the research question within this thesis regards the records to be kept²⁰⁸ by the facility and the submission thereof to the Director General of Health and the nature and extent thereof.

2.9 CONCLUDING REMARKS

The discussions in this chapter addressed the commencement of the togetherness of a pregnant woman and a foetus, namely the instance of pregnancy. The development and viability of a foetus was discussed in order to aid in the discussion of the status of the unborn under the South African Law as well as the South African legal position regarding the burial of foetuses.

²⁰⁶ Act 92 of 1996.

²⁰⁷ Act 51 of 1992.

²⁰⁸ The importance of this statement will be discussed in more detail and concluded upon in Ch. 5.

The different approaches to pregnancy were discussed which are mainly founded on the principles of the South African Constitutional Law as well as the Common Law principle of the born alive rule. This aided the discussion of legal personhood and the commencement thereof in order to establish the rights of foetuses in South Africa.

Due to Constitutional constraints and other considerations the author rejected both the single entity approach as well as the separate entity approach and agrees with the not-one-but-not-two approach which acknowledges the intrinsic value of the foetus, and strives to promote this value with due consideration of the rights of the pregnant woman embodied in the Constitution. It was noted that the foetus is not afforded legal personhood and that criminally the foetus cannot be murdered, but there are certain instances, especially relating to succession stating that when the foetus is born alive, the right vests even if the foetus became entitled to it before birth.

The real consideration for the author is in relation to the Registration of Births and Deaths Act²⁰⁹ as the main purpose of this thesis is to allow for the burial of foetuses of any gestational age based on the discretion of the parent(s).

The author submits that the South African Law acknowledges viability of a foetus from 20 weeks as the Choice on Termination of Pregnancy Act²¹⁰ stipulates that from 20 weeks a pregnancy can only be terminated in the event that there are specific medical considerations. It should be noted that there is a clear *lacuna* with regard to viability in the South African Law in that one cannot terminate a pregnancy after 20 weeks of pregnancy, but the foetus is only considered a stillborn baby from 26 weeks. This leaves a 6-week grey area where the foetus is something that is protected from termination but not considered a stillborn baby. This is, according to the author, a clear indication that law reform should take place to obtain a position with regard to viability that will keep up with medical technology and advances.

²⁰⁹ Act 51 of 1992.

²¹⁰ Act 92 of 1996.

The author submits that one should not rely on viability as it is not a criterion that can be easily applied and adapted. Furthermore it would not be feasible to afford the foetus rights under the Constitution as it would create more confusion with regard to which rights should be afforded and the impact on the pregnant woman could lead to a limitation of her constitutional rights. There is a third part to consider and this is the proposed solution within this thesis. In the next chapter, the author will discuss the legal position found in Canada relating to the burial of foetuses which basically affords the parent(s) of the foetus the discretion to bury the foetus. This would still have to adhere to the other provisions of the Registration of Births and Deaths Act²¹¹ but would provide a more dignified position, would be beneficial to the parent(s) of the foetus as will acknowledge the intrinsic value of the foetus.

²¹¹ Act 51 of 1992.

CHAPTER 3: INTERNATIONAL LAW AND FOREIGN LAW RELATING TO THE INTRINSIC VALUE OF FOETUSES AND BURIAL RIGHTS OF FOETUSES

3.1 Differentiation between Foreign Law and Domestic Law and the acknowledgement and application of Foreign Law in South Africa

This chapter focuses mainly on the foreign law pertaining to the intrinsic value of foetuses and burial rights of foetuses, which constitutes the comparative study within this thesis. In order to establish the intrinsic value of the foetus and its relation to human dignity, the author will first distinguish shortly between foreign law and domestic law with regards to the application of foreign law in terms of the South African Constitution.

Section 2 of the South African Constitution provides that: ‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’ This section guarantees the rights within the South African Constitution and places a duty on any person or the state to fulfil the obligations within. This means that any provision within it must be applied. Chapter 2 of the South African Constitution provides for the Bill of Rights, being a set of rights that enforces the democracy in the Republic. These rights are not absolute, as there are certain applicable limitations, but these limitations only apply in exceptional circumstances subject to certain criterion.

The above contains the domestic law part of the South African Constitution and when doing comparative study, it should be noted that the South African Constitution provides for the incorporation of the foreign into the domestic law in order to ensure that the legal position which is at hand is fair and reasonable in an open and democratic society. The only requirement is that the foreign law should not cause an infringement of the rights contained in Chapter 2 of the South African Constitution.

The limitation-clause is found in section 36 of the South African Constitution and provides that the rights encompassed within the Bill of Rights cannot be limited by legislation or case law in any way, other than by the provisions of this section or a provision within the Bill of Rights. This means that the provisions of any legislation inconsistent with any right enshrined in the Bill of Rights, needs to be tested against the limitation clause in order to determine if the limitation is fair and justifiable in an open and democratic society based on the values of human dignity, equality and fairness as envisaged in section 36(1). It is now apparent that there are certain rights enshrined in the South African Constitution, which may only be limited by the Bill of Rights itself, but the application and implications of Foreign Law on South African Law have a certain set of requirements.

Section 39 of the South African Constitution provides that when the Bill of Rights is interpreted, international law must be taken into account. This ensures benchmarking²¹² with the international sphere, which in turn safeguards South African Law as fair and justifiable in an open and democratic society based on the principles of human dignity, equality and fairness.²¹³ Chapter 14 of the Constitution directly deals with International Law and its application within the South African context. The provisions concern *inter alia* international agreements²¹⁴ and application of international law²¹⁵.

²¹² As discussed previously.

²¹³ Test derived from s. 36(1) of the South African Constitution.

²¹⁴ S. 231 of the South African Constitution provides that:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

²¹⁵ S. 233 of the South African Constitution provides that:

This has the implication that for international law to be regarded as part of the South African law, it needs to be enacted within legislation, but that the court should prefer any reasonable interpretation of legislation taking international law into account. This means that South Africa is a monistic country that recognizes international law and national law to be essentially different, but at the same time emphasises the need to view the 2 systems as part of one conception of law.

The provision of Section 39 of the South African Constitution also pertains to the application of Foreign Law in the South African legal context. It states that courts may take foreign law into account. Therefore, if the provisions found in the foreign law does not cause an infringement of the rights found in Chapter 2 of the South African Constitution, then there is no bearing on the incorporation thereof into the South African Law.

3.2 Burial of foetuses in Canada

As basis of this discussion the right to equality as encapsulated in the Canadian Charter of Rights and Freedoms is taken into account. The Canadian Charter of Rights and Freedoms is analogous to the South African Constitution.²¹⁶ Section 15(1) of the Charter provides that: 'every individual is equal before and under the Law.' Sheppard²¹⁷ states that the Supreme Court held the following with regards to interpretation of the Right to Equality: '[interpretation] must be informed by an appreciation and understanding of its social and historical purpose.'²¹⁸

The purpose of the discussion of equality will become clear once the relevant legislation is discussed and explained in regard to case law. With regard to burial of foetuses, one should take note of the contents of *Bastien*

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

²¹⁶ The South African Constitution.

²¹⁷ Sheppard *Recognition of the disadvantaging of women: the promise of Andrews v Law Society of British Columbia* 1989 210ff.

²¹⁸ *Ibid.*

v Ottawa Hospital (General Campus).²¹⁹ This case pertains directly to the burial of fetuses in Canada and explains all the necessary processes and procedures to be followed including the legal position in this regard.

Before *Bastien v Ottawa Hospital (General Campus)*²²⁰ is discussed, the relevant legislation will be mentioned to aid the discussion of the case law. In Part 7 of the Cemeteries Act²²¹ it is stated in section 65(1), that the Minister may make Regulations pertaining to various aspects, but with specific reference to paragraph (oo) which states that: 'respecting the disposal of fetuses and the bodies of newborn infants who have died, subject in each case to the parents' or guardians' request, and defining newborn infant for the purposes of the regulations.'

In actual fact the regulations were made²²² pertaining to the death of a foetus. Regulation 8 stipulates the following:

- In the case of the death of a fetus, the remains need not be disposed of as required by section 5 and 6 of the Act, but
- (a) the manner of disposition is subject to the parents' or guardians' request,
 - (b) the manner of disposition must not cause public offence, and
 - (c) where the fetus completed 20 weeks' gestation or weighed 500 grams or more, a burial permit must be obtained prior to any disposition of the remains.

This legislative and regulative principles is exactly the position the author is proposing and seeing as it is encompassing the discretion of the parents or guardians of the foetus and is not specific in relation to the fetuses it applies to.

Part (c) does in fact determine that 20 weeks or 500 grams sets the condition that a burial permit should be obtained. This only entails that in those instances the burial permit is a requirement, before the 20 weeks or 500 grams the foetus can be disposed of without a burial permit.

²¹⁹ 2001 CanLII 28016 (ON SC).

²²⁰ *Ibid.*

²²¹ Consolidated Statutes of Alberta RSA 2000 cC-3.

²²² Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

This further confirms the rights of the parents to have a choice in the disposal of the body of the foetus regardless of the age thereof. It can therefore be stated that the right to be buried is not the right of the foetus, but the right to decide upon the method of burial vests in the parents or guardians of the child.

In relation to the discussion of section 15(1) of the Charter, it becomes apparent that all persons are equal before the Law. All parents or guardians are allowed the choice regarding burial of the foetus and not only foetuses, which died after a specifically stated number of weeks. This is in clear contradiction with South African Law.

In the case of *Bastien v Ottawa Hospital (General Campus)* ²²³ the application of the above principles was confirmed. Therefore, it can be stated that the legislation and regulations quoted above is not only theoretically possible but is practically executable.

The discussions above confirm that where parents or guardians are given the choice to bury the foetus or to have it disposed of by the hospital, most parents or guardians would make the choice to bury the foetus, affording it a proper burial service and also assisting the parents or guardians with the grieving process.

The position found in the Canadian Law does not at any instance afford the foetus any rights, it only provides the parent(s) with the discretion to bury the foetus or to have it disposed of by the State.

This means that there is no limitation on any rights of any person and that although burial of foetuses less than 20 weeks do not require a burial permit, the law can be adapted to only providing the discretion and maintaining the other provisions with regard to burial orders and burial requirements.

²²³ 2001 CanLII 28016 (ON SC)

The author therefore proposes that this position as found in the Canadian Law to be applied in South Africa by way of amendment to the Registration of Births and Deaths Act²²⁴ through the application of section 39(1)(b) of the Constitution.²²⁵

3.3 Concealment of birth

3.3.1 Canadian case law

In order to obtain clarity, the author will now discuss the Canadian case of *R v Levkovic*²²⁶ with specific reference to the constitutional aspects of the offence of concealment of birth.

In the Canadian Law the offence of Concealment of Birth is set out in section 243 of the Canadian Criminal Code, and provides that:

Every person who in any manner disposes of the dead body of a child, with the intent to conceal the fact that the mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment not exceeding two years.

With regards to this offence it can be noted that there is no specific person mentioned and the offence is gender-neutral. Although on face value there does not seem to be anything the matter with this offence, but the Constitutionality of this offence was challenged in the case of *R v Levkovic*²²⁷.

²²⁴ Act 51 of 1992.

²²⁵ S. 39(1)(c) of the South African Constitution, enables the use of foreign law when interpreting the Bill of Rights, e.g. s. 9. The right to equality should be interpreted as the right to equality before the law of all parents or guardians who lose foetuses, some at an earlier stage than others. Therefore by interpreting s. 9 to afford all parents or guardians the right to bury the foetus, s. 39(1)(c) allows for the consideration of foreign law. In light hereof the Canadian Law position can be used to interpret s. 9 of the Constitution in a way that promotes the equality of persons and therefore being able to bury the foetus, regardless of the age of the foetus.

²²⁶ 2008 CarswellOnt 5744 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, heard in the Ontario Superior Court of Justice.

²²⁷ 2008 CarswellOnt 5744 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, heard in the Ontario Superior Court of Justice.

The applicant in this case argued that the basis of the crime was set to punish women who bore illegitimate children and secondly the crime was technically challenged due to vagueness.²²⁸

In its finding the Court emphasized the constitutionality of the offence on appeal as neither vague, nor broad or unconstitutional.²²⁹

Further the honourable court concluded in this case that: 'We must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objects, by requiring a law to ascend to a level of precision to which its subject-matter fails to lend itself.'²³⁰

3.3.2 New Zealand Crimes Act

In terms of the Crimes Act²³¹ of New Zealand section 181 states that:

Concealing the body of a child

Every one is liable to imprisonment for a term not exceeding 2 years who disposes of the dead body of any child in any manner and with the intent to conceal the fact of its birth, whether the child dies before, or during, or after birth.

²²⁸ Derived from *R v Levkovic* 2008 CarswellOnt 5744 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, heard in the Ontario Superior Court of Justice par. 2 as cited in Hoctor & Carnelley 2012 at p. 740. The applicant in the case argued *inter alia* the following:

(i) that the sole legislative purpose of s. 243 is to 'socially stigmatize and criminally punish' women who bore illegitimate children; and (ii) that s. 243 is overbroad in its effects 'because of vagueness of language ... or because any identifiable purpose in enacting the crime overshoots legitimate objectives for criminal legislation.'

²²⁹ 'In assessing the issue of unconstitutionality, the court held that with regard to the question of overbreadth of legislation with penal consequences, a provision could be found to be arbitrary or disproportionate where such provision could be described as 'overshooting or sweeping too broadly in relation to its animating purpose' (par 104). ... the court held that the *actus reus* of the offence was the disposal of the body of a child after birth or delivery, and not, as contended by the applicant, the concealment of the pregnancy itself (par 119). ... With regard to the issue of vagueness the court noted that the applicant's focus on the ambiguity of the word 'child', and in particular in circumstances other than a live-birth, and posed the question: '[I]s there a discernible meaning to the term giving fair notice to an ordinary person of the scope or risk of liability while avoiding the potential for arbitrary enforcement discretion?' (par 158). Having investigated various standards (par 174 – 197), the court noted the lack of consensus as to the identifiable point of viability measured in weeks of gestational age, along with the movement of such point of viability towards the point of conception (par 199-200).

¹⁸ *Ibid.*

²³⁰ 2008 CarswellOnt 5744 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, heard in the Ontario Superior Court of Justice at par. 120.

²³¹ Crimes Act 1961, Public Act 43 of 1961 assented 1 November 1961 and reprinted 1 June 2010.

Therefore it can be deduced that the crime of concealment of birth in New Zealand consists of the same elements and therefore the *actus reus* is similar to the English, Canadian and South African crimes of concealment of birth. This means that the crime of concealment of birth in South Africa is compatible with more than 2 jurisdictions in the world, namely New Zealand, Canada and Great Britain. This adds to the fact that the crime is not outdated and if applied correctly does not limit the viability of a foetus, but rather acknowledges the intrinsic value of the foetus at any gestational age.

3.4 Concluding Remarks

With regard to foreign law, the author's mention of the Canadian law and the New Zealand law was merely to emphasise respective principles.

Firstly, Canadian law was utilised to emphasise the ideal legal position with regard to the burial of foetuses. This was done by explaining that under Canadian law the woman carrying the foetus can elect to have the foetus buried in the event that it meets with death. This reiterates the fact that the woman in Canada whose foetus meets with death at any gestational age has the discretion to bury the foetus. There is no differentiation under Canadian law between foetuses meeting with death.

Secondly, as stated in the previous chapter there have been great uncertainty regarding the outdatedness of the crime of concealment of birth. Therefore, the author referred to the provisions of the New Zealand Crimes Act which encapsulates the crime of concealment of birth as still valid.

With regard to the applicability of international law, the only principle that the author would like to emphasise is that even before birth, foetuses have an intrinsic value worthy of protection. This reiterates the authors point of view regarding the intrinsic value of the foetus that requires acknowledgement

rather than affording rights to the foetus that may infringe upon the rights of the pregnant woman under the South African Constitution.²³²

The applicability of the foreign and international on the intrinsic value of foetuses and the burial rights of foetuses will further be discussed in Chapter 5 where conclusions and inferences will be drawn.

²³² This includes *inter alia* the right to patient autonomy in terms of s. 12 of the South African Constitution.

CHAPTER 4: THE VOICE OF THE UNBORN

4.1 INTRODUCTION

When considering pregnancy loss, one cannot only focus on miscarriages and stillbirths. With the enactment of the Choice on Termination of Pregnancy Act, both abortions and medical inducement of miscarriage was legislated. Therefore the mentioned act did not only legalize and regulate abortions by choice, it provides for late-term terminations due to medical reasons.

