

## An argument for foetal protection within a framework of legal abortion in South Africa\*

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**Abstract:** Termination of pregnancy (abortion) and foetal protection remain a challenging topic in South Africa where abortion is legalised and largely decriminalised. As a general rule, an unborn (*nasciturus*) does not have legal status and a human right to life, until born alive. A meaningful engagement with South African law highlights that the life of an unborn may be worthy of protection in some abortion cases. This paper proffers an argument favouring increased foetal protection that goes beyond the usual pro-life/pro-choice perspectives. It proposes, as an exception to the general rule, the application of the *nasciturus* maxim as a “rule” to conditionally advance legal subjectivity to an unborn and thereby afford it rights. It argues that such application may be reinforced when combined with a “legal” foetal viability implicit in the abortion law. Such proposal does not require any amendment to the existing law.

**Keywords:** Termination of Pregnancy (Abortion); Foetal Viability; *Nasciturus* (Unborn); South Africa.

### 1. Introduction

Termination of pregnancy (or abortion) and foetal protection remain a challenging topic in South Africa where abortion is legalised and largely decriminalised. As a general rule, an unborn (*nasciturus*) does not have legal status and a human right to life, until it is born alive. A meaningful engagement with different branches of public and private law, including the new abortion law and the Constitution, highlights that the life of an unborn may be worthy of protection in some abortion cases. This paper proffers an argument favouring increased foetal protection that goes beyond the usual pro-life/pro-choice perspectives. It proposes, as an exception to the general rule, the application of the *nasciturus* maxim as a “rule” (rather than a “fiction”) to conditionally advance the status of legal subjectivity to an unborn and thereby afford it rights.

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\* This paper was initially intended to be a revised version of a chapter that was published in a Festschrift publication as: Moosa N (2016) “Decriminalising Abortion in South Africa: Implications for the “Unborn’s Right to Life” in Martin BSC & Koen RA (eds) *Law and Justice at the Dawn of the 21st Century Essays in Honour of Lovell Derek Fernandez: Lawyer, Linguist, Mensch* 89-116 Bellville: Faculty of Law, University of Western Cape. Although permission was granted to do this, it has now become virtually a new publication for the following reasons: A reconsideration of some of the more debatable and controversial arguments outlined in that chapter prompted me to revise my position in some respects. The content has also been extensively revised, and sources updated. I am indebted to the anonymous reviewers of the earlier (chapter) publication for their insightful comments. I acknowledge, with thanks, Professor I Leeman for his editorial assistance.

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It argues that such an application may be reinforced when combined with a “legal” foetal viability implicit in the abortion law. Such a proposal does not require any amendment to the existing law.

The paper is divided into eight Sections (including the Introduction). Cognisant of the emotive use of the terms “abortion” and “termination”, both terms will be used interchangeably in this paper when referring to a termination of pregnancy. Given the complex nature of the topic and space constraints, only relevant aspects of the various laws, still applicable in South Africa, will be elaborated. Section Two serves a dual purpose in providing a general overview of the various contexts relevant to the topic and the position in South Africa. This allows the discussion in the remaining sections (Three to Seven) to be brief and to focus on substantiating the proposal and argument, as detailed in Section Two. Given that its application is a theme that straddles the rest of the paper, Section Three provides a detailed overview of the *nasciturus* maxim as a private law foetal protection measure. It highlights the distinction between the maxim’s use, as a fiction and as a rule, and discusses its conditions. Section Four provides an overview of foetal protection, in the context of current South African abortion law, and Section Five does so in the context of the current Constitution. The possibility of a “legal” (rather than a clinical) foetal viability to prevent an unwarranted abortion from the third trimester (on the basis of gestational age), forms the focus of Section Five (i).

Section Six gives a brief outline of case law during the operation of the old abortion law and since its replacement with the new law and Constitution. Cases are also referred to in other sections where relevant. Section Seven adopts a balanced approach to abortion and foetal protection. It approaches the abortion question from the point of view of whether legislation remains necessary and whether the status quo should remain unchanged. It suggests that there may be more scope for alternatives, like adoption, to be given greater consideration. Such a balanced perspective is intended to go beyond the usual ideological rhetoric. Section Eight concludes the paper.