Slabbert²³³ explains that although the occurrence of pregnancy loss is covered by the law, the emotional distress and pain suffered by the parents should be based on moral convictions, *i.e.* the *boni mores* and not the law itself. In the article it is explained that although the Choice on Termination of Pregnancy Act deals with the pro-choice approach to terminations, not all terminations are based on a mere decision to terminate the pregnancy, whether on social, financial or personal considerations.²³⁴

In some instances parent(s) are informed that there may be a medical deformity or other problem with the foetus, and thereafter the medical decision is made to terminate the pregnancy. As discussed in Chapter 2 of this thesis, it is clear that the Legislature during the enactment of the Choice on Termination of Pregnancy Act²³⁵, the intrinsic value of the foetus was considered, limiting the timeframes for terminations on social and financial grounds and only allowing late-term terminations on medical grounds where the life of the mother is in danger or the foetus will have a severe deformity.²³⁶

²³³ Slabbert *Pregnancy Loss: A Burial or Medical Waste* 2017 80 THRHR 102.

²³⁴ *Ibid.*

²³⁵ Act 92 of 1996.

²³⁶ Slabbert 2017 at p. 102 – 103.

4.2 THE VOICE OF THE UNBORN BABY NPC

The co-founder and Executive Director of the Non-Profit Company, Mrs Sonja Smith-Janse van Rensburg being a funeral director by profession was called to a private hospital in Pretoria during 2003 to collect a set of triplets born at 20 weeks gestation. At the time the doctor agreed to sign the 'necessary paperwork' in order for the parents, whom lived in Hoedspruit to have the body removed from the hospital and transported by Mrs Smith-Janse van Rensburg in order to hold a funeral service. Upon her arrival at the hospital to collect the foetal remains, the remains were missing. It became apparent that the remains were discarded with all the other anatomical waste, e.g. amputated limbs, organs, tissues, etc. Mrs Smith-Janse van Rensburg caused such havoc in the maternity ward looking for the remains of the triplets, that the Unit Manager drove to the medical waste plant to look through the anatomical waste for the remains and recover such.²³⁷

At the time of the events, Mrs Smith-Janse van Rensburg was not aware that this was the law, that the fate of a foetus meeting with death before 26 weeks gestation was anatomical waste. In 2011 her daughter had a miscarriage and the family felt that somebody should do something about this and she realised, she was somebody and she had to do something to change the fate of foetuses meeting with death before 26 weeks gestation.²³⁸

This is how the Non-Profit Company came into existence with the goal to change the fate of the foetus meeting with death before 26 weeks gestational age from anatomical waste to something with intrinsic value – valuable enough to be afforded a burial service.²³⁹

²³⁷ Adapted from e-mail correspondence with Mrs Smith-Janse van Rensburg on 28 March 2017.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

The name of the Non-Profit Company is based on the recognition that many bereaved parents who experience pregnancy loss have already made such a significant emotional investment in the prospective child that it is perceived to be classified as a baby. In the event that the 'baby' is lost, such bereaved parents is said to have the desire to give the 'baby' the dignity of a burial, thereby giving a metaphorical voice to such bereaved parents' subjective psychological reality of the prospective child as an unborn baby.²⁴⁰

4.3 THE VOICE OF THE UNBORN BABY NPC VS THE MINISTER OF HOME AFFAIRS AND THE MINISTER OF HEALTH

The author was placed in the possession of the Founding Affidavit of the Voice of the Unborn Baby NPC and due to the fact that the case has not yet been heard, the author will discuss the case based on the Founding Affidavit only. This part is therefore only based on the factual information provided for in the Founding Affidavit and does not contain any information provided by the First or Second Respondent in this matter. The discussion also in no way can protrude the outcome of the matter and therefore only pertains to the stance of the Applicant in this matter, which is supported by the author.

The Applicant in this matter is The Voice of the Unborn Baby NPC, duly represented by the co-founder and executive director, Sonja Smith-Janse van Rensburg who disposed the affidavit for and on behalf of the applicant.²⁴¹ The nature of the application is stated as a Constitutional challenge to the legislation pertaining to the burial of foetuses meeting with death before the foetus reached 26 weeks gestational age.

The parties to the matter include the applicant, The Voice of the Unborn Baby NPC who brings the matter in its own interest pursuant to section 38(a) of the South African Constitution and in the public interest pursuant to

²⁴⁰ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit par. 32 relating to the naming of the Non-Profit Company, Case number to be allocated and case to be commenced in the High Court of South Africa, Gauteng Division, Pretoria in June 2017.

²⁴¹ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another*. Citation part and Par. 1 and 2 of the Founding Affidavit.

section 38(d) of the South African Constitution. The First Respondent is the Minister of Home Affairs as the Minister responsible for the administration of the Registration of Births and Deaths Act 51 of 1992. The Second Respondent is the Minister of Health as the Minister responsible for the administration of the Regulations relating to the Management of Human Remains, made in terms of the National Health Act 61 of 2003.²⁴²

The basis for the application relates to the loss of pregnancy by expecting parents, the emotional consequences of such loss and how the State should deal with such bereaved parents in our Constitutional dispensation, specifically regarding the burial or other method of disposal of foetal remains of fetuses meeting with death before 26 weeks gestation. The Applicant states that the present application does not explicitly or implicitly aim to allocate any legal rights or quasi-rights to a foetus. The application is grounded on the reality that many expecting parents make a significant emotional investment in their prospective child long before birth and that pregnancy loss consequently has an undeniable negative emotional impact on the bereaved parents. The application at hand focuses on the rights of the bereaved parents rather than on the rights of the foetus.²⁴³

The Applicant indicates that the terms foetus, prospective child, pregnancy loss and burial have specific meanings in this matter. On the one hand foetus refers to the 'human conceptus until born alive' and prospective child on the other hand means 'the intangible, mental construct of the hoped-for child in people's minds.' It is indicated that the term is used in the same way as section 295 (d) and (e) of the Children's Act 38 of 2005 in the context of surrogate motherhood employs the terminology 'the child is to be born' to refer to the mental construct of the future child. With pregnancy loss it is meant to include any manner in which the foetus dies before being born alive. Therefore it can include spontaneous and induced pregnancy loss where induced pregnancy loss is governed by the Choice on Termination of

²⁴² *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit pars. 5 to 8 regarding the citation of the parties.

²⁴³ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit pars 9 - 10 regarding Pregnancy Loss and the Rights of Bereaved Parents.

Pregnancy Act 92 of 1996. Burial is used in the context of the Registration of Births and Deaths Act 51 of 1992 to mean burial in the earth or cremation. In practice it should be noted that burial entails the opportunity for a ceremony or ritual in which the bereaved parents, their family and friends, and religious, cultural, and/or other counsellors can participate.²⁴⁴

With regards to spontaneous pregnancy loss the Applicant categorizes such as either early or late spontaneous pregnancy loss where it was traditionally referred to as miscarriage and still-birth respectively. This is based on whether the foetus is viable, where viability means the capability of the foetus to survive outside the womb of the mother at the stage when pregnancy loss occurs.²⁴⁵

It is noted by the Applicant that there is no international consensus on how to determine viability. The author in Chapter 2 of this thesis confirmed this statement. The World Health Organization recommends 28 weeks gestational age for purposes of international comparison, given the difference in financial position of countries and the assertion that a foetus has little chance of survival outside the mother's womb in low-income countries prior to 28 weeks gestational age. It has further been stated that in high-income countries the gestational age of viability can be as low as 22 weeks.²⁴⁶

The South African legal position as mentioned in Chapter 2 of this thesis is also referred to by the Applicant in the Application and it is indicated that the purpose of the Application is not to engage the issue regarding the 26-weeks gestational age for viability in South Africa, it is merely to ameliorate the drastic divergent legal effects of a pregnancy loss.²⁴⁷

Important to note from the Applicants Founding Affidavit is that the Application relates to the loss of pregnancy irrespective of the cause of the

²⁴⁴ *Id.* at pars. 11 to 14.

²⁴⁵ *Id.* at par. 15 to 16.

²⁴⁶ *Id.* at par. 17.

²⁴⁷ *Id.* at par. 18 to 20.

loss. Just as expecting parents who experience the loss of pregnancy due to natural causes may be emotionally impacted by such loss, expecting parents will also be emotionally impacted by a conscious decision to end the pregnancy based on medical advice. It should be noted that in the event that there was a conscious decision made to terminate the pregnancy based on medical advice, irrespective of the viability of the foetus, the remains are considered to be medical waste and cannot legally be buried.²⁴⁸

The Applicant contends that there is no real issue with the application of the 26-week rule for viability, the main issue relates to the terms 'birth' and 'still-birth' as found in the Registration of Births and Deaths Act.²⁴⁹ It is indicated by the Applicant that the definitions pose a paradox in that the term 'birth' requires live birth, whereas the term 'still-birth' excludes live birth. Furthermore, the definition of 'still-birth' is presented in the Registration of Births and Deaths Act²⁵⁰ as a 'child' with reference to a still-born foetus. The Applicant further contends that it is a well-established position in the South African Law that life starts at live birth and therefore a still-born foetus cannot in law be considered a 'child' as it is not born alive. The Applicant further indicates that in no way is the Application aimed at challenging the legal status of the foetus under the law as there are no legal anomalies to be caused or legal fictions needed in order to recognize and protect bereaved parents' rights in the case of pregnancy loss.²⁵¹

With regard to the similarities between still-birth and induced pregnancy loss, the Applicant indicates that the question can be raised as to whether late-term conscious decisions regarding termination of pregnancies would qualify as a still-birth in terms of the Registration of Births and Deaths Act²⁵² as a still-birth can occur through a caesarean section and a termination is deemed to be the separation and expulsion, by medical or surgical means of the contents of the uterus of a pregnant woman. In the mind of the Applicant

²⁴⁸ *Id.* at pars. 21 to 23.

²⁴⁹ Act 51 of 1992. *Ibid* at pars. 34 to 35.

²⁵⁰ *Ibid.*

²⁵¹ *Id.* at pars. 36 to 37.

²⁵² Act 51 of 1992.

and that of the author these appear semantic and no difference could be found.²⁵³

The Applicant further indicates that the Legislature intended spontaneous pregnancy loss to be a still-birth and therefore it can be said that late-term induced pregnancy loss would not qualify as a still-birth due to the nature of the pregnancy loss with disregard to the similarity in the process of pregnancy loss between a still-birth and a late-term termination.²⁵⁴

There are several valid points of discussion in the Founding Affidavit of the Applicant, but the author will only focus on the definitions of the terms as discussed above and in addition thereto, the Human Rights Analysis and the subsequent application thereof to the relief sought by the Applicant in relation to the engagements with the First and Second Respondent.²⁵⁵

From paragraph 66 in the Founding Affidavit²⁵⁶ the 'facts' regarding pregnancy loss is discussed. For legal purposes, this is the emotional impact of the death of a foetus on the prospective parent, which can be derived from the naturalistic approach to law, where all is taken into account, even human emotion. One can contend that emotion does not have a place in legal context, but this goes against the principle in the South African Law indicating that the *boni mores* or the opinions and values of the community must be taken into account.

The Applicant in this matter relies on the values of equality, human dignity and privacy as encapsulated in Chapter 2 of the South African Constitution. With regard to Human Dignity, the Applicant indicates that the decision to bury the remains of a dead prospective child can be an important decision.

²⁵³ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit par. 39 relating to the difference between a caesarean section and a late-term termination based on medical advice.

²⁵⁴ *Id.* at pars. 40 to 41.

²⁵⁵ *Id.* at pars. 79 to 124.

²⁵⁶ *Id.* from pars. 66.

Accordingly, such decision falls within the right to human dignity which entails the protection of a person's autonomy.²⁵⁷

The Applicant states with regard to privacy that the decision to elect to bury a foetus meeting with death is a decision within the core personal sphere of a person and accordingly falls within the ambit of the right to privacy which is encapsulated in Chapter 2 of the South African Constitution.²⁵⁸

With regard to the right to equality, the Applicant eloquently states: 'Equality demands that, our law gives bereaved parents in Category A the benefit of the right to bury the remains of their dead prospective child, bereaved parents in Category B should be afforded the same right.'²⁵⁹

With regard to Category A and Category B parents, the difference, according to the Plaintiff relates to Category A fetuses meeting with death after 26 weeks gestational age and Category B fetuses are fetuses meeting with death before 26 weeks gestational age as discussed in paragraph 82 of the Founding Affidavit.²⁶⁰

Accordingly the Plaintiff concludes that in the case of a pregnancy loss under 26 weeks gestation (stillbirth), the bereaved parent(s) have the right, based on the Constitutional rights and values of human dignity, privacy and equality to elect to bury the foetus meeting with death at any gestational age.²⁶¹

In relation to the above, the Plaintiff acknowledges some challenges under the current South African Law which may cause infringements if the conclusion that a foetus meeting with death at any gestational age can be buried is followed. This includes:

- (a) The provisions of the Registration of Births and Deaths Act, 1992;

²⁵⁷ *Id.* at par. 80.

²⁵⁸ *Id.* at par. 81.

²⁵⁹ *Id.* at par. 87.

²⁶⁰ *Id.* at par. 82.

²⁶¹ *Id.* at par. 89.

- (b) The provisions of the Choice on Termination of Pregnancy Act, 1996; and
- (c) The provisions of the Regulations in terms of the National Health Act, 2003.

The Plaintiff further states that the legal team could not find any legitimate government purpose that can be served by the possible infringement. The author agrees with the Plaintiff in this instance.²⁶²

In the search for justice, the Plaintiff engaged firstly with the First Respondent in writing on 28 September 2015, but to date no response was received other than receipt of the letter. Further engagement was done with the Second Respondent where the Deputy Director General: Hospitals, Tertiary Health Services and Human Resource Development for the Department of Health showed co-operation by commencing the drafting of a policy addressing some of the issues.²⁶³

Unfortunately in October 2016, the Deputy Director General: Hospitals, Tertiary Health Services and Human Resource Development for the Department of Health retired. Furthermore the Plaintiff stated that the draft policy cannot amend the current statutory framework in line with the constitutional right of a bereaved parent(s), leaving the Plaintiff no other choice than to approach the High Court for relief.²⁶⁴

In light of the Plaintiff approaching the High Court, the relief sought relates to the granting of a declaration in terms of section 38 of the South African Constitution that, in the case of a pregnancy loss other than stillbirth, the bereaved parent(s) have the right based on the constitutional rights/values of human dignity, privacy and equality to elect to bury the foetus that met with

²⁶² *Id.* at par. 95.

²⁶³ *Id.* at par. 99 to 109.

²⁶⁴ *Ibid.*

death and is referred to as the 'burial right'. The High Court will hear the matter in June 2017 and thereafter there will be clarity regarding this matter.

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4.4 DEPARTMENT OF HEALTH: DRAFT POLICY ON THE MANAGEMENT OF BIRTHS UNDER 26 WEEKS OF GESTATION²⁶⁶

When considering what the Draft Policy relates to, it is necessary to give attention to the preamble of this policy in order to become acquainted with the legal provisions considered in the drafting thereof and the reasoning behind the drafting of this policy. As with most policies, procedures and regulations, the South African Constitution plays a main part in the reasoning for the drafting thereof. This instance is no different, as section 27 of the South African Constitution provides that the Minister of Health must enact legislation and other legal instruments in order to promote the protection of every person's right to access to healthcare services, including reproductive healthcare. The provisions of section 27 of the South African Constitution therefore directly relate all occurrences in regard to pregnancy as it is part of reproductive healthcare.

Section 3(1) of the National Health Act²⁶⁷ provides that the Minister of Health must, within the limits of available resources determine the policies and procedures necessary to protect, promote, improve and maintain the health and well-being of the population and ensure that these policies and procedures are followed in order to provide such essential health services to the population.

Section 7(2) and 8(1) of the National Health Act²⁶⁸ provides that a healthcare provider must take all reasonable steps to obtain the user's informed

²⁶⁵ *Id.* at par. 111.

²⁶⁶ Department of Health, Draft 1 Version 5 dated 25 August 2016 hereinafter referred to as 'the Draft Policy'.

²⁶⁷ Act 61 of 2003.

²⁶⁸ *Ibid.*

consent regarding any procedure done and furthermore that a person has the right to participate in any decision affecting his or her personal health and treatment. This satisfies the provisions of section 12(2)(b) of the South African Constitution in that the person is given the choice regarding medical treatment.

This Draft Policy highlights the Minister of Health's adherence to the provisions of section 27 of the South African Constitution and section 3(1), 7(2) and 8(1) of the National Health Act. The Draft Policy is, in the opinion of the author the correct implementation of the objectives of the South African Constitution, being *inter alia* equality and human dignity. Furthermore, this does not afford the foetus any rights, but merely illustrates and re-iterates the right to human dignity of the parents and the acknowledgement of the intrinsic value of the foetus.

The regulations pertaining to the disposal of the remains of the foetus or stillborn can be categorized into two sections, namely stillbirths and miscarriages. Stillbirths are dealt with in terms of the current South African legal position as encapsulated in the provisions of the Registration of Births and Deaths Act.²⁶⁹ This position was discussed in Chapter 2 of this thesis and directly relates to the burial of remains where 26 weeks gestational age was reached.

As discussed previously, in Chapter 1 and 2 of this thesis, the problem does not relate to the burial of remains where 26 weeks gestational age was met, it refers to instances where the foetus meets with death before reaching the gestational age of 26 weeks. The Draft Policy directly deals with these situations and prescribes the procedure to be followed at a healthcare institution when a woman has a miscarriage.

The Regulations proposed in the Draft Policy relates to all instances of pregnancy loss, including:

²⁶⁹ Act 51 of 1992 as discussed in Ch. 2 of this thesis.

- (a) all live births at any gestational age meeting with death due to natural causes,²⁷⁰
- (b) all live births at any gestational age meeting with death due to unnatural causes,²⁷¹
- (c) no signs of life after birth at 26 weeks or more gestational age,²⁷² and
- (d) no signs of life after birth under 26 weeks gestational age.²⁷³

With regard to the first three instances, the Department of Health indicates in the Regulations that the current legal positions should still be applicable and only proposed new procedures with regard to the instance where no signs of life after birth was under 26 weeks gestational age. In instances where there was a live birth and the baby died due to natural causes, or in this instance that there was no signs of life after birth at 26 weeks or more gestational age, the normal provisions of section 35 of the Registration of Births and Deaths Act apply.²⁷⁴ The second instance regards death at any gestational age where there is live birth, but death occurs due to unnatural causes. In these cases, the provisions of section 3 of the Inquest Act²⁷⁵ will apply.

Regulation 6.4 of the Draft Policy relates to the instances where the gestational age is less than 26 weeks and there are no signs of life at birth, the birth is considered to be a miscarriage. The procedure to be followed is determined in Regulation 6.5 of the Draft Policy. The responsible healthcare practitioner must complete the following medical records relating to the death of the foetus:

- (a) Delivery records;
- (b) Nursing/medical records; and

²⁷⁰ Regulation 6.1 of the Draft Policy will apply.

²⁷¹ Regulation 6.2 of the Draft Policy will apply.

²⁷² Regulation 6.3 of the Draft Policy will apply.

²⁷³ Regulation 6.4 of the Draft Policy will apply.

²⁷⁴ These are the burial provisions relating to stillbirths. Although in one instance the foetus was born alive, even after 26 weeks gestational age, it was still considered a stillbirth as the baby died before the birth could be registered. Only in instances where the birth was already registered with the Department of Home Affairs and the baby subsequently dies, there will be a registration of the birth and of the death.

²⁷⁵ Act 58 of 1995.

(c) Maternal patient records.

Thereafter the midwife does the identification of the foetus and the placenta. Emotional support, pastoral care and/or counselling should be provided to the parents. The patient must be informed that no death certificate will be issued but only a notification of death. The birth will not be registered with the Department of Home Affairs.²⁷⁶

The medical practitioner must advise the parents on the options of the disposal of the human remains or advise when a *post mortem* may be indicated as such as where there is a need to establish the presence of underlying congenital abnormalities in order for the parents to make an informed decision on future pregnancies. In order to assist with the grief process, the body of the foetus may be kept in the labour ward for at least 12 hours to allow the mother or parents to decide on the disposal of the human remains.²⁷⁷

Furthermore, the parents should be provided with support to participate in decision-making regarding the disposition of the foetus. The options provided to the family must include:

- (a) Seeing and holding the foetus; and
- (b) Options for disposal including burial by the family or incineration as per provisions of the regulations related to the disposal of non-viable human foetuses.

Where the parents choose that the remains be incinerated, they must be advised that no ashes will be provided to the family. The placenta must be placed in a leak proof container and identified with the mother's name, surname, folder number, date and time of birth of the foetus. The placenta must be disposed of as medical waste, unless the family, for religious reasons, require the placenta for burial. In such cases, the placenta will be

²⁷⁶ Regulation 6.5 of the Draft Policy.

²⁷⁷ Regulation 6.5 of the Draft Policy.

provided that the regulations in terms of the disposal of human remains are strictly adhered to. Lastly, permission could be obtained from the parents to use the placenta for research purposes.²⁷⁸

4.5 CONCLUDING REMARKS

With regards to the Draft Policy, one can conclude that it is a step in the right direction towards a fair legal practice with regard to the instances where there are no signs of life after birth of a foetus regardless of the gestational age as the Draft Policy will expand the current application of the Registration of Births and Deaths Act²⁷⁹ with regard to stillbirths to include all live births at any gestational age meeting with death before being registered at the Department of Home Affairs. Furthermore, the Draft Policy provides for the instances where the foetus meets with death before being born alive at a gestational age less than 26 weeks.

The case of *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another*²⁸⁰ may provide the judicial relief required as per the Founding Affidavit and in the instance that it does, the Draft Policy would not be futile, but it would support the enactment of the Draft Policy in order to ensure that justice is done, parents are afforded with the discretion to bury the foetus and in the process the intrinsic value of the foetus will be acknowledged.

²⁷⁸ Regulation 6.5 of the Draft Policy.

²⁷⁹ Act 51 of 2002 as it directly relates to stillbirths.

²⁸⁰ Case number to be allocated and case to be commenced in the High Court of South Africa, Gauteng Division, Pretoria in June 2017.

CHAPTER 5: EVALUATION, ANALYSIS AND CONCLUSION

5.1 INTRODUCTION

In the preceding chapters of this thesis the author has set out to gather all information and explore all instances regarding burial rights of fetuses in South Africa, encompassing foreign law, international law and constitutional law. The author focussed not only on the private law sphere, discussing the rights of the pregnant woman and intrinsic value of the foetus, but also discussed the impact of the burial of a body as found in the public law sphere and further explored the crime of concealment of birth as it may have had a bearing on the author's proposed position.

In this thesis the author has set out to prove that fetuses, regardless of its point of development *in utero*, have intrinsic value and that this intrinsic value should be protected in a manner that would promote the rights of the pregnant woman without conflicting with their (the pregnant woman's) constitutional rights. This means that we should not view a pregnant woman and a foetus as a single entity where the foetus is merely part of the woman's body. Furthermore, we cannot view the foetus and the pregnant woman as separate legal and physical entities as that would mean that the foetus should be afforded all rights that a person has under the law, regardless of the fact that it lives off the body of the pregnant woman until birth. The author agrees with the approach of viewing a foetus and a pregnant woman as not one legal entity and also not as two legal entities, but rather accentuating the unique togetherness of the pregnant woman and the foetus without degrading at the one end and over-emphasising the intrinsic value of the foetus at the other end. This combined approach, the not-one-but-not-two approach is for the author the essence of acknowledgement of intrinsic value without affording constitutional rights.

In addition to the above, the author has set out to disprove that in order to acknowledge and protect the intrinsic value of the foetus; you need to afford the foetus the right to life and other constitutional rights. The reason why the author is setting out to disprove that the foetus should be afforded constitutional rights is due to the unique togetherness of the foetus and the pregnant woman and the fact that the right to life and other constitutional rights if afforded to the foetus would conflict with the pregnant woman's constitutional rights. The most common of these would be in regard to the right of the pregnant woman to terminate the pregnancy in certain instances,²⁸¹ which would directly conflict with the right of life of the foetus.²⁸²

Within the past few chapters of this thesis, the author has set out to achieve the acknowledgement of the intrinsic value of the foetus by affording the parents of the foetus meeting with death the discretion to bury the foetus and not to couple the burial of foetuses meeting with death with stagnant medical tests for viability. By affording parents this discretion, the law would be said to acknowledge the intrinsic value of the foetus without affording it rights and therefore not creating constitutional conflict. This position would be comprehensible when the section 9 test for equality applies.²⁸³ The consideration would relate to the situation where a pregnant woman wants to terminate the pregnancy and is afforded that right in terms of the Choice on Termination of Pregnancy Act²⁸⁴ before 20 weeks of pregnancy for any reason and thereafter for medical reasons. In contrast to this position a woman pregnant with a foetus meeting with death, may only bury the foetus in an instance where the foetus was *in utero* for 26 weeks or more.

²⁸¹ Termination of pregnancy refers to terminations allowed in certain instances by the provisions of the Choice on Termination of Pregnancy Act 92 of 1996.

²⁸² The right to life of the foetus in this instance is only used in an explanatory manner to indicate the effect if the foetus is afforded constitutional rights and the pregnant woman exercises her right of autonomy of her body found in s. 12(2)(b) of the South African Constitution. The moment the pregnant woman decides to terminate the pregnancy, she would be causing conflict between her right of patient autonomy with the right of life of the foetus. In normal circumstances one would be of the opinion that the right of life would enjoy precedence, but this would cause the pregnant woman to become an incubator for the nine months of pregnancy and this would not be promoting her constitutional rights to patient autonomy and human dignity. The above would be a direct effect of an instance where the separate entities approach is followed, which contributed to the author's view that this approach would not be comprehensible under South African law.

²⁸³ S. 9 of the South African Constitution indicates that everyone is equal before the law and in this section the test for equality is found.

²⁸⁴ Act 92 of 1996.

This creates the situation that before 20 weeks of pregnancy you can terminate at any time and for any reason as if the foetus has no value, but that it only gathers value from 26 weeks when it can be buried. The problem the author faces is that during the time that the foetus reaches 20 weeks, the pregnant woman cannot terminate the pregnancy for a reason not medically related, but the value of the foetus as a child is only recognized after 26 weeks of pregnancy when a foetus meeting with death can be buried. Based on equality the author is of the opinion that the pregnant woman that can terminate the pregnancy before 20 weeks for any reason is afforded a termination right, but the pregnant woman wanting to conserve the pregnancy and where the foetus meets with death, may only bury the foetus after 26 weeks. It seems to the author that there is confusion relating to the intrinsic value of the foetus and these instances were researched and discussed in great detail in the preceding chapters.

During the next parts of this chapter, the author will analyse the discussions in the previous chapters and conclude upon the intrinsic value of the foetus in the first instance. Secondly the author will conclude upon the ideal legal position in South Africa and eliminate any bearings that may be found within the law relating to this position in order to provide a position that is not only ideal, but that can be applied in practice without creating a confliction of constitutional rights.

5.2 WHAT IS THE LEGAL POSITION IN SOUTH AFRICA WITH REGARD TO THE STATUS OF THE FOETUS?

The legal status of the foetus in South Africa relates to the discussion of legal personhood in South Africa, with a direct focus on the point of commencement of legal personhood. The question in this part relates to the exact moment that a person is regarded a legal entity with certain rights enshrined within the South African Constitution as well as other rights provided for in the common law and found in Acts and other legal instruments within South Africa.

There are no statutory provisions in South Africa relating to the exact moment at which legal personhood vests. Furthermore the South African Constitution does not expressly define the terms 'person' or 'everyone' and therefore it cannot be said to either include or exclude fetuses. In addition thereto the provisions of section 28²⁸⁵ merely refer to a child as being under the age of 18 years.²⁸⁶ This means that we cannot be sure when legal personhood commences.

In South African law, where a certain instance is not regulated by either the South African Constitution or a piece of legislation, procedure or regulation the common law applies. In this instance the common law is very clear regarding the commencement of legal personhood in that it stipulates that complete birth is required and the child should have lived, even if it was for a short while.²⁸⁷ This means that the unique togetherness of the pregnant woman and the foetus should no longer apply and the special entity should become separate entities to the point where the foetus is no longer dependent on the body of the pregnant woman to survive. The foetus (or child after birth) should be able to breath and survive independently from the body of the pregnant woman. Therefore the unique togetherness is separated and the pregnant woman and the foetus (child)²⁸⁸ should be two separate entities. Therefore it is clear that a foetus (child) can only be considered a legal entity with rights after it has been separated from the body of the mother and lives, even if just for a short while.

It can therefore be said that legal personhood relates to a certain independence. If you cannot live independently as your own human being then you cannot be afforded any rights in terms of the South African law. Therefore legal personhood, rights in terms of the South African Constitution

²⁸⁵ S. 28 of the South African Constitution relates to children with specific relation to protection of children under the South African law.

²⁸⁶ The definition of child in s. 28 of the South African Constitution was adapted for ease of reading.

²⁸⁷ Cronjè & Heaton (2008) at p. 7.

²⁸⁸ The author will continue to refer to the term foetus and place the term 'child' in brackets where applicable in order to maintain consistency in terminology when discussing the applicable instances applicable to the problem statement within this thesis.

and other legal instruments will only vest in a person, meaning a foetus separated from the body of the pregnant woman able to live independently.

There is no mention of a bearing on legal personhood if medically dependent for survival. The only indication relates to the separation of the foetus (child) from the body of the pregnant woman and therefore it would seem that even if a foetus (child) is born prematurely and can be separated from the body of the pregnant woman and survive even if medically assisted, would be entitled to legal personhood and therefore the rights encapsulated in the South African Constitution and other legal instruments pertaining to the South African law.

5.3 APPLICABILITY OF THE RIGHT TO LIFE OF A FOETUS IN SOUTH AFRICAN LAW AND INTERNATIONAL LAW AND THE LINK BETWEEN THE RIGHT TO LIFE AND THE INTRINSIC VALUE OF A FOETUS

As discussed above, the right to life in South Africa is encapsulated in section 11 of the Constitution of South Africa, 1996 and applies to all persons in South Africa and therefore it can be said that one should possess legal personhood in order to be entitled to the right to life and other rights encapsulated in the South African Constitution. This means that if a foetus meets with death before being born alive and being able to survive separately from the body of the pregnant woman, it is not entitled to the right to life as encapsulated in the South African Constitution.

There are, however instances where foreign and international law impacts upon the South African Constitution and can render a certain provision inconsistent with this law or legal instrument and cause law reform. At the outset one should note that there are two approaches with regard to the impact of international law on a country's legal system, namely monism and dualism. Whereas monism refers to an approach where the law of a country and international law is one, dualism refers to an instance where domestic law and international law may differ, but that international law becomes applicable in some instances. South Africa follows a dualistic system and

therefore the applicable provision relating to the development of South African law in light of international law can be found in section 39(1)(b) of the South African Constitution which stipulates that international law must be considered during legal interpretation. Therefore should the international law afford the right to life to a foetus *in utero*, the common law must be developed to afford the foetus this right.²⁸⁹

When turning to the international law, we find that within the International Covenant on Civil and Political Rights of 1969 there was a prohibition on the carrying out of the death penalty on pregnant women. This does not afford the right to life to a foetus, but acknowledges the intrinsic value of the foetus as worthy of protection. Furthermore paragraph 3 of the preamble of the Declaration of the Rights of the Child 1959 states that children needs special safeguards and care including legal protection before as well as after birth.

Due to the above international law provisions and the fact that section 39(1)(b) of the Constitution²⁹⁰ places a duty regarding law reform in order to conform to the international law, it is only natural to accept that the intrinsic value of foetuses should be promoted and protected even by the South African Legislature.

It is clear that there is no right to life for foetuses in the international law or South African law, mainly due to the confliction thereof with the rights of the pregnant woman, but the international law does reckon that a foetus should be protected before birth based on its intrinsic value. This may cause certain questions relating to the correctness of abortion legislation, but for the moment we can accept that the fact that there is abortion legislation promotes the right of the pregnant woman to patient autonomy and this will not be challenged during this thesis.

²⁸⁹ This is based on the interpretation of s. 39(1)(b) of the South African Constitution. Development of law takes place either by way of the amendment of current legal instruments by the Legislature or by law reform through the courts, especially a High Court, Supreme Court of Appeal or the Constitutional Court.

²⁹⁰ The South African Constitution.

5.4 THE DIFFERENCE BETWEEN THIRD PARTY VIOLENCE AND A TERMINATION OF PREGNANCY IN TERMS OF THE CHOICE ON TERMINATION OF PREGNANCY ACT²⁹¹ IN LIGHT OF PERSONAL AUTONOMY AND INTRINSIC VALUE OF THE FOETUS

During this part of the Chapter the author will interact with the criminality of third party violence against a foetus in light of the intrinsic value of the foetus. In addition thereto the author will discuss the termination of pregnancies in terms of the Choice on Termination of Pregnancy Act²⁹² based on patient autonomy found in section 12(2)(b) of the South African Constitution. After these discussions, the author will differentiate between an instance of third party violence and termination of pregnancy and lastly indicate why third party violence against a foetus should be criminalized in light of the intrinsic value of the foetus.

The crime for killing a newborn baby is encapsulated in section 239(1) of the Criminal Procedure Act 51 of 1977 and states that if the foetus (child) did not breathe before being killed, the accused cannot be charged with the murder of the foetus (child). This was the basis of the case of *S v Mshumpa*²⁹³ where the South African criminal law concerning third party violence against a foetus as well as the court's constitutional duty to develop the common law was dealt with. In this case, the two accused persons allegedly shot the victim causing the 38-week foetus to meet with death.