## **2. General contexts**

According to South African law, a mixture of Roman-Dutch and English law, a person is legally deemed to come into existence at birth. An unborn is not accorded any formal legal status until it is born alive because in terms of South African private law, legal subjectivity only starts at birth. Legal personality begins when the birth is complete, that is, when the child is separated from its mother and is breathing.<sup>1</sup> Continuing in the same vein, the provisions of the two most important pieces of public and private law legislation currently affecting the status of children in South Africa, namely, the 1996 Constitution<sup>2</sup> and the 2005 Children’s Act<sup>3</sup>, respectively, only apply to children once they have been born alive. The Constitution<sup>4</sup>, in a Bill of Rights, simply states that “[e]veryone has the right to life”.

The *nasciturus* maxim, a protective legal measure based on the Roman-Dutch component of the South African common law, has been incorporated into private law, where it

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<sup>1</sup> P Carstens & R Du Plessis “Medico-Legal Aspects Pertaining to Children” 587-634 in Boezaart T (ed) *Child Law in South Africa* (2009) Cape Town: Juta, p. 588 and 593.

<sup>2</sup> Constitution of the Republic of South Africa, 1996 (‘the Constitution’). Effective from 4 February 1997.

<sup>3</sup> Childrens Act 38 of 2005 (‘Children’s Act’).

<sup>4</sup> Constitution of the Republic of South Africa 1996, section 11.

operates as an exception to safeguard the interests of the unborn. An academic distinction, which is important to the discussion at hand, has been drawn between the application of the *nasciturus* maxim as a “fiction”, on the one hand, and a “rule”, on the other. The ultimate effect of the operation of the maxim, whether it is applied as a fiction or a rule is the same, namely, an unborn is deemed to have already been born, when it is to its advantage, and it subsequently is born alive. When the maxim is applied as a “rule”, it conditionally advances the status of legal subjectivity to an unborn and affords it rights. In South Africa, the *nasciturus* maxim is typically applied in succession and property cases. The theory of extending the *nasciturus* rule as a “preventive protection” measure to afford a foetus legal subjectivity and personality was proposed some 25 years ago already and is not a new proposal. The author’s<sup>5</sup> call for an amendment to the then applicable abortion law, namely, the 1975 Abortion and Sterilisation Act (ASA)<sup>6</sup>, to provide for all applications for abortion to be heard in judicial proceedings in which an unborn is represented by a *curator ad litem*, may have been both extreme and unaffordable. The proposal does not require an amendment to the existing law although it does not rule out the possibility of the appointment of a curator to protect the interests of an unborn in instances where an abortion may not be warranted.

Although an argument that the ambit of the maxim be extended to include other cases<sup>7</sup>, including abortion, is also not new. It has been pointed out<sup>8</sup> that the maxim is usually not a contested issue when it comes to termination of pregnancy since abortion is not a case where the foetus’ interests are protected on the premise that a child will eventually be born alive. This may be both true and untrue in the case of the current liberal abortion law, namely, the 1996 Choice on Termination of Pregnancy Act (CTOPA)<sup>9</sup> since it follows a trimester approach (in terms of which foetal viability may also be narrowed down purely on the basis of gestational age) and only allows a woman an unrestricted right to an abortion in the first trimester. It may also be possible for an argument to be made for the prevention of an unwarranted abortion in a succession matter. It may be true that if a woman exercises her right in the first trimester, doing so will put any application of the maxim to rest. There may still be scope for the application of the maxim, in the remaining two trimesters, to prevent an abortion.

The *nasciturus* maxim may be applied as a “rule”, which recognises an unborn as a legal subject with human rights before its birth (rather than as a fiction which does not), in some abortion cases. In that event, there will not necessarily be any “clash”<sup>10</sup> between the rights of the mother and those of her unborn (as contemplated by some academics) since the maxim will effectively be used as an *exception* to the current position that an unborn does not have a right to life. This can be done without having to amend any legislation, including the CTOPA. It does not mean that a consideration of amending legislation

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<sup>5</sup> See LM Du Plessis ‘Jurisprudential Reflections on the Status of Unborn Life’ 1 Tydskrif vir die Suid-Afrikaanse Reg (1990) 44-59, p.49-52 and LM Du Plessis ‘Reflecting on Law, Morality and Communal Mores (with Particular Reference to the Protection of Pre-Natal Life)’ Koers Vol.56 No.3 (1991) 339-357, p.339, 348-350 & 353-354.

<sup>6</sup> Abortion and Sterilisation Act 2 of 1975.

<sup>7</sup> L Schäfer Child Law in South Africa – Domestic and International Perspectives, (2011) Durban: LexisNexis, p. 34 opined that “[i]n principle, there is no reason why a doctrine cannot be adapted to analogous situations even if they could never have been foreseen by its originators.”