During the case it became clear that both accused persons had the intention to kill the foetus and therefore charging them with murder would suffice as the accused had *dolus directus* to cause the death of the foetus. It was stated that the born-alive rule was outdated and there was a call for law reform to include a foetus in the ambit of murder.

²⁹¹ Act 92 of 1996.

²⁹² *Ibid.*

²⁹³ *S v Mshumpa* 2008 (1) SACR 126 (E).

The problem that arose was that the state indicated that a viable foetus should be included in the ambit of the term 'person' when murder is considered as murder is the intentional killing of another person. The court stated that it is one thing to develop common law within the private law sphere in order to eradicate patterns of unequal personal, social and economic domination on the ground that these patterns causes an infringement on the values found within the South African Constitution and therefore the court reiterated that for murder to be applicable, the foetus (child) should be born alive.²⁹⁴ Due to the fact that the act is seen as an offence committed against the pregnant woman would not bring the law in disrepute by leaving action unpunished.

The court did not dismiss the fact that the killing of a foetus should be criminalized, but indicated that the Legislature is better suited to affect this kind of legal reform. The author tends to agree with this statement as court decisions can more easily be overturned on appeal, but enactment of Legislation by the Legislature would ensure firmer and more secure protection of the intrinsic value of the foetus against third party violence.

In some instances people view the termination of a pregnancy as third party violence against a foetus. In order to evaluate if there is a link between third party violence and the termination of a pregnancy by a pregnant woman, one should first evaluate the termination of pregnancies in terms of the Choice on Termination of Pregnancy Act 92 of 1996. This Act does not intend to make the process of termination of pregnancy an easy process and provide rather strict regulations in this regard. Firstly there are time constraints that determine when and for which reasons a termination may be done. Secondly the person(s) that may execute the termination is regulated and determined and thirdly the records to be kept are determined. Although the records are confidential, it is an express requirement that the termination is recorded in a certain manner. This proves that the process is very clinical and regulated quite strictly.

²⁹⁴ Par. 55 and 56 of *S v Mshumpa* 2008 (1) SACR 126 (E).

When evaluating if there is a link between third party violence and termination of a pregnancy, one should evaluate if a pregnant woman is a third party, who acts with the intent to kill the foetus through violence. Therefore it can be said that there are three elements, namely the element of a third party, the element of intent to cause death and the element of violence. If all three are elements are not met, the termination of a pregnancy cannot be viewed as third party violence against a foetus.

The problem with this is that the pregnant woman possesses the right to patient autonomy encapsulated in section 12(2)(b) of the South African Constitution. This means that when a pregnant woman decides to terminate a pregnancy, she is making a choice over her own body and is not intentionally harming a part of another person's body. Due to the unique togetherness of a pregnant woman and a foetus, the pregnant woman cannot be considered as a third party inciting violence on the foetus and a termination is a medical procedure and not an intentional act of violence. It can therefore be deduced that the only element present is the intent to cause the death of the foetus and that the pregnant woman is not a third party and that there is no violence in the procedure for the termination of the pregnancy.

From the above discussion we can deduce that although the intrinsic value of a foetus is acknowledged, even by courts, the legal protection afforded to a foetus based upon this intrinsic value is yet to be established. The possible confusion between third party violence against a foetus and the termination of a pregnancy is a contributing factor to the fact the intrinsic value of the foetus has not yet established its legal protection.

5.5 LEGAL POSITION WITH REGARD TO THE BURIAL OF FOETUSES IN SOUTH AFRICA

The legal position in South Africa with regard to the burial of foetuses can be found in the provisions of the Registration of Births and Deaths Act 51 of

1992. The most prominent provisions within this Act relates to the burial of foetuses (stillborn babies). This Act refers to stillborn babies rather than foetuses and the definition of a stillborn baby is a foetus that has survived at least 26 weeks *intra uterine* before meeting with death. There are several other provisions within this Act that applies to the current situation, but the most prominent is the definition of the stillborn baby.

The author does not agree with the test for viability as encapsulated within the definition of a stillborn baby found within the Registration of Births and Deaths Act 51 of 1992. The reason for the disagreement is twofold. Firstly the author is of the opinion that placing viability at 26 weeks *intra uterine* existence causes the measurement of viability to become stagnant and therefore it does not progress together with medical technology. Furthermore the author is of the opinion that viability should be determined on a case to case basis as there are numerous factors that have an effect on the viability of a foetus.

5.6 THE VIABILITY OF FOETUSES IN REGARD TO THE CHOICE ON TERMINATION OF PREGNANCY ACT 92 OF 1996 AND THE REGISTRATION OF BIRTHS AND DEATHS ACT 51 OF 1992.

The discussion regarding the viability of a foetus was set to prove that viability in South Africa is problematic and caused the South African law to stagnate. In order to comprehend the issues regarding viability in South Africa, the viability of foetuses in regard to the Choice on Termination of Pregnancy Act 92 of 1996 will be discussed together with the Registration of Births and Deaths Act 51 of 1992.

As stated above the viability discussion has come a long way and therefore personhood is vested in the born-alive rule as it is the simplest way to ensure that a foetus is viable. The problem the author has with this approach is that it is causing our law to stagnate due to the fact that the advances in medical technology have placed us within the foetal realm and therefore the viability of a foetus can be more easily determined. Furthermore, it should be

noted that viability of a foetus is actually a determination that should be done on a case to case basis as there are numerous factors impeding thereupon.

Previously the South African law has acknowledged that a foetus is viable at 26 weeks *intra uterine* existence as stipulated in the provisions of the Registration of Births and Deaths Act 51 of 1992 which determines that in order to obtain a burial order for a foetus meeting with death, the foetus must be viable. The issue with connecting viability to a certain number of weeks became problematic once the Choice on Termination of Pregnancy Act 92 of 1996 was enacted. Section 2 of this Act²⁹⁵ indicates the instances at which the pregnancy may be terminated. For the first 12 weeks it is within the woman's discretion to terminate the pregnancy, whereafter the conditions for termination becomes more complex and is then mainly based on medical considerations and the health (mental and physical) of the pregnant woman. This is a clear indication that the Legislature is acknowledging the intrinsic worth of the foetus, otherwise there would have been less strict and complex provisions regarding the termination of a foetus.

The main issue identified by the author in this instance is that after 20 weeks of pregnancy, the law²⁹⁶ views the foetus as something worth protecting and in a sense viable as it cannot then be terminated for a non-medical related reason, but at the same instance only regards the foetus as viable and a stillborn baby in the event that it meets with death after 26 weeks *intra uterine* existence. This leaves a grey area of 6 weeks where the foetus is protected from termination on non-medical grounds, but should it meet with death it is not viable and cannot be buried.

The author is of the opinion that this creates confusion in the legal system as it would seem that the Legislature strived to protect the foetus from termination, but did not develop the legal provisions relating to the foetus in other instances to keep up with this legal protection afforded. It would have been logical to develop all provisions relating to viability of foetuses when the

²⁹⁵ The Choice on Termination of Pregnancy Act 92 of 1996.

²⁹⁶ As encapsulated in s. 2 of the Choice on Termination of Pregnancy Act 92 of 1996.

Choice on Termination of Pregnancy Act 92 of 1996 was enacted. In the opinion of the author the provisions regarding the burial of fetuses meeting with death should be construed in the same manner as the provisions relating to termination of pregnancies as the two inter-correlates with the foetus. What the author means by this is that it is like two sides of the same coin.

The one side (or legislative instrument) regulates the instance where the pregnant woman (common denominator) wants to terminate the pregnancy and the other side (or legislative instrument) regulates the instance where the pregnant woman wanted to continue with the pregnancy, but the foetus met with death.

It is the opinion of the author that all pregnant women should be treated alike under the equality provisions of the South African Constitution and therefore should be able to exercise their right in terms of section 12(2)(b) which relates to control over their own body. If a pregnant woman can be granted the discretion to end a pregnancy, why can a pregnant woman wanting to keep the foetus not be afforded the opportunity to bury the foetus in the unfortunate event that the foetus meets with death. This is the problem statement within this thesis and the author found a position that will enable the pregnant woman the discretion to bury the foetus without affording it any rights and in the opinion of the author this position is in line with the provisions of section 9 of the South African Constitution regarding equality before the law.

This approach was taken due to the fact that it would be unthinkable to limit the rights of the pregnant woman for 9 months in order to afford constitutional rights to the foetus. Furthermore, one cannot merely afford more rights to the pregnant woman without severe consideration, therefore it would be comprehensible and much easier to afford a pregnant woman the discretion in regard to whether or not the foetus should be buried or disposed of as medical waste. This would mean that in the event that the discretion is exercised and the pregnant woman chooses to bury the foetus,

the normal regulatory provisions and prescriptions of the Registration of Births and Deaths Act 51 of 1992 would apply and should still be followed. This would enable the pregnant woman the opportunity to bury the foetus that met with death and still be regulated by the State as is the burial of any other body of a person meeting with death.

5.7 WHAT IS THE CANADIAN LEGAL POSITION WITH REGARD TO THE BURIAL OF FOETUSES?

The Canadian law was selected as comparative legal system due to the fact that the Canadian Charter of Rights and Freedoms are analogous to the South African Constitution and therefore it can be said that the morals of the communities of South Africa and Canada are alike and therefore the legal principles of one country will be easily accepted by the other country based on the fact that they have common principles and morals.

The Cemeteries Act and Regulations²⁹⁷ distinguishes between foetuses meeting with death before 20 weeks *in utero* existence and foetuses meeting with death after 20 weeks *in utero* existence. The difference is that no burial order is required when the foetus meets with death before 20 weeks *in utero* existence, with the reservation that the disposal must not cause public offence. In an instance where the foetus meets with death after 20 weeks *in utero* existence, a burial order is required and all required processes must be following when the foetus is buried. This would imply that the Canadian law views a foetus as viable around 20 weeks' *in utero* existence. Recent Canadian case law²⁹⁸ confirmed that the legal position above is still in force and that the provisions thereof are correct.

The key of the Canadian legal position is that the parent(s) of the foetus meeting with death has the discretion to have the foetus buried in the prescribed manner or to let the State dispose of the remains.

²⁹⁷ Part 7 of the Cemeteries Act Consolidated Statutes of Alberta 2000 cC-3 and Regulation 8 of the Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

²⁹⁸ *Bastien v Ottawa Hospital (General Campus)* 2001 CanLII 28016 (ON SC).

5.8 POSSIBLE CHALLENGES FACED WITH DIRECT IMPLEMENTATION OF THE CANADIAN LEGAL POSITION IN TERMS OF SECTION 39(1)(C) OF THE SOUTH AFRICAN CONSTITUTION

Section 39(1)(c) of the South African Constitution stipulates that when the Bill of Rights is interpreted, foreign law may be considered. As stated above, the author decided to utilize the Canadian law as comparative legal position and therefore the direct application of the position regarding burial of foetuses need to be evaluated in order to establish if it would be comprehensible or if it should be adapted to become part of the South African legal position.

The main concern for the author is the distinction between the burial requirements of foetuses meeting with death before 20 weeks *in utero* existence and foetuses meeting with death after 20 weeks *in utero* existence. The problem arising relates to the fact that foetuses meeting with death before 20 weeks *in utero* existence may be buried without a burial order. The provisions of the Registration of Births and Deaths Act 51 of 1992 is very clear about burial requirements in South Africa and therefore a direct application of the Canadian legal position may cause issues in this regard.

Further to the above, it should be noted that burial of a foetus without a legal burial order issued in terms of the provisions of the Registration of Births and Deaths Act 51 of 1992 in South Africa may constitute the offence of Concealment of Birth in terms of section 113 of the General Law Amendment Act 46 of 1935. Further to the above, the disposal of remains without the legal burial order may result in other statutory crimes that the person may be charged with. Bearing this in mind it would be incomprehensible to adopt a legal position in South Africa with regard to the burial of foetuses meeting with death before 26 weeks *intra uterine* existence, if a person exercising this discretion will be charged with an offence. In this premise, the crime of concealment of birth was discussed in grave detail in order to fully understand the development of this crime in

South Africa and to evaluate if the Canadian legal position would cause a transgression.

The elements of the crime of concealment of birth in terms of section 113 of the General Law Amendment Act 46 of 1935 include firstly no burial order, secondly disposal of a body, thirdly the intent to conceal the fact of birth and lastly any new-born child. The first two elements are present in the first part of the Canadian legal position seeing as it is the disposal of a body without a legal burial order and therefore these elements will not be discussed in further detail. The two elements to discuss are the elements of intent and the element of new-born child.

In order to conclude if this crime is applicable on the Canadian legal position it would need to be proved that there was an intention to conceal the birth and secondly that a new-born baby can include a foetus of less than 20 weeks *in utero* existence. With regard to the intention to conceal the birth of the foetus, it would seem that each burial may be concealment due to the fact that there will be very little or no paperwork in this regard seeing as a burial order will not be required. Although the element of intention to conceal the birth of the child will have to be proved beyond reasonable doubt, this is mainly done by way of argument and not usually by way of concrete evidence and can therefore have a bearing on the application of the Canadian legal position resulting in the pregnant woman or parents of the foetus unknowingly committing a crime.

With regard to the element of a newly born child, various cases were quoted and it was found that a newly born child can refer to a viable foetus. It was reiterated by the courts that viability of a foetus is around 26 weeks' *in utero* existence.²⁹⁹ In this premise the Canadian legal position would not constitute this crime as the legal position refers to foetuses of less than 20 weeks *in*

²⁹⁹ Case law confirming 26 weeks *in utero* existence renders a foetus viable, include: *S v Molefe* 2012 (2) SACR 574 (GNP); *R v Dema* 1947 (1) SA 599 (E). Foreign case law from Zimbabwe and Venda also stated that viability is between 26 and 28 weeks *in utero* existence: *S v Jasi* 1994 (1) SACR 568 (ZH), *S v Madombwe* 1977 (3) SA 1008 (R) and *S v Mgti* [1998] JOL 2684 (ZH).

utero existence, whereas the crime of concealment of birth refers to 26 weeks *in utero* existence.

In this instance the crime of concealment of birth is not applicable upon the Canadian legal position. What one should consider is that the crime of concealment of birth may still be applicable, especially in instances of maladministration where there are no records pertaining to the birth of the foetus. In such a premise it would be very hard to prove that there was no intention to conceal the birth of the child.

5.9 APPLICABLE LEGISLATIVE PRINCIPLE FOUND IN THE CANADIAN LAW THAT COULD BE APPLIED IN THE SOUTH AFRICAN LAW TO ADDRESS THE ISSUES IDENTIFIED WITH THE APPLICATION OF THE PROVISIONS OF THE REGISTRATION OF BIRTHS AND DEATHS ACT 51 OF 1992

As discussed previously and based on the similarities between the provisions found in the constitutions of both Canada and South Africa, the author found what she believes to be the ideal position in Part 7 of the Canadian Cemeteries Act³⁰⁰. Where it is stated in section 65(1), that the Minister may make Regulations pertaining to various aspects, but with specific reference to paragraph (oo) which states that: ‘respecting the disposal of fetuses and the bodies of newborn infants who have died, subject in each case to the parents’ or guardians’ request, and defining newborn infant for the purposes of the regulations.’

In line with the above, the Canadian Legislature promulgated Regulations³⁰¹ pertaining to the death of a foetus. Regulation 8 stipulates the following:

In the case of the death of a fetus, the remains need not be disposed of as required by section 5 and 6 of the Act, but
(d) the manner of disposition is subject to the parents’ or guardians’ request,
(e) the manner of disposition must not cause public offence, and

³⁰⁰ Consolidated Statutes of Alberta RSA 2000 cC-3.

³⁰¹ Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

- (f) where the fetus completed 20 weeks' gestation or weighed 500 grams or more, a burial permit must be obtained prior to any disposition of the remains.

These principles encapsulate the position that the author is proposing and seeing as it is encompassed the discretion of the parents or guardians of the foetus and are not specific in relation to the foetuses it applies to. This means that there is no provision made for any rights being afforded to the foetus and therefore there will be no infringement on the rights of the pregnant woman to terminate the pregnancy in terms of section 12(2)(b) of the South African Constitution and the Choice on Termination of Pregnancy Act 92 of 1996.

In actual fact, this strengthens the application of the right that a woman has to terminate a pregnancy as it enforces the discretion of the parent(s).

Part (c) does in fact determine that 20 weeks or 500 grams sets the condition that a burial permit should be obtained. This only entails that in those instances the burial permit is a requirement, before the 20 weeks or 500 grams the foetus can be disposed of without a burial permit.

This further confirms the rights of the parents to have a choice in the disposal of the body of the foetus regardless of the age thereof. It can therefore be stated that the right to be buried is not the right of the foetus, but the right to decide upon the method of burial vests in the parents or guardians of the child.