<sup>8</sup> J Heaton, *The South African Law of Persons. Fourth edition 2012*, (2012) Durban:LexisNexis, p. 20 and see LM Du Plessis ‘Vraagstukke rondom die Lewe Juridies Besien’ Potchefstroom IBC Reeks (1976) F2 nr 9 (39pp), p.17.

<sup>9</sup> Choice on Termination of Pregnancy Act 92 of 1996 (‘the CTOPA’). Effective from 1February 1997.

<sup>10</sup> For detail of the arguments made see Heaton 2012, p.24 and Schäfer 2011, p.34.

should be ruled out to favour both pro-choice and pro-life tendencies. There may be scope to amend the CTOPA to increase the possibility of obtaining an abortion on the basis of suicidal tendencies. There is also scope, in the existing adoption legislation, to make it easier to adopt children, born because the women, including minors<sup>11</sup>, chose not to abort or the abortion was prevented or averted for a variety of reasons.

In past publications on abortion, an amendment to the CTOPA may have been justified. Although certain provisions of the CTOPA may be flawed (for example: there is no conscience clause; minors are allowed to abort without parental consent or knowledge), disparities and inequalities still existing between the sexes do not warrant an ideological argument calling for an amendment to, or the repeal of, the CTOPA. The CTOPA is secular in nature and this paper does not consider the role of religion or culture. It highlights arguments that may equally merit a pro-choice and a pro-life approach. The reason for doing so is because pro-lifers are not necessarily anti-choice in all cases.

There may be enough scope within the CTOPA to balance both the reproductive rights of a woman and the interests of the unborn that she may be carrying. The CTOPA allows a woman alone unrestricted access to an abortion in the first trimester. If she fails to exercise that right during this time and opts to abort in the second trimester, for social and economic reasons, which she is allowed to do, the CTOPA provides that the decision to abort is no longer hers alone since a ground for an abortion is now a clinical determination. If a medical doctor (service provider) finds the proposed abortion not to be warranted, it can be argued that the woman's right to abortion is limited by the CTOPA itself and can be constitutionally challenged and limited on that basis. Given that, in such a case, there may be no real clash between the right of a pregnant woman and the right of the unborn that she is carrying, if the *nasciturus* rule is applied as an exception, it could also be applied to prevent such a late (second trimester) abortion or to strengthen an argument by interested parties that if there is a need to abort, for social and economic reasons. Given the already advanced stage of the pregnancy, such decision should be made earlier in the second trimester rather than later.

The question of viability, or the ability of a foetus to independently survive outside the uterus or womb of the mother, is explored. It is contended that there is scope, within the CTOPA, for the determination of a "legal" foetal viability to be estimated in the third trimester at an earlier point than clinically deemed to be the case. Clinical viability is uncertain, given that its determination is not based on an exact science. Such a determination of "legal" foetal viability, coupled with the application of the *nasciturus* rule, may avert such a late abortion when not warranted.

An academic proposal to use the *nasciturus* rule, to protect an unborn, was already made in the context of the old abortion law but had its limitations because it called for an amendment to the existing law. The novel approach proposed, if adopted, may yet see an outcome that is different to the current judicial position which has hitherto not favoured an unborn in cases pertaining to abortion. Earlier cases were decided on the basis of the old abortion law and may not be relevant and more recent decisions may have adopted

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<sup>11</sup> Section 28(3) of the Constitution of the Republic of South Africa, 1996 and section 1(1) (interpretation) and section 17 of the Children's Act 38 of 2005 support the definition of a "child" as a person under the age of 18.

arguments based on too “exacting” positions regarding the current law. Although the Constitution does not afford the unborn a right to life, a prediction of a favourable judicial outcome may be premised on several considerations. There is scope, within the CTOPA, for a right to abortion to be restricted. The Constitution does not afford a woman a clear right to an abortion. Such right can only be inferred from it. All human rights, contained in the Bill of Rights, may be subject to constitutional limitation. This may include a woman’s right to reproduction and a service provider’s freedom to object to an abortion on conscientious grounds. Although the CTOPA does not afford conscientious objectors a clear right to refuse to perform an abortion may be subject to constitutional challenge, their right to object may also be limited in medical emergencies. Given that there has not been a Constitutional Court decision pertaining specifically to abortion, the last word on the matter has not been spoken.

### **3. The *nasciturus* maxim and its application as a “rule”**

The *nasciturus* maxim is a private law protective measure which favours the interests of an unborn.

“[T]he Latin maxim *nasciturus pro iam nato habetur quotiens de commodo eius agitur...*[f]reely translated...means that the unborn (or *nasciturus*) can be regarded as already having been born when it is to the unborn’s advantage...”<sup>12</sup>

Heaton<sup>13</sup> highlights that a distinction has been drawn by jurists between the operation of the *nasciturus* maxim, as a “rule” and as a “fiction” (or as a rule by way of fiction to achieve the same result as a fiction). When the maxim operates as a rule, it may be possible that an unborn (*nasciturus*) may, as an exception to the general rule that legal personality begins at birth, in some instances, be recognised before its birth as a legal subject with human rights. Heaton explains that although the ultimate effect of its operation, as a fiction, may be the same (protection of the interests of the unborn), she prefers its operation as a fiction because the premise on which the ‘rule’ is based may be legally flawed. She elaborates that the ‘rule’ essentially deems the law to recognise an unborn as a legal subject with legal personality from the date of its conception, rather than only from birth, as an exception in some instances, when this may be to its benefit. As a ‘fiction’, the unborn is deemed to have been born, at the time of its conception, if a situation was to arise where it would be deemed to have been to its advantage had it already been born. In other words, the protection of its rights is qualified as subject to the expectation that it be, and is, later born alive. Heaton submits that, “...to avoid confusion, the term ‘*nasciturus* rule’ should be reserved for the view that our law recognises an exception to the rule that legal personality begins at birth, and...the term ‘*nasciturus* fiction’...for the view that legal personality always begins at birth and that when the *nasciturus*’ interests are protected it is the child’s birth that is fictionally antedated.”<sup>14</sup> In either case (whether as a rule or a fiction), its effective operation is entirely dependent upon subsequent live birth.

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<sup>12</sup> T Boezaart, ‘Child Law, the Child and South African Private Law’ 3-37 in Boezaart T (ed) *Child Law in South Africa* Cape Town: Juta, (2009) pp 4-5.

<sup>13</sup> Heaton 2012, p.27 (including n 157) and p. 28. See also Boezaart 2009, p.5-6.

<sup>14</sup> Heaton 2012, p.28.

“Common law recognised the following three requirements for the application of the *nasciturus* fiction which also form part of the current private law:

- (1) [Its]...application...is subject to the condition that it must be to the advantage of the unborn. This requirement will be met if both the child and a third person, for example, a parent, are jointly benefited. However, the benefit should not be solely in favour of the other person(s).
- (2) The benefit must accrue to the *nasciturus* after the date of conception.
- (3) The *nasciturus* must be born in the legal-technical sense.”<sup>15</sup>

Abortion is not a topic that one would expect to encompass a discussion of the *nasciturus* maxim. While this argument may not be without merit, a critical discussion of this maxim may yet have merit as a protective measure to avert an abortion that takes place *after* (and not during) the first trimester since this will ensure that there will be no obvious conflict or clash between the human right of a pregnant woman to an abortion and the human right to life of her unborn. The CTOPA limits a woman’s unrestricted reproductive right to abortion to the first trimester only. During this period, according any rights to an unborn will result in a clash with the woman’s (unrestricted) right to an abortion. In such instances, a woman’s right to abortion will always prevail. If she fails to exercise her right within that period, the maxim can still come into operation thereafter because the point of conception hasn’t changed and the idea is to protect the developing life of an unborn. In the second and third trimesters, the decision is also no longer hers alone to make. If a doctor (service provider) finds no justifiable basis for an abortion, then a woman’s right thereto may also be limited to prevent an abortion. In either case, there will be no need to amend the CTOPA. The rule affords an unborn a human right to life and the protections of interests which it would otherwise not have had. The right and interests will only manifest with actual live birth. Although the word “benefit” is specifically used in the requirements for the application of the maxim, as a fiction in cases pertaining to succession and property, when it is applied as a rule, there appears to be little reason to draw a strict distinction between “rights”, “interests” and “benefits” of the unborn or to limit its application only to matters relating to succession and property. It can even be used in succession matters to prevent an abortion. If an unscrupulous pregnant woman has been widowed, and no-one is aware of her pregnancy, nothing legally precludes her from circumventing the application of the *nasciturus* rule by furtively seeking an abortion in the first trimester in order to augment her share of the inheritance. The outcome could be different where the woman’s pregnancy was known, and had advanced to the second trimester, and she then sought an abortion on social grounds (wanting to continue with her education or career or for sex-selection reasons) rather than economic grounds (although the latter may be inferred from a possible motivation for self-enrichment). Such an abortion could be averted by an application of the *nasciturus* rule. The question of “legal” foetal viability does not arise here.