In relation to the discussion of section 15(1) of the Charter, it becomes apparent that all persons are equal before the law. All parents or guardians are allowed the choice regarding burial of the foetus and not only foetuses,

which died after a specifically stated amount of weeks. This is in clear contradiction with South African law, but can duly assist the South African Legislature in correcting the current injustice and legal uncertainty caused by the provisions of the Registration of Births and Deaths Act 51 of 1992.

5.10 PROPOSED LEGAL POSITION

The discussions above confirm that where parents or guardians are given the choice to bury the foetus or to have it disposed of by the hospital, most parents or guardians would make the choice to bury the foetus, affording it a proper burial service and also assisting the parents or guardians with the grieving process.

The position found in the Canadian law does not at any instance afford the foetus any rights, it only provides the parent(s) with the discretion to bury the foetus or to have it disposed of by the State.

This means that there is no limitation on any rights of any person and that although burial of foetuses less than 20 weeks do not require a burial permit, the law can be adapted to only providing the discretion and maintaining the other provisions with regard to burial orders and burial requirements.

The author therefore proposes that this position as found in the Canadian law to be applied in South Africa by way of amendment to the Registration of Births and Deaths Act³⁰² through the application of section 39(1)(b) of the Constitution.³⁰³

³⁰² 51 of 1992.

³⁰³ S. 39(1)(c) of the South African Constitution, enables the use of foreign law when interpreting the Bill of Rights, e.g. s. 9. The right to equality should be interpreted as the right to equality before the law of all parents or guardians who lose foetuses, some at an earlier stage than others. Therefore by interpreting S. 9 to afford all parents or guardians the right to bury the foetus, s. 39(1)(c) allows for the consideration of foreign law. In light hereof the Canadian law position can be used to interpret s. 9 of the Constitution in a way that promotes the equality of persons and therefore being able to bury the foetus, regardless of the age of the foetus.

Therefore, it is proposed that the Legislature amends the provisions relating to the burial of foetuses to include the discretion of the parent(s) of the foetus and together with this provision, that all burials regardless of the age of the foetus requires a burial order as it would bring too much uncertainty in the instance that a burial order is required in some instances and not in others.

It should be noted that during the study, the author realised that not only the instance of foetuses meeting with death before 26 weeks gestational age is affected, but in addition thereto, parents of foetuses being terminated due to medical reasons are also affected.

It is submitted that in order to incorporate the Canadian legal position into the South African law, the courts would have to be approached for an order in this regard. As discussed in great detail in Chapter 4 of this thesis, the case of *The Voice of the Unborn Child NPC vs Minister of Home Affairs and Another*³⁰⁴ does not make direct use of the Canadian Legal Position in order to afford the parents of the foetus the discretion to bury the foetus meeting with death at any gestational age.

Therefore, should the relief sought by the Voice of the Unborn NPC be granted by the High Court, the injustice identified in the thesis would be corrected, although in a different way as envisioned by the author. The outcome of this matter would either be in line with what the thesis proposes or would lead to a continuance of the injustice against the parents of foetuses meeting with death before 26 weeks gestation and the parents of foetuses who are terminated based on medical concerns.

Word count: 38 968

³⁰⁴ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* Case number to be allocated and case to be commenced in the High Court of South Africa, Gauteng Division, Pretoria in September 2017.

BIBLIOGRAPHY

PART A: SOUTH AFRICAN SOURCES

Legislation

1. Constitution of the Republic of South Africa, 1996
2. General Law Amendment Act 46 of 1935
3. Criminal Procedure Act 51 of 1977
4. Registration of Births and Deaths Act 51 of 1992
5. Occupational Health and Safety Act 85 of 1993
6. Compensation for Occupational Injuries and Diseases Act 130 of 1993
7. Choice on Termination of Pregnancy Act 92 of 1996
8. Children's Act 38 of 2005

Case Law

1. *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)
2. *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938
3. *Chrisholm v East Rand Property Mines Ltd* 1909 TH 297
4. *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 113 (T)
5. *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA)
6. *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 (O)
7. *Msiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC)
8. *Pinchin v SANTAM Insurance Co Ltd* 1963 (2) SA 254 (W)
9. *R v Berrman* (1854) 6 Cox CC 388
10. *R v Dema* 1947 (1) SA 599 (E)
11. *R v Matthews* 1943 CPD 8 9
12. *R v Oliphant* 19580 (1) SA 48 (O)
13. *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA)
14. *S v Jasi* 1994 (1) SACR 568 (ZH)
15. *S v Madombwe* 1977 (3) SA 1008 (R)

16. *S v Manngo* 1980 (3) SA 1041 (V)
17. *S v Molefe* 2012 (2) SACR 574 (GNP)
18. *S v Muguti* [1990] JOL 2684 (ZH)
19. *S v Mshumpa* 2008 (1) SACR 126 (E)

Books

1. Bourquin (2010) *The Very Practical Pregnancy Handbook* 5th Edition
2. Burcott (ed) (2010) *Law of Persons and the Family*
3. Cronje & Heaton (2003) *The South African Law of Persons* 3rd edition
4. F du Bois (et al) (2007) *Wille's Principles of South African Law* 9th Edition
5. Payne-James et al (2011) *Simpson's Forensic Medicine* 13th edition
6. Radzinowicz (1948) *History of English Criminal Law* Volume 1
7. Seymour (2000) *Childbirth and the Law*

Journal Articles

1. Meyerson *Abortion: The Constitutional Issues* (1999) 116 SALJ 50
2. Cohen & Sayeed *Fetal Pain, Abortion, Viability and the Constitution* (2011) 36 JLME 235
3. Hoctor & Carnelly *The Purpose and Ambit of the offence of Concealment of Birth* 2012 Obiter 732
4. Sarkin-Hughes *A Perspective on Abortion Legislation in South Africa's Bill of Rights Era* (1993) 56 THRHR 83
5. Pickles *Approaches to pregnancy under the Law: a relational response to the current South African Position and recent academic trends* 2014 De Jure 20
6. Powell et al *Decisions and Dilemmas related to Resuscitation of Infants born on the verge of viability* (2012) 12 NAINR 27
7. Pillay *The Beginning of Legal Personhood: Is South African Law Outdated?* (2010) 21 Stel LR 230
8. Slabbert *Pregnancy Loss: A Burial or Medical Waste* (2017) 80 THRHR 102
9. Van Oosten *The Choice on Termination of Pregnancy Act: Some Comments* 1999 South African Law Journal 60

Other sources

8. Pickles v Mshumpa: a time for law reform LLM Thesis University of Pretoria 2010
9. Swanepoel *Om afskeid te neem van 'n ongebore kind* Beeld 21 May 2012 [www.beeld.com] last visited on 13 November 2012 @ 09h00

PART B: FOREIGN SOURCES

Legislation

1. New Zealand Crimes Act, Public Act 43 of 1961 Cemeteries Act, Consolidated Statutes of Alberta RSA 2000 cC-3
2. Consolidated Regulations of Alberta, Cemeteries Act, General Regulation, Alta Reg 249/1998 RSC, c.C-46, as amended.
3. Canadian Criminal Code

Case Law

1. *Bastien v Ottawa Hospital (General Campus)* 2001 CanLII 28016 (on SC)
2. *R v Levkovic* 2008 Carswell Ont 5744 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, Ontario Superior Court of Justice

Journal Articles

1. MacKinnon *Reflection on sex equality under the law* 1991 Yale Law Journal 1316
2. Sheppard *Recognition of the disadvantaging of women: the promise of Andrews v Law Society of British Columbia* 1989 210ff

Other sources

1. Ellman *Now without hesitation* [www.nowwithouthesitation.blogspot.com/2009/06/where-does-objective-normative-value.html] last visited on 8 November 2013
2. Foetal Development [http://www.nrlc.org/abortion/facts/fetal-development.html] last visited on 22 January 2013

CHAPTER 4: THE VOICE OF THE UNBORN

4.1 INTRODUCTION

When considering pregnancy loss, one cannot only focus on miscarriages and stillbirths. With the enactment of the Choice on Termination of Pregnancy Act, both abortions and medical inducement of miscarriage were legislated. Therefore, the mentioned Act does not only legalise and regulate abortions by choice, it provides for late-term terminations due to medical reasons.

Slabbert³⁰⁵ explains that although the occurrence of pregnancy loss is covered by the law, the emotional distress and pain suffered by the parents should be based on moral convictions, i.e. the *boni mores* and not the law itself. In her article, she explains that although the Choice on Termination of Pregnancy Act exemplifies a pro-choice approach to terminations, not all terminations are based on a mere decision to terminate the pregnancy, whether on social, financial or personal considerations.³⁰⁶

In some instances, parent(s) are informed that there may be a medical deformity or other problem with the foetus, and thereafter the medical decision is made to terminate the pregnancy. As discussed in Chapter 2 of the dissertation, it is clear that the legislature, during the enactment of the Choice on Termination of Pregnancy Act,³⁰⁷ considered the intrinsic value of the foetus, thereby limiting the timeframes for terminations on social and financial grounds and only allowing late-term terminations on medical grounds where the life of the mother is in danger or the foetus will have a severe deformity.³⁰⁸

³⁰⁵ Slabbert *Pregnancy Loss: A Burial or Medical Waste* 2017 80 THRHR 102.

³⁰⁶ *Ibid.*

³⁰⁷ Act 92 of 1996.

³⁰⁸ Slabbert (2017) at pp. 102 – 103.

4.2 THE VOICE OF THE UNBORN BABY NPC

The co-founder and Executive Director of the non-profit company, The voice of the unborn baby, is Mrs Sonja Smith-Janse van Rensburg, a funeral director by profession. She was called to a private hospital in Pretoria during 2003 to collect a set of triplets born at 20 weeks' gestation. At the time the doctor agreed to sign the "necessary paperwork" in order for the parents, who lived in Hoedspruit, to have the bodies removed from the hospital and transported by Mrs Smith-Janse van Rensburg in order to hold a funeral service. Upon her arrival at the hospital to collect the foetal remains, the remains were missing. It became apparent that the remains were discarded with all the other anatomical waste, e.g. amputated limbs, organs, tissues, and so on. Mrs Smith-Janse van Rensburg caused such havoc in the maternity ward looking for the remains of the triplets, that the Unit Manager drove to the medical waste plant to look through the anatomical waste for the remains and recovered such.³⁰⁹

At the time of the events, Mrs Smith-Janse van Rensburg was not aware that this was the law - that the fate of a foetus meeting with death before 26 weeks gestation was anatomical waste. In 2011 her daughter had a miscarriage and the family felt that somebody should do something about this and she realised that she was this somebody and she had to do something to change the fate of foetuses meeting with death before 26 weeks gestation.³¹⁰

This is how the non-profit company came into existence with the goal to change the fate of the foetus meeting with death before 26 weeks gestational age from anatomical waste to something with intrinsic value – valuable enough to be afforded a burial service.³¹¹

³⁰⁹ Adapted from e-mail correspondence with Mrs Smith-Janse van Rensburg on 28 March 2017.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

The name of the Non-Profit Company is based on the recognition that many bereaved parents who experience pregnancy loss have already made such a significant emotional investment in the prospective child that it is perceived to be classified as a baby. In the event that the “baby” is lost, such bereaved parents is said to have the desire to give the “baby” the dignity of a burial, thereby giving a metaphorical voice to such bereaved parents’ subjective psychological reality of the prospective child as an unborn baby.³¹²

4.3 THE VOICE OF THE UNBORN BABY NPC V THE MINISTER OF HOME AFFAIRS AND THE MINISTER OF HEALTH

The author was placed in the possession of the Founding Affidavit of the Voice of the Unborn Baby NPC and due to the fact that the the case will be heard only in September 2017, the author will discuss the case based on the Founding Affidavit only. This part is therefore only based on the factual information provided for in the Founding Affidavit and does not contain any information provided by the first or second respondent in this matter. The discussion also in no way can protrude the outcome of the matter and therefore only pertains to the stance of the applicant in this matter, which is supported by the author.

The applicant in this matter is The Voice of the Unborn Baby NPC, duly represented by the co-founder and executive director, Sonja Smith-Janse van Rensburg, who disposed the affidavit for and on behalf of the applicant.³¹³ The nature of the application is stated as a constitutional challenge to the legislation pertaining to the burial of foetuses meeting with death before the foetus reached 26 weeks gestational age.

³¹² *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit par. 32 relating to the naming of the Non-Profit Company, Case number to be allocated and case to be commenced in the High Court of South Africa, Gauteng Division, Pretoria in June 2017.

³¹³ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another*. Citation part and Pars. 1 and 2 of the Founding Affidavit.

The parties to the matter include the applicant, The Voice of the Unborn Baby NPC, who brings the matter in its own interest pursuant to section 38(a) of the South African Constitution and in the public interest pursuant to section 38(d) of the South African Constitution. The first respondent is the Minister of Home Affairs as the Minister responsible for the administration of the Registration of Births and Deaths Act 51 of 1992. The second respondent is the Minister of Health as the Minister responsible for the administration of the Regulations relating to the Management of Human Remains, made in terms of the National Health Act 61 of 2003.³¹⁴

The basis for the application relates to the loss of pregnancy by expecting parents, the emotional consequences of such loss and how the state should deal with such bereaved parents in our constitutional dispensation, specifically regarding the burial or other method of disposal of foetal remains of foetuses meeting with death before 26 weeks gestation. The applicant states that the present application does not explicitly or implicitly aim to allocate any legal rights or quasi-rights to a foetus. The application is grounded on the reality that many expecting parents make a significant emotional investment in their prospective child long before birth and that pregnancy loss consequently has an undeniable negative emotional impact on the bereaved parents. The application at hand focuses on the rights of the bereaved parents rather than on the rights of the foetus.³¹⁵

The applicant indicates that the terms ‘foetus’, ‘prospective child’, ‘pregnancy loss’ and ‘burial’ have specific meanings in this matter. On the one hand, foetus refers to the “human conceptus until born alive” and prospective child on the other hand means “the intangible, mental construct of the hoped-for child in people’s minds”. It is indicated that the term is used in the same way as section 295(d) and (e) of the Children’s Act 38 of 2005 in the context of surrogate motherhood employs the terminology “the child is to be born” to refer to the mental construct of the future child. With pregnancy loss it is

³¹⁴ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit pars. 5 - 8 regarding the citation of the parties.

³¹⁵ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit pars. 9 - 10 regarding Pregnancy Loss and the Rights of Bereaved Parents.

meant to include any manner in which the foetus dies before being born alive. Therefore it can include spontaneous and induced pregnancy loss where induced pregnancy loss is governed by the Choice on Termination of Pregnancy Act 92 of 1996. Burial is used in the context of the Registration of Births and Deaths Act 51 of 1992 to mean burial in the earth or cremation. In practice it should be noted that burial entails the opportunity for a ceremony or ritual in which the bereaved parents, their family and friends, and religious, cultural, and/or other counsellors can participate.³¹⁶

With regards to spontaneous pregnancy loss, the applicant categorizes such as either early or late spontaneous pregnancy loss where it was traditionally referred to as miscarriage and still-birth respectively. This is based on whether the foetus is viable, where viability means the capability of the foetus to survive outside the womb of the mother at the stage when pregnancy loss occurs.³¹⁷

It is noted by the applicant that there is no international consensus on how to determine viability. The author in Chapter 2 of this dissertation confirmed this statement. The World Health Organization recommends 28 weeks gestational age for purposes of international comparison, given the difference in financial position of countries and the assertion that a foetus has little chance of survival outside the mother's womb in low-income countries prior to 28 weeks gestational age. It has further been stated that in high-income countries the gestational age of viability can be as low as 22 weeks.³¹⁸

The South African legal position as mentioned in Chapter 2 of this dissertation is also referred to by the applicant in the application and it is indicated that the purpose of the application is not to engage the issue regarding the 26-weeks gestational age for viability in South Africa, it is

³¹⁶ *Id.* at pars. 11 - 14.

³¹⁷ *Id.* at pars. 15 - 16.

³¹⁸ *Id.* at par. 17.

merely to ameliorate the drastic divergent legal effects of a pregnancy loss.³¹⁹

Important to note from the applicant's Founding Affidavit is that the application relates to the loss of pregnancy irrespective of the cause of the loss. Just as expecting parents who experience the loss of pregnancy due to natural causes may be emotionally impacted by such loss, expecting parents will also be emotionally impacted by a conscious decision to end the pregnancy based on medical advice. It should be noted that in the event that there was a conscious decision made to terminate the pregnancy based on medical advice, irrespective of the viability of the foetus, the remains are considered to be medical waste and cannot legally be buried.³²⁰

The applicant contends that there is no real issue with the application of the 26-week rule for viability, the main issue relates to the terms "birth" and "still-birth" as found in the Registration of Births and Deaths Act.³²¹ It is indicated by the applicant that the definitions pose a paradox in that the term "birth" requires live birth, whereas the term "still-birth" excludes live birth. Furthermore, the definition of "still-birth" is presented in the Registration of Births and Deaths Act³²² as a "child" with reference to a still-born foetus. The applicant further contends that it is a well-established position in the South African law that life starts at live birth and therefore a still-born foetus cannot in law be considered a "child" as it is not born alive. The applicant further indicates that in no way is the application aimed at challenging the legal status of the foetus under the law as there are no legal anomalies to be caused or legal fictions needed in order to recognize and protect bereaved parents' rights in the case of pregnancy loss.³²³

With regard to the similarities between still-birth and induced pregnancy loss, the applicant indicates that the question can be raised as to whether late-

³¹⁹ *Id.* at pars. 18 - 20.