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<sup>15</sup> Boezaart 2009, p.6.

#### 4. The CTOPA

The Preamble to the CTOPA provides that the right to an abortion cannot be denied on the basis of race, sex or religion and that the offence<sup>16</sup> of abortion has largely been decriminalised by it. It also places an emphasis on ‘early, safe and legal’ abortions.

In South Africa, all women, that is, “any female person of any age”<sup>17</sup> (this includes minor girls and single and married women) has the unconditional right to obtain an abortion on request (demand), without restriction as to reason, during the first trimester of pregnancy, that is, up to, and including, the 12<sup>th</sup> week of gestation (which is roughly 10 weeks of pregnancy) as the upper limit.<sup>18</sup>

In the second trimester (from the 13<sup>th</sup> week up to, and including, the 20<sup>th</sup> week of gestation) abortion is only permitted if: a continuing pregnancy would pose a risk to the woman’s mental or physical health (therapeutic considerations); would end in the birth of an infant with a severe mental or physical abnormality (eugenic considerations); or the pregnancy resulted from rape or incest (humanitarian considerations). Additionally, and controversially, abortion is also available during the second trimester, if carrying the foetus to term would “significantly affect the social or economic circumstances of the woman” (social and economic considerations).<sup>19</sup> Family planning may be deemed to be one such ‘social’ consideration.

In the last trimester (after the 20<sup>th</sup> week or from the 21<sup>st</sup> week) terminations are only available in very limited circumstances and are allowed only if the continuing pregnancy would endanger the woman’s life or result in a severe foetal malformation or a risk of foetal injury.<sup>20</sup> A case of Down syndrome is a possible example of a “high risk” pregnancy (which may justify an abortion in either the second or third trimester). Service providers who may either perform or assist with the abortion in the first trimester include doctors, midwives and nurses.<sup>21</sup> Doctors are required to both approve of, and perform, the abortion thereafter. In the third trimester, the doctor is also expected to consult with another service provider (doctor or midwife). In the second trimester, the patient must have a legislatively acceptable reason (even if it is social or economic) and this reason must be accepted by the attending medical practitioner. While doctors are expected to evaluate and approve of abortions, on the basis of “social and economic considerations”, it is unclear, given the absence of any guidelines or criteria, how, as medical experts, they are expected to be able to adequately justify the approval or denial of an abortion on this basis?<sup>22</sup> A pertinent question would be whether the *nasciturus* rule could be invoked by a doctor as an interested party to prevent an abortion on socio-economic grounds?

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<sup>16</sup> J Burchell Principles of Criminal Law (4 ed) (2013) Juta: Cape Town, p. 557. See also P Carstens & R Du Plessis 2009 p587-634.

<sup>17</sup> See definition in section 1 of the CTOPA.

<sup>18</sup> Choice on Termination of Pregnancy Act 92 of 1996, section 2(1)(a).

<sup>19</sup> Choice on Termination of Pregnancy Act 92 of 1996, sections 2(1)(b)(i-iv).

<sup>20</sup> Choice on Termination of Pregnancy Act 92 of 1996, see sections 2(1)(c)(i)-(iii).

<sup>21</sup> Choice on Termination of Pregnancy Act 92 of 1996, section 2(2) indicates that providers performing an abortion include medical practitioners, trained registered nurses and midwives.

<sup>22</sup> MN Slabbert, ‘Does South African legislation protect the human embryo and the foetus in utero sufficiently?’ TSAR (2001) 729-746, p. 738.

The CTOPA does not contain a clear “conscience” clause that allows health care providers to exercise a constitutional right to refuse to perform an abortion, although such a right can be inferred<sup>23</sup>. Although objecting providers are not forced to perform abortions, they must inform women, seeking an abortion, of their rights in terms of the CTOPA and provide them with related information to enable them to make informed choices<sup>24</sup> and must advise minors to do so in consultation with their “parents, guardians, family members or friends”.<sup>25</sup> Minors are not obliged to heed this advice, with the result that their parents may have no knowledge of the abortion nor is their consent necessary.<sup>26</sup>

This position was unsuccessfully challenged in 2004 in *Christian Lawyers’ Association v National Minister of Health and Others*<sup>27</sup> where it was argued that minor girls, below the age of 12, were not capable of giving informed consent, as defined by the CTOPA, without parental involvement.