³²⁰ *Id.* at par. 21 - 23.

³²¹ Act 51 of 1992. *Ibid* at par. 34 - 35.

³²² *Ibid.*

³²³ *Id.* at par. 36 - 37.

term conscious decisions regarding termination of pregnancies would qualify as a still-birth in terms of the Registration of Births and Deaths Act³²⁴ as a still-birth can occur through a caesarean section and a termination is deemed to be the separation and expulsion, by medical or surgical means of the contents of the uterus of a pregnant woman. In the mind of the applicant and that of the author these appear semantic and no difference could be found.³²⁵

The applicant further indicates that the legislature intended spontaneous pregnancy loss to be a still-birth and therefore it can be said that late-term induced pregnancy loss would not qualify as a still-birth due to the nature of the pregnancy loss with disregard to the similarity in the process of pregnancy loss between a still-birth and a late-term termination.³²⁶

There are several valid points of discussion in the Founding Affidavit of the applicant, but the author will only focus on the definitions of the terms as discussed above and in addition thereto, the human rights analysis and the subsequent application thereof to the relief sought by the applicant in relation to the engagements with the first and second respondent.³²⁷

From paragraph 66 in the Founding Affidavit,³²⁸ the “facts” regarding pregnancy loss is discussed. For legal purposes, this is the emotional impact of the death of a foetus on the prospective parent, which can be derived from the naturalistic approach to law, where all is taken into account, even human emotion. One can contend that emotion does not have a place in legal context, but this goes against the principle in the South African law indicating that the *boni mores* or the opinions and values of the community must be taken into account.

³²⁴ Act 51 of 1992.

³²⁵ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* - Founding Affidavit par. 39 relating to the difference between a caesarean section and a late-term termination based on medical advice.

³²⁶ *Id.* at par. 40 - 41.

³²⁷ *Id.* at par. 79 - 124.

³²⁸ *Id.* from par. 66.

The applicant in this matter relies on the values of equality, human dignity and privacy as encapsulated in Chapter 2 of the South African Constitution. With regard to human dignity, the applicant indicates that the decision to bury the remains of a dead prospective child can be an important decision. Accordingly, such decision falls within the right to human dignity which entails the protection of a person's autonomy.³²⁹

The applicant states with regard to privacy that the decision to elect to bury a foetus meeting with death is a decision within the core personal sphere of a person and accordingly falls within the ambit of the right to privacy which is encapsulated in Chapter 2 of the South African Constitution.³³⁰

With regard to the right to equality, the applicant eloquently states: 'Equality demands that, our law gives bereaved parents in Category A the benefit of the right to bury the remains of their dead prospective child, bereaved parents in Category B should be afforded the same right.'³³¹

With regard to Category A and Category B parents, the difference, according to the plaintiff relates to Category A foetuses meeting with death after 26 weeks gestational age and Category B foetuses are foetuses meeting with death before 26 weeks gestational age as discussed in paragraph 82 of the Founding Affidavit.³³²

Accordingly the plaintiff concludes that in the case of a pregnancy loss under 26 weeks gestation (stillbirth), the bereaved parent(s) have the right, based on the Constitutional rights and values of human dignity, privacy and equality to elect to bury the foetus meeting with death at any gestational age.³³³

In relation to the above, the plaintiff acknowledges some challenges under the current South African law which may cause infringements if the

³²⁹ *Id.* at par. 80.

³³⁰ *Id.* at par. 81.

³³¹ *Id.* at par. 87.

³³² *Id.* at par. 82.

³³³ *Id.* at par. 89.

conclusion that a foetus meeting with death at any gestational age can be buried is followed. This includes:

- (a) The provisions of the Registration of Births and Deaths Act, 1992;
- (b) The provisions of the Choice on Termination of Pregnancy Act, 1996; and
- (c) The provisions of the Regulations in terms of the National Health Act, 2003.

The plaintiff further states that the legal team could not find any legitimate government purpose that can be served by the possible infringement. The author agrees with the plaintiff in this instance.³³⁴

In the search for justice, the plaintiff engaged firstly with the first respondent in writing on 28 September 2015, but to date no response was received other than receipt of the letter. Further engagement was done with the second respondent where the Deputy Director General: Hospitals, Tertiary Health Services and Human Resource Development for the Department of Health showed co-operation by commencing the drafting of a policy addressing some of the issues.³³⁵

Unfortunately, in October 2016, the Deputy Director General: Hospitals, Tertiary Health Services and Human Resource Development for the Department of Health retired. Furthermore the plaintiff stated that the draft policy cannot amend the current statutory framework in line with the constitutional right of a bereaved parent(s), leaving the plaintiff no other choice than to approach the High Court for relief.³³⁶

In light of the plaintiff approaching the High Court, the relief sought relates to the granting of a declaration in terms of section 38 of the South African Constitution that, in the case of a pregnancy loss other than stillbirth, the bereaved parent(s) have the right based on the constitutional rights/values of human dignity, privacy and equality to elect to bury the foetus that met with

³³⁴ *Id.* at par. 95.

³³⁵ *Id.* at par. 99 - 109.

³³⁶ *Ibid.*

death and is referred to as the “burial right”. The High Court will hear the matter in September 2017 and thereafter there will be clarity regarding this matter.³³⁷

4.4 DEPARTMENT OF HEALTH: DRAFT POLICY ON THE MANAGEMENT OF BIRTHS UNDER 26 WEEKS OF GESTATION³³⁸

When considering what the Draft Policy relates to, it is necessary to give attention to the preamble of this policy in order to become acquainted with the legal provisions considered in the drafting thereof and the reasoning behind the drafting of this policy. As with most policies, procedures and regulations, the South African Constitution plays a main part in the reasoning for the drafting thereof. This instance is no different, as section 27 of the South African Constitution provides that the Minister of Health must enact legislation and other legal instruments in order to promote the protection of every person’s right to access to healthcare services, including reproductive healthcare. The provisions of section 27 of the South African Constitution therefore directly relate all occurrences in regard to pregnancy as it is part of reproductive healthcare.

Section 3(1) of the National Health Act³³⁹ provides that the Minister of Health must, within the limits of available resources, determine the policies and procedures necessary to protect, promote, improve and maintain the health and well-being of the population and ensure that these policies and procedures are followed in order to provide such essential health services to the population.

Sections 7(2) and 8(1) of the National Health Act³⁴⁰ provides that a healthcare provider must take all reasonable steps to obtain the user’s informed consent regarding any procedure done and furthermore that a

³³⁷ *Id.* at par. 111.

³³⁸ Department of Health, Draft 1 Version 5 dated 25 August 2016 hereinafter referred to as “the Draft Policy”, see <http://www.kznhealth.gov.za/savingmothers.pdf>.

³³⁹ Act 61 of 2003.

³⁴⁰ *Ibid.*

person has the right to participate in any decision affecting his or her personal health and treatment. This satisfies the provisions of section 12(2)(b) of the South African Constitution in that the person is given the choice regarding medical treatment.

This Draft Policy highlights the Minister of Health's adherence to the provisions of section 27 of the South African Constitution and sections 3(1), 7(2) and 8(1) of the National Health Act. The Draft Policy is, in the opinion of the author, the correct implementation of the objectives of the South African Constitution, being *inter alia* equality and human dignity. Furthermore, this does not afford the foetus any rights, but merely illustrates and re-iterates the right to human dignity of the parents and the acknowledgement of the intrinsic value of the foetus.

The regulations pertaining to the disposal of the remains of the foetus or stillborn can be categorized into two sections, namely stillbirths and miscarriages. Stillbirths are dealt with in terms of the current South African legal position as encapsulated in the provisions of the Registration of Births and Deaths Act.³⁴¹ This position was discussed in Chapter 2 of this dissertation and directly relates to the burial of remains where 26 weeks gestational age was reached.

As discussed previously, in Chapter 1 and 2 of this dissertation, the problem does not relate to the burial of remains where 26 weeks gestational age was met, it refers to instances where the foetus meets with death before reaching the gestational age of 26 weeks. The Draft Policy directly deals with these situations and prescribes the procedure to be followed at a healthcare institution when a woman has a miscarriage.

The Regulations proposed in the Draft Policy relates to all instances of pregnancy loss, including:

³⁴¹ Act 51 of 1992 as discussed in Ch. 2 of the thesis.

- (a) all live births at any gestational age meeting with death due to natural causes,³⁴²
- (b) all live births at any gestational age meeting with death due to unnatural causes,³⁴³
- (c) no signs of life after birth at 26 weeks or more gestational age,³⁴⁴ and
- (d) no signs of life after birth under 26 weeks gestational age.³⁴⁵

With regard to the first three instances, the Department of Health indicates in the Regulations that the current legal positions should still be applicable and only proposed new procedures with regard to the instance where no signs of life after birth was under 26 weeks gestational age. In instances where there was a live birth and the baby died due to natural causes, or in this instance that there was no signs of life after birth at 26 weeks or more gestational age, the normal provisions of section 35 of the Registration of Births and Deaths Act apply.³⁴⁶ The second instance regards death at any gestational age where there is live birth, but death occurs due to unnatural causes. In these cases, the provisions of section 3 of the Inquest Act³⁴⁷ will apply.

Regulation 6.4 of the Draft Policy relates to the instances where the gestational age is less than 26 weeks and there are no signs of life at birth, the birth is considered to be a miscarriage. The procedure to be followed is determined in Regulation 6.5 of the Draft Policy. The responsible healthcare practitioner must complete the following medical records relating to the death of the foetus:

- (a) Delivery records;
- (b) Nursing/medical records; and
- (c) Maternal patient records.

³⁴² Regulation 6.1 of the Draft Policy will apply.

³⁴³ Regulation 6.2 of the Draft Policy will apply.

³⁴⁴ Regulation 6.3 of the Draft Policy will apply.

³⁴⁵ Regulation 6.4 of the Draft Policy will apply.

³⁴⁶ These are the burial provisions relating to stillbirths. Although in one instance the foetus was born alive, even after 26 weeks gestational age, it was still considered a stillbirth as the baby died before the birth could be registered. Only in instances where the birth was already registered with the Department of Home Affairs and the baby subsequently dies, there will be a registration of the birth and of the death.

³⁴⁷ Act 58 of 1995.

Thereafter the midwife does the identification of the foetus and the placenta. Emotional support, pastoral care and/or counselling should be provided to the parents. The patient must be informed that no death certificate will be issued but only a notification of death. The birth will not be registered with the Department of Home Affairs.³⁴⁸

The medical practitioner must advise the parents on the options of the disposal of the human remains or advise when a *post mortem* may be indicated as such as where there is a need to establish the presence of underlying congenital abnormalities in order for the parents to make an informed decision on future pregnancies. In order to assist with the grief process, the body of the foetus may be kept in the labour ward for at least 12 hours to allow the mother or parents to decide on the disposal of the human remains.³⁴⁹

Furthermore, the parents should be provided with support to participate in decision-making regarding the disposition of the foetus. The options provided to the family must include:

- (a) Seeing and holding the foetus; and
- (b) Options for disposal including burial by the family or incineration as per provisions of the regulations related to the disposal of non-viable human foetuses.

Where the parents choose that the remains be incinerated, they must be advised that no ashes will be provided to the family. The placenta must be placed in a leak proof container and identified with the mother's name, surname, folder number, date and time of birth of the foetus. The placenta must be disposed of as medical waste, unless the family, for religious reasons, require the placenta for burial. In such cases, the placenta will be provided that the regulations in terms of the disposal of human remains are

³⁴⁸ Regulation 6.5 of the Draft Policy.

³⁴⁹ Regulation 6.5 of the Draft Policy.

strictly adhered to. Lastly, permission could be obtained from the parents to use the placenta for research purposes.³⁵⁰

4.5 CONCLUDING REMARKS

With regards to the Draft Policy, one can conclude that it is a step in the right direction towards a fair legal practice with regard to the instances where there are no signs of life after birth of a foetus regardless of the gestational age as the Draft Policy will expand the current application of the Registration of Births and Deaths Act³⁵¹ with regard to stillbirths to include all live births at any gestational age meeting with death before being registered at the Department of Home Affairs. Furthermore, the Draft Policy provides for the instances where the foetus meets with death before being born alive at a gestational age less than 26 weeks.

The case of *The Voice of the Unborn Baby NPC v Minister of Home Affairs and Another*³⁵² may provide the judicial relief required as per the Founding Affidavit and in the instance that it does, the Draft Policy would not be futile, but it would support the enactment of the Policy in order to ensure that justice is done, parents are afforded with the discretion to bury the foetus and in the process the intrinsic value of the foetus will be acknowledged.

³⁵⁰ Regulation 6.5 of the Draft Policy.

³⁵¹ Act 51 of 2002 as it directly relates to stillbirths.

³⁵² Case number to be allocated and case to be commenced in the High Court of South Africa, Gauteng Division, Pretoria in June 2017. Case heard again on 11 September 2017 and postponed to the first quarter of 2018.

5.1 INTRODUCTION

The preceding chapters of this dissertation the author set out to gather all information and explore all instances regarding burial rights of foetuses in South Africa, encompassing foreign law, international law and constitutional law. The focus was not only on the private law sphere, where the rights of the pregnant woman and the intrinsic value of the foetus were discussed, but the impact of the burial of a body as found in the sphere of public law was discussed. The crime of concealment of birth as it may have a bearing on the thesis's proposed position, was explored.

This thesis set out to prove that foetuses, regardless of its point of development *in utero*, have intrinsic value and that this intrinsic value should be protected in a manner that would promote the rights of the pregnant woman without conflicting with their (pregnant women's) constitutional rights. This means that we should not view a pregnant woman and a foetus as a single entity where the foetus is merely part of the woman's body. Furthermore, we cannot view the foetus and the pregnant woman as separate legal and physical entities as that would mean that the foetus should be afforded all rights that a person has under the law, regardless of the fact that it lives off the body of the pregnant woman until birth. The author agrees with the approach of viewing a foetus and a pregnant woman as not one legal entity and also not as two legal entities, but rather accentuating the unique togetherness of the pregnant woman and the foetus without degrading at the one end and over-emphasising the intrinsic value of the foetus at the other end. This approach, the not-one-but-not-two approach is for the author the essence of acknowledgement of intrinsic value without affording constitutional rights.

In addition to the above, the thesis set out to disprove that in order to acknowledge and protect the intrinsic value of the foetus; you need to afford

the foetus the right to life and other constitutional rights. The reason why the foetus should be afforded constitutional rights is due to the unique togetherness of the foetus and the pregnant woman and the fact that the right to life and other constitutional rights, if afforded to the foetus, would conflict with the pregnant woman's constitutional rights. The most common of these would be in regard to the right of the pregnant woman to terminate the pregnancy in certain instances,³⁵³ which would directly conflict with the right of life of the foetus.³⁵⁴

Within the past few chapters of this dissertation, the author has set out to achieve the acknowledgement of the intrinsic value of the foetus by affording the parents of the foetus meeting with death the discretion to bury the foetus and not to couple the burial of foetuses meeting with death with stagnant medical tests for viability. By affording parents this discretion, the law would be said to acknowledge the intrinsic value of the foetus without affording it rights and therefore not creating constitutional conflict. This position would be comprehensible when the section 9 test for equality applies.³⁵⁵ The consideration would relate to the situation where a pregnant woman wants to terminate the pregnancy and is afforded that right in terms of the Choice on Termination of Pregnancy Act³⁵⁶ before 20 weeks of pregnancy for any reason and thereafter for medical reasons. In contrast to this position a woman pregnant with a foetus meeting with death, may only bury the foetus in an instance where the foetus was *in utero* for 26 weeks or more.

³⁵³ Termination of pregnancy refers to terminations allowed in certain instances by the provisions of the Choice on Termination of Pregnancy Act 92 of 1996.

³⁵⁴ The right to life of the foetus in this instance is only used in an explanatory manner to indicate the effect if the foetus is afforded constitutional rights and the pregnant woman exercises her right of autonomy of her body found in s. 12(2)(b) of the South African Constitution. The moment the pregnant woman decides to terminate the pregnancy, she would be causing conflict between her right of patient autonomy with the right of life of the foetus. In normal circumstances one would be of the opinion that the right of life would enjoy precedence, but this would cause the pregnant woman to become an incubator for the nine months of pregnancy and this would not be promoting her constitutional rights to patient autonomy and human dignity. The above would be a direct effect of an instance where the separate entities approach is followed, which contributed to the author's view that this approach would not be comprehensible under South African law.

³⁵⁵ S. 9 of the South African Constitution indicates that everyone is equal before the law and in this s. the test for equality is found.

³⁵⁶ Act 92 of 1996.

This creates the situation that before 20 weeks of pregnancy you can terminate at any time and for any reason as if the foetus has no value, but that it only gathers value from 26 weeks when it can be buried. The problem the author faces is that during the time that the foetus reaches 20 weeks, the pregnant woman cannot terminate the pregnancy for a reason not medically related, but the value of the foetus as a child is only recognized after 26 weeks of pregnancy when a foetus meeting with death can be buried. Based on equality the author is of the opinion that the pregnant woman that can terminate the pregnancy before 20 weeks for any reason is afforded a termination right, but the pregnant woman wanting to conserve the pregnancy and where the foetus meets with death, may only bury the foetus after 26 weeks. It seems to the author that there is confusion relating to the intrinsic value of the foetus and these instances were researched and discussed in great detail in the preceding chapters.

During the next parts of this chapter, the author will analyse the discussions in the previous chapters and conclude upon the intrinsic value of the foetus in the first instance. Secondly, the author will conclude upon the ideal legal position in South Africa and eliminate any bearings that may be found within the law relating to this position in order to provide a position that is not only ideal, but that can be applied in practice without creating a confliction of constitutional rights.

5.2 WHAT IS THE LEGAL POSITION IN SOUTH AFRICA WITH REGARD TO THE STATUS OF THE FOETUS?

The legal status of the foetus in South Africa relates to the discussion of legal personhood in South Africa, with a direct focus on the point of commencement of legal personhood. The question in this part relates to the exact moment that a person is regarded a legal entity with certain rights enshrined within the South African Constitution as well as other rights provided for in the common law and found in Acts and other legal instruments within South Africa.

There are no statutory provisions in South Africa relating to the exact moment at which legal personhood vests. Furthermore the South African Constitution does not expressly define the terms “person” or “everyone” and therefore it cannot be said to either include or exclude fetuses. In addition thereto the provisions of section 28³⁵⁷ merely refer to a child as being under the age of 18 years.³⁵⁸ This means that we cannot be sure when legal personhood commences.

In South African law, where a certain instance is not regulated by either the South African Constitution or a piece of legislation, procedure or regulation, the common law applies. In this instance the common law is very clear regarding the commencement of legal personhood in that it stipulates that complete birth is required and the child should have lived, even if it was for a short while.³⁵⁹ This means that the unique togetherness of the pregnant woman and the foetus should no longer apply and the special entity should become separate entities to the point where the foetus is no longer dependent on the body of the pregnant woman to survive. The foetus (or child after birth) should be able to breath and survive independently from the body of the pregnant woman. Therefore the unique togetherness is separated and the pregnant woman and the foetus (child)³⁶⁰ should be two separate entities. Therefore it is clear that a foetus (child) can only be considered a legal entity with rights after it has been separated from the body of the mother and lives, even if just for a short while.

It can therefore be said that legal personhood relates to a certain independence. If you cannot live independently as your own human being then you cannot be afforded any rights in terms of the South African law. Therefore legal personhood, rights in terms of the South African Constitution and other legal instruments will only vest in a person, meaning a foetus separated from the body of the pregnant woman able to live independently.

³⁵⁷ S. 28 of the South African Constitution relates to children with specific relation to protection of children under the South African law.

³⁵⁸ The definition of child in s. 28 of the South African Constitution was adapted for ease of reading.

³⁵⁹ Cronjé & Heaton (2008) at p. 7.

³⁶⁰ The author will continue to refer to the term foetus and place the term ‘child’ in brackets where applicable in order to maintain consistency in terminology when discussing the applicable instances applicable to the problem statement within this dissertation.

There is no mention of a bearing on legal personhood if medically dependent for survival. The only indication relates to the separation of the foetus (child) from the body of the pregnant woman and therefore it would seem that even if a foetus (child) is born prematurely and can be separated from the body of the pregnant woman and survive even if medically assisted, would be entitled to legal personhood and therefore the rights encapsulated in the South African Constitution and other legal instruments pertaining to the South African law.

5.3 APPLICABILITY OF THE RIGHT TO LIFE OF A FOETUS IN SOUTH AFRICAN LAW AND INTERNATIONAL LAW AND THE LINK BETWEEN THE RIGHT TO LIFE AND THE INTRINSIC VALUE OF A FOETUS

As discussed above, the right to life in South Africa is encapsulated in section 11 of the Constitution of South Africa, 1996 and applies to all persons in South Africa and therefore it can be said that one should possess legal personhood in order to be entitled to the right to life and other rights encapsulated in the South African Constitution. This means that if a foetus meets with death before being born alive and being able to survive separately from the body of the pregnant woman, it is not entitled to the right to life as encapsulated in the South African Constitution.

There are, however instances where foreign and international law impacts upon the South African Constitution and can render a certain provision inconsistent with this law or legal instrument and cause law reform. At the outset one should note that there are two approaches with regard to the impact of international law on a country's legal system, namely monism and dualism. Whereas monism refers to an approach where the law of a country and international law is one, dualism refers to an instance where domestic law and international law may differ, but that international law becomes applicable in some instances. South Africa follows a dualistic system and therefore the applicable provision relating to the development of South African law in light of international law can be found in section 39(1)(b) of the

South African Constitution which stipulates that international law must be considered during legal interpretation. Therefore should the international law afford the right to life to a foetus *in utero*, the common law must be developed to afford the foetus this right.³⁶¹

When turning to the international law, we find that within the International Covenant on Civil and Political Rights of 1969 there was a prohibition on the carrying out of the death penalty on pregnant women. This does not afford the right to life to a foetus, but acknowledges the intrinsic value of the foetus as worthy of protection. Furthermore paragraph 3 of the preamble of the Declaration of the Rights of the Child 1959 states that children needs special safeguards and care including legal protection before as well as after birth.

Due to the above international law provisions and the fact that section 39(1)(b) of the Constitution³⁶² places a duty regarding law reform in order to conform to the international law, it is only natural to accept that the intrinsic value of foetuses should be promoted and protected even by the South African legislature.

It is clear that there is no right to life for foetuses in the international law or South African law, mainly due to the confliction thereof with the rights of the pregnant woman, but the international law does reckon that a foetus should be protected before birth based on its intrinsic value. This may cause certain questions relating to the correctness of abortion legislation, but for the moment we can accept that the fact that there is abortion legislation promotes the right of the pregnant woman to patient autonomy and this will not be challenged during this dissertation.

5.4 THE DIFFERENCE BETWEEN THIRD PARTY VIOLENCE AND A TERMINATION OF PREGNANCY IN TERMS OF THE CHOICE ON

³⁶¹ This is based on the interpretation of s. 39(1)(b) of the South African Constitution. Development of law takes place either by way of the amendment of current legal instruments by the legislature or by law reform through the courts, especially a High Court, Supreme Court of Appeal or the Constitutional Court.

³⁶² The South African Constitution.

TERMINATION OF PREGNANCY ACT³⁶³ IN LIGHT OF PERSONAL AUTONOMY AND INTRINSIC VALUE OF THE FOETUS

This part of the Chapter interacts with the criminality of third party violence against a foetus in light of the intrinsic value of the foetus. In addition thereto the termination of pregnancies in terms of the Choice on Termination of Pregnancy Act³⁶⁴ is discussed based on patient autonomy found in section 12(2)(b) of the South African Constitution. After these discussions, the distinction will be drawn between an instance of third party violence and termination of pregnancy and it will be indicated why third party violence against a foetus should be criminalized in light of the intrinsic value of the foetus.

The crime for killing a new-born baby is encapsulated in section 239(1) of the Criminal Procedure Act 51 of 1977 and states that if the foetus (child) did not breathe before being killed, the accused cannot be charged with the murder of the foetus (child). This was the basis of the case of *S v Mshumpa*³⁶⁵ where the South African criminal law concerning third party violence against a foetus as well as the court's constitutional duty to develop the common law was dealt with. In this case, the two accused persons allegedly shot the victim causing the 38-week old foetus to meet with death. During the case it became clear that both accused persons had the intention to kill the foetus and therefore charging them with murder would suffice as the accused had *dolus directus* to cause the death of the foetus. It was stated that the born-alive rule was outdated and there was a call for law reform to include a foetus in the ambit of murder.

The problem that arose was that the state indicated that a viable foetus should be included in the ambit of the term "person" when murder is considered as murder is the intentional killing of another person. The court stated that it is one thing to develop common law within the private law

³⁶³ Act 92 of 1996.

³⁶⁴ *Ibid.*

³⁶⁵ *S v Mshumpa* 2008 (1) SACR 126 (E).

sphere in order to eradicate patterns of unequal personal, social and economic domination on the ground that these patterns causes an infringement on the values found within the South African Constitution and therefore the court reiterated that for murder to be applicable, the foetus (child) should be born alive.³⁶⁶ Due to the fact that the act is seen as an offence committed against the pregnant woman would not bring the law in disrepute by leaving action unpunished.

The court did not dismiss the fact that the killing of a foetus should be criminalized, but indicated that the legislature is better suited to affect this kind of legal reform. The author tends to agree with this statement as court decisions can more easily be overturned on appeal, but enactment of legislation by the legislature would ensure firmer and more secure protection of the intrinsic value of the foetus against third party violence.

In some instances people view the termination of a pregnancy as third party violence against a foetus. In order to evaluate if there is a link between third party violence and the termination of a pregnancy by a pregnant woman, one should first evaluate the termination of pregnancies in terms of the Choice on Termination of Pregnancy Act 92 of 1996. This Act does not intend to make the process of termination of pregnancy an easy process and provide rather strict regulations in this regard. Firstly there are time constraints that determine when and for which reasons a termination may be done. Secondly the person(s) that may execute the termination is regulated and determined and thirdly the records to be kept are determined. Although the records are confidential, it is an express requirement that the termination is recorded in a certain manner. This proves that the process is very clinical and regulated quite strictly.

When evaluating if there is a link between third party violence and termination of a pregnancy, one should evaluate if a pregnant woman is a third party, who acts with the intent to kill the foetus through violence.

³⁶⁶ Par. 55 and 56 of *S v Mshumpa* 2008 (1) SACR 126 (E).

Therefore it can be said that there are three elements, namely the element of a third party, the element of intent to cause death and the element of violence. If all three are elements are not met, the termination of a pregnancy cannot be viewed as third party violence against a foetus.

The problem with this is that the pregnant woman possesses the right to patient autonomy encapsulated in section 12(2)(b) of the South African Constitution. This means that when a pregnant woman decides to terminate a pregnancy, she is making a choice over her own body and is not intentionally harming a part of another person's body. Due to the unique togetherness of a pregnant woman and a foetus, the pregnant woman cannot be considered as a third party inciting violence on the foetus and a termination is a medical procedure and not an intentional act of violence. It can therefore be deduced that the only element present is the intent to cause the death of the foetus and that the pregnant woman is not a third party and that there is no violence in the procedure for the termination of the pregnancy.

From the above discussion we can deduce that although the intrinsic value of a foetus is acknowledged, even by courts, the legal protection afforded to a foetus based upon this intrinsic value is yet to be established. The possible confusion between third party violence against a foetus and the termination of a pregnancy is a contributing factor to the fact the intrinsic value of the foetus has not yet established it legal protection.

5.5 LEGAL POSITION WITH REGARD TO THE BURIAL OF FOETUSES IN SOUTH AFRICA

The legal position in South Africa with regard to the burial of foetuses can be found in the provisions of the Registration of Births and Deaths Act 51 of 1992. The most prominent provisions within this Act relates to the burial of foetuses (stillborn babies). This Act refers to stillborn babies rather than foetuses and the definition of a stillborn baby is a foetus that has survived at least 26 weeks *intra uterine* before meeting with death. There are several

other provisions within this Act that applies to the current situation, but the most prominent is the definition of the stillborn baby.

The author does not agree with the test for viability as encapsulated within the definition of a stillborn baby found within the Registration of Births and Deaths Act 51 of 1992. The reason for the disagreement is twofold. Firstly the author is of the opinion that placing viability at 26 weeks *intra uterine* existence causes the measurement of viability to become stagnant and therefore it does not progress together with medical technology. Furthermore, it is submitted that viability should be determined on a case to case basis as there are numerous factors that have an effect on the viability of a foetus.

5.6 THE VIABILITY OF FOETUSES IN REGARD TO THE CHOICE ON TERMINATION OF PREGNANCY ACT 92 OF 1996 AND THE REGISTRATION OF BIRTHS AND DEATHS ACT 51 OF 1992.

The discussion regarding the viability of a foetus was set to prove that viability in South Africa is problematic and caused the South African law to stagnate. In order to comprehend the issues regarding viability in South Africa, the viability of foetuses in regard to the Choice on Termination of Pregnancy Act 92 of 1996 will be discussed together with the Registration of Births and Deaths Act 51 of 1992.

As stated above the viability discussion has come a long way and therefore personhood is vested in the born-alive rule as it is the simplest way to ensure that a foetus is viable. The problem the author has with this approach is that it is causing our law to stagnate due to the fact that the advances in medical technology have placed us within the foetal realm and therefore the viability of a foetus can be more easily determined. Furthermore, it should be noted that viability of a foetus is actually a determination that should be done on a case to case basis as there are numerous factors impeding thereupon.

Previously, the South African law has acknowledged that a foetus is viable at 26 weeks *intra uterine* existence as stipulated in the provisions of the Registration of Births and Deaths Act 51 of 1992 which determines that in order to obtain a burial order for a foetus meeting with death, the foetus must be viable. The issue with connecting viability to a certain number of weeks became problematic once the Choice on Termination of Pregnancy Act 92 of 1996 was enacted. Section 2 of this Act³⁶⁷ indicates the instances at which the pregnancy may be terminated. For the first 12 weeks it is within the woman's discretion to terminate the pregnancy, where after the conditions for termination becomes more complex and is then mainly based on medical considerations and the health (mental and physical) of the pregnant woman. This is a clear indication that the legislature is acknowledging the intrinsic worth of the foetus, otherwise there would have been less strict and complex provisions regarding the termination of a foetus.

The main issue identified by the author in this instance is that after 20 weeks of pregnancy, the law³⁶⁸ views the foetus as something worth protecting and in a sense viable as it cannot then be terminated for a non-medical related reason, but at the same instance only regards the foetus as viable and a stillborn baby in the event that it meets with death after 26 weeks *intra uterine* existence. This leaves a grey area of 6 weeks where the foetus is protected from termination on non-medical grounds, but should it meet with death it is not viable and cannot be buried.

The author is of the opinion that this creates confusion in the legal system as it would seem that the legislature strived to protect the foetus from termination, but did not develop the legal provisions relating to the foetus in other instances to keep up with this legal protection afforded. It would have been logical to develop all provisions relating to viability of foetuses when the Choice on Termination of Pregnancy Act 92 of 1996 was enacted. In the opinion of the author the provisions regarding the burial of foetuses meeting with death should be construed in the same manner as the provisions

³⁶⁷ The Choice on Termination of Pregnancy Act 92 of 1996.

³⁶⁸ As encapsulated in s. 2 of the Choice on Termination of Pregnancy Act 92 of 1996.

relating to termination of pregnancies as the two inter-correlates with the foetus. What the author means by this is that it is like two sides of the same coin.

The one side (or legislative instrument) regulates the instance where the pregnant woman (common denominator) wants to terminate the pregnancy and the other side (or legislative instrument) regulates the instance where the pregnant woman wanted to continue with the pregnancy, but the foetus met with death.

It is submitted that all pregnant women should be treated alike under the equality provisions of the South African Constitution and, therefore, should be able to exercise their right in terms of section 12(2)(b) which relates to control over their own body. If a pregnant woman can be granted the discretion to end a pregnancy, why can a pregnant woman wanting to keep the foetus not be afforded the opportunity to bury the foetus in the unfortunate event that the foetus meets with death. This is the problem statement within this dissertation and the author found a position that will enable the pregnant woman the discretion to bury the foetus without affording it any rights and in the opinion of the author this position is in line with the provisions of section 9 of the South African Constitution regarding equality before the law.

This approach was taken due to the fact that it would be unthinkable to limit the rights of the pregnant woman for 9 months in order to afford constitutional rights to the foetus. Furthermore, one cannot merely afford more rights to the pregnant woman without severe consideration, therefore it would be comprehensible and much easier to afford a pregnant woman the discretion in regard to whether or not the foetus should be buried or disposed of as medical waste. This would mean that in the event that the discretion is exercised and the pregnant woman chooses to bury the foetus, the normal regulatory provisions and prescriptions of the Registration of Births and Deaths Act 51 of 1992 would apply and should still be followed. This would enable the pregnant woman the opportunity to bury the foetus

that met with death and still be regulated by the state as is the burial of any other body of a person meeting with death.

5.7 WHAT IS THE CANADIAN LEGAL POSITION WITH REGARD TO THE BURIAL OF FOETUSES?

The Canadian law was selected as comparative legal system due to the fact that the Canadian Charter of Rights and Freedoms are analogous to the South African Constitution and therefore it can be said that the morals of the communities of South Africa and Canada are alike and therefore the legal principles of one country will be easily accepted by the other country based on the fact that they have common principles and morals.

The Cemeteries Act and Regulations³⁶⁹ distinguishes between foetuses meeting with death before 20 weeks *in utero* existence and foetuses meeting with death after 20 weeks *in utero* existence. The difference is that no burial order is required when the foetus meets with death before 20 weeks *in utero* existence, with the reservation that the disposal must not cause public offence. In an instance where the foetus meets with death after 20 weeks *in utero* existence, a burial order is required and all required processes must be following when the foetus is buried. This would imply that the Canadian law views a foetus as viable around 20 weeks' *in utero* existence. Recent Canadian case law³⁷⁰ confirmed that the legal position above is still in force and that the provisions thereof are correct.

The key of the Canadian legal position is that the parent(s) of the foetus meeting with death has the discretion to have the foetus buried in the prescribed manner or to let the state dispose of the remains.

³⁶⁹ Part 7 of the Cemeteries Act Consolidated Statutes of Alberta 2000 cC-3 and Regulation 8 of the Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

³⁷⁰ *Bastien v Ottawa Hospital (General Campus)* 2001 Can LII 28016 (ON SC).

5.8 POSSIBLE CHALLENGES FACED WITH DIRECT IMPLEMENTATION OF THE CANADIAN LEGAL POSITION IN TERMS OF SECTION 39(1)(C) OF THE SOUTH AFRICAN CONSTITUTION

Section 39(1)(c) of the South African Constitution stipulates that when the Bill of Rights is interpreted, foreign law may be considered. As stated above, the author decided to utilize the Canadian law as comparative legal position and therefore the direct application of the position regarding burial of foetuses need to be evaluated in order to establish if it would be comprehensible or if it should be adapted to become part of the South African legal position.

The main concern for the author is the distinction between the burial requirements of foetuses meeting with death before 20 weeks *in utero* existence and foetuses meeting with death after 20 weeks *in utero* existence. The problem arising relates to the fact that foetuses meeting with death before 20 weeks *in utero* existence may be buried without a burial order. The provisions of the Registration of Births and Deaths Act 51 of 1992 is very clear about burial requirements in South Africa and therefore a direct application of the Canadian legal position may cause issues in this regard.

Further to the above, it should be noted that burial of a foetus without a legal burial order issued in terms of the provisions of the Registration of Births and Deaths Act 51 of 1992 in South Africa may constitute the offence of concealment of birth in terms of section 113 of the General Law Amendment Act 46 of 1935. Further to the above, the disposal of remains without the legal burial order may result in other statutory crimes that the person may be charged with. Bearing this in mind it would be incomprehensible to adopt a legal position in South Africa with regard to the burial of foetuses meeting with death before 26 weeks *intra uterine* existence, if a person exercising this discretion will be charged with an offence. In this premise, the crime of concealment of birth was discussed in grave detail in order to fully understand the development of this crime in South Africa and to evaluate if the Canadian legal position would cause a transgression.

The elements of the crime of concealment of birth in terms of section 113 of the General Law Amendment Act 46 of 1935 include firstly no burial order, secondly disposal of a body, thirdly the intent to conceal the fact of birth and lastly any new-born child. The first two elements are present in the first part of the Canadian legal position seeing as it is the disposal of a body without a legal burial order and therefore these elements will not be discussed in further detail. The two elements to discuss are the elements of intent and the element of new-born child.

In order to conclude if this crime is applicable on the Canadian legal position it would need to be proved that there was an intention to conceal the birth and secondly that a new-born baby can include a foetus of less than 20 weeks *in utero* existence. With regard to the intention to conceal the birth of the foetus, it would seem that each burial may be concealment due to the fact that there will be very little or no paperwork in this regard seeing as a burial order will not be required. Although the element of intention to conceal the birth of the child will have to be proved beyond reasonable doubt, this is mainly done by way of argument and not usually by way of concrete evidence and can therefore have a bearing on the application of the Canadian legal position resulting in the pregnant woman or parents of the foetus unknowingly committing a crime.

With regard to the element of a newly born child, various cases were quoted and it was found that a newly born child can refer to a viable foetus. It was reiterated by the courts that viability of a foetus is around 26 weeks' *in utero* existence.³⁷¹ In this premise the Canadian legal position would not constitute this crime as the legal position refers to foetuses of less than 20 weeks *in utero* existence, whereas the crime of concealment of birth refers to 26 weeks *in utero* existence.

³⁷¹ Case law confirming 26 weeks *in utero* existence renders a foetus viable, include: *S v Molefe* 2012 (2) SACR 574 (GNP); *R v Dema* 1947 (1) SA 599 (E). Foreign case law from Zimbabwe and Venda also stated that viability is between 26 and 28 weeks *in utero* existence: *S v Jasi* 1994 (1) SACR 568 (ZH), *S v Madombwe* 1977 (3) SA 1008 (R) and *S v Mguni* [1998] JOL 2684 (ZH).

In this instance the crime of concealment of birth is not applicable upon the Canadian legal position. What one should consider is that the crime of concealment of birth may still be applicable, especially in instances of maladministration where there are no records pertaining to the birth of the foetus. In such a premise it would be very hard to prove that there was no intention to conceal the birth of the child.

5.9 APPLICABLE LEGISLATIVE PRINCIPLE FOUND IN THE CANADIAN LAW THAT COULD BE APPLIED IN THE SOUTH AFRICAN LAW TO ADDRESS THE ISSUES IDENTIFIED WITH THE APPLICATION OF THE PROVISIONS OF THE REGISTRATION OF BIRTHS AND DEATHS ACT 51 OF 1992

As discussed previously and based on the similarities between the provisions found in the constitutions of both Canada and South Africa, the thesis found what may be termed the ideal position in Part 7 of the Canadian Cemeteries Act³⁷². Section 65(1) determines that the Minister may make Regulations pertaining to various aspects, but with specific reference to paragraph (oo) which states that: 'respecting the disposal of fetuses and the bodies of newborn infants who have died, subject in each case to the parents' or guardians' request, and defining newborn infant for the purposes of the regulations'.

In line with the above, the Canadian legislature promulgated Regulations³⁷³ pertaining to the death of a foetus. Regulation 8 stipulates the following:

- In the case of the death of a foetus, the remains need not be disposed of as required by section 5 and 6 of the Act, but
- (a) the manner of disposition is subject to the parents' or guardians' request,
 - (b) the manner of disposition must not cause public offence, and
 - (c) where the foetus completed 20 weeks' gestation or weighed 500 grams or more, a burial permit must be obtained prior to any disposition of the remains.

³⁷² Consolidated Statutes of Alberta RSA 2000 cC-3.

³⁷³ Consolidated Regulations of Alberta, Cemeteries Act; General Regulation, Alta Reg 249/1998.

These principles encapsulate the position that the author is proposing and seeing as it is encompassed the discretion of the parents or guardians of the foetus and are not specific in relation to the foetuses it applies to. This means that there is no provision made for any rights being afforded to the foetus and therefore there will be no infringement on the rights of the pregnant woman to terminate the pregnancy in terms of section 12(2)(b) of the South African Constitution and the Choice on Termination of Pregnancy Act 92 of 1996.

In actual fact, this strengthens the application of the right that a woman has to terminate a pregnancy as it enforces the discretion of the parent(s).

Part (c) does in fact determine that 20 weeks or 500 grams sets the condition that a burial permit should be obtained. This only entails that in those instances the burial permit is a requirement, before the 20 weeks or 500 grams the foetus can be disposed of without a burial permit.

This further confirms the rights of the parents to have a choice in the disposal of the body of the foetus regardless of the age thereof. It can therefore be stated that the right to be buried is not the right of the foetus, but the right to decide upon the method of burial vests in the parents or guardians of the child.

In relation to the discussion of section 15(1) of the Charter, it becomes apparent that all persons are equal before the law. All parents or guardians are allowed the choice regarding burial of the foetus and not only foetuses, which died after a specifically stated amount of weeks. This is in clear contradiction with South African law, but can duly assist the South African legislature in correcting the current injustice and legal uncertainty caused by the provisions of the Registration of Births and Deaths Act 51 of 1992.

5.10 PROPOSED LEGAL POSITION

The discussions above confirm that where parents or guardians are given the choice to bury the foetus or to have it disposed of by the hospital, most parents or guardians would make the choice to bury the foetus, affording it a proper burial service and also assisting the parents or guardians with the grieving process.

The position found in the Canadian law does not at any instance afford the foetus any rights, it only provides the parent(s) with the discretion to bury the foetus or to have it disposed of by the state. This means that there is no limitation on any rights of any person and that although burial of foetuses less than 20 weeks do not require a burial permit, the law can be adapted to only providing the discretion and maintaining the other provisions with regard to burial orders and burial requirements.

It is therefore submitted that this position as found in the Canadian law should be applied in South Africa by way of amendments to the Registration of Births and Deaths Act³⁷⁴ through the application of section 39(1)(b) of the Constitution.³⁷⁵

Therefore, it is proposed that the legislature amends the provisions relating to the burial of foetuses to include the discretion of the parent(s) of the foetus and together with this provision, that all burials regardless of the age of the foetus requires a burial order as it would bring too much uncertainty in the instance that a burial order is required in some instances and not in others.

It should be noted that during the study, the author realised that not only the instance of foetuses meeting with death before 26 weeks gestational age is affected, but in addition thereto, parents of foetuses being terminated due to medical reasons are also affected.

³⁷⁴ 51 of 1992.

³⁷⁵ Refer n. 38.

It is submitted that in order to incorporate the Canadian legal position into the South African law, the courts would have to be approached for an order in this regard. As discussed in great detail in Chapter 4 of this dissertation, the case of *The Voice of the Unborn Child NPC v Minister of Home Affairs and Another*³⁷⁶ does not make direct use of the Canadian legal position in order to afford the parents of the foetus the discretion to bury the foetus meeting with death at any gestational age.

Therefore, should the relief sought by the Voice of the Unborn NPC be granted by the High Court, the injustice would be corrected, although in another manner as is recommended by the author. The outcome of this matter would either be in line with what is proposed in the thesis or would lead to a continuance of the injustice against the parents of fetuses meeting with death before 26 weeks gestation, and the parents of fetuses who are terminated based on medical concerns.

Word count: 38 859

³⁷⁶ *The Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another* Case number to be allocated and case to be commenced in the High Court of South Africa, Gauteng Division, Pretoria in June 2017.

PART A: SOUTH AFRICAN SOURCES

Legislation

1. Inquest Act 58 of 1995
2. The Constitution of the Republic of South Africa, 1996
3. The General Law Amendment Act 46 of 1935
4. The Criminal Procedure Act 51 of 1977
5. The National Health Act 61 of 2003
6. The Registration of Births and Deaths Act 51 of 1992
7. The Occupational Health and Safety Act 85 of 1993
8. The Compensation for Occupational Injuries and Diseases Act 130 of 1993
9. The Choice on Termination of Pregnancy Act 92 of 1996
10. The Children's Act 38 of 2005

Case Law

1. *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)
2. *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938
3. *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297
4. *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 113 (T)
5. *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA)
6. *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 (O)
7. *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC)
8. *Pinchin v SANTAM Insurance Co Ltd* 1963 (2) SA 254 (W)
9. *R v Berrman* (1854) 6 Cox CC 388
10. *R v Dema* 1947 (1) SA 599 (E)
11. *R v Matthews* 1943 CPD 8 9
12. *R v Oliphant* 1950 (1) SA 48 (O)
13. *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA)

14. *S v Jasi* 1994 (1) SACR 568 (ZH)
15. *S v Madombwe* 1977 (3) SA 1008 (R)
16. *S v Manngo* 1980 (3) SA 1041 (V)
17. *S v Molefe* 2012 (2) SACR 574 (GNP)
18. *S v Muguti* [1990] JOL 2684 (ZH)
19. *S v Mshumpa* 2008 (1) SACR 126 (E)
20. *Voice of the Unborn Baby NPC vs Minister of Home Affairs and Another - Founding Affidavit* (Pending Pretoria High Court Case 2017)

Books

1. Barratt (ed) (2012) *Law of Persons and the Family*
2. Bourquin (2010) *The Very Practical Pregnancy Handbook* 5th Edition
3. Burcott (ed) (2010) *Law of Persons and the Family*
4. Cronjé & Heaton (2008) *The South African Law of Persons* 3rd edition
5. F du Bois et al (2007) *Wille's Principles of South African Law* 9th Edition
6. Payne-James et al (2011) *Simpson's Forensic Medicine* 13th edition
7. Radzinowicz (1948) *History of English Criminal Law* Volume 1
8. Seymour (2000) *Childbirth and the Law*

Journal Articles

1. Meyerson *Abortion: The Constitutional Issues* (1999) 116 SALJ 50
2. Cohen & Sayeed *Fetal Pain, Abortion, Viability and the Constitution* (2011) 36 JLME 235
3. Hoctor & Carnelley *The Purpose and Ambit of the Offence of Concealment of Birth* 2012 Obiter 732
4. Sarkin-Hughes *A Perspective on Abortion Legislation in South Africa's Bill of Rights Era* (1993) 56 THRHR 83
5. Pickles *Approaches to pregnancy under the Law: a relational response to the current South African Position and recent academic trends* 2014 De Jure 20
6. Powell et al *Decisions and Dilemmas related to Resuscitation of Infants Born on the Verge of Viability* (2012) 12 NAINR 27
7. Pillay *The Beginning of Legal Personhood: Is South African Law Outdated?* (2010) 21 Stel LR 230
8. Slabbert *Pregnancy Loss: A Burial or Medical Waste* (2017) 80 THRHR 102

9. Van Oosten *The Choice on Termination of Pregnancy Act: Some Comments* 1999 South African Law Journal 60

Other sources

1. Cause for Justice *Voice of the Unborn Baby Court Case: First Court Appearance* [<http://causeforjustice.org/voice-of-the-unborn-baby-court-case-media-briefing/>] last visited 15 October 2017 @ 12h00
2. Pickles *S v Mshumpa: a time for law reform* LLM Dissertation University of Pretoria 2010
3. Smith *Om afskeid te neem van 'n ongebore kind* Beeld 21 May 2012 [<http://152.111.1.88/argief/berigte/beeld/2012/05/22/B1/10/tesbabasbegrawe.html>] last visited on 13 November 2012 @ 09h00

PART B: FOREIGN SOURCES

Books

1. Lord Hailsham of St Marylebone (ed) *Halbury's Laws of England Vol 11(1)* 4th Edition (re-issue) (1990)

Legislation

1. Act to Prevent the Destroying and Murthering of Bastard Children 21 Jac c.27 (1623)
2. Canadian Criminal Code
3. Canadian Charter of Rights and Freedoms 1984
4. Consolidated Regulations of Alberta, Cemeteries Act, General Regulation, Alta Reg 249/1998 RSC, c.C-46, as amended.
5. Consolidated Statutes of Alberta RSA 2000 cC-3
6. New Zealand Crimes Act, Public Act 43 of 1961
7. Offences against the Person Act of 1861

International instruments

1. Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV)

2. International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, 171

Case Law

1. *Bastien v Ottawa Hospital (General Campus)* 2001 CanLII 28016 (on SC)2.
2. *R v Berriman* (1854) 6 Cox CC 388
3. *R v Levkovic* 2008 Carswell Ont 5744 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, Ontario Superior Court of Justice

Journal Articles

1. MacKinnon *Reflection on sex equality under the law* 1991 Yale Law Journal 1316
2. Sheppard *Recognition of the disadvantaging of women: the promise of Andrews v Law Society of British Columbia* 1989 210ff

Other sources

1. Ellman *Now without hesitation* [www.nowwithouthesitation.blogspot.com/2009/06/where-does-objective-normative-value.html] last visited on 8 November 2013 @ 10h20
2. Foetal Development [<http://www.nrlc.org/abortion/facts/fetal-development.html>] last visited on 22 January 2013 @ 11h45
3. National Right to Life *Fetal Development – from conception to birth* [<http://www.nrlc.org/abortion/facts/fetaldevelopmentmt.html>] last visited 22 January 2013