Given that a decision, to seek an abortion, remains a woman’s alone, the fact that a married or unmarried prospective father or partner has no say in his wife’s or partner’s decision to abort is also further elaborated in the next subsection (i) and in Sections Five and Seven where constitutional limitations and considerations, like adoption, are explored.

### **(i) “Legal” foetal viability and clinical foetal viability?**

In this section it is contended that, since the termination of clinical viability is also not an exact science, there may be more scope than meets the eye in the CTOPA to make a case for a “legal” determination of foetal viability upon which to base a right to prevent the unwarranted abortion of a foetus at an earlier stage than is clinically possible. In this way, the *nasciturus* rule could be applied to challenge the abortion of a “legally” viable foetus from the beginning of the third trimester (21 weeks), when an abortion is sought on obscure medical grounds that may not necessarily warrant it. What exactly is meant by “severe foetal malformation or a risk of foetal injury” (third trimester considerations for abortion), and how, and on what basis, do two service providers make such a determination in order to justify an abortion, at this late stage, on this basis?<sup>28</sup> There are cases of women threatening to commit suicide, should their pregnancies not be terminated. Ireland, where abortion was recently extended to such women, is a case in point.<sup>29</sup> This may merit either an inferred reading into, or even actual future extension of, the current mental health ground for abortion in the CTOPA to include such cases. Burchell<sup>30</sup> explains that a foetus begins to display signs of life (“quickening”) at about 20 weeks (five months) and is viable around 24 weeks (six months). If birth is given to a foetus after about 36 weeks (nine months), the law will recognise it as a human being. In a recent case, the Court ruled that the killing of an “unborn child”, at 38 weeks, when it was

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<sup>23</sup> Choice on Termination of Pregnancy Act 92 of 1996, Section 6 provides that “[a] woman who in terms of section 2(1) requests a termination of pregnancy from ... [designated providers] ... shall be informed of her rights under this Act by the person concerned”.

<sup>24</sup> Choice on Termination of Pregnancy Act 92 of 1996, Section 5(1).

<sup>25</sup> Choice on Termination of Pregnancy Act 92 of 1996, Section 5(3).

<sup>26</sup> In terms of section 5(2) of the CTOPA “no consent other than that of the pregnant woman shall be required for the termination of a pregnancy” (emphasis added).

<sup>27</sup> 2004] (10) BCLR 1086 (T).

<sup>28</sup> See Slabbert 2001, p.739-740.

<sup>29</sup> ‘Ireland extends abortion to women threatening suicide’ (3 January 2014) viewed 25 October 2016, <http://www.christianconcern.com/our-concerns/abortion/ireland-extends-abortion-to-women-threatening-suicide>.

<sup>30</sup> Burchell 2013, p.557 n 1.



viable, did not constitute murder since there was no birth.<sup>31</sup> In this case, an unmarried prospective father, who had arranged for its killing, clearly did not relish the prospect of fatherhood. It can be argued that he could have opted for sterilisation. The decision to abort effectively remains a woman's and excludes all prospective fathers who may want to become fathers, or partners of both sexes, who may want to become parents.

There is no internationally accepted, uniform gestational age that defines viability and scientific thresholds range from around 23 to around 27 weeks.<sup>32</sup> Although the CTOPA has not defined a "foetus", it has adopted, and operates within, a convenient trimester approach in terms of which an abortion is only legally allowed after 20 weeks (five months) of pregnancy, as an exception. While medical guidance, regarding "viability", can be sought, clinical viability is an estimate of foetal ability (from around 24 to 28 weeks) in the extra-uterine (womb) environment. If the clinical upper limit is assumed to be around (seven months), since the CTOPA makes provision for abortion within restricted timeframes, it may be possible to infer from it a reduced "legal" foetal viability that can start from the end of the second trimester (after 20 weeks or five months), that is, from the beginning of the third trimester (or 21 weeks). If this is done, then it will be possible to protect a foetus from an abortion at an earlier stage than a clinical estimate.

Such a legal foetal viability will stand at the midpoint between when Burchell proposes viability is attained (24 weeks or six months) and what the medical upper limit may deem it to be (28 weeks or seven months). The current theory is not without criticism and a view that deems foetal viability to be pegged even later, at 24 weeks (as Burchell above), has already been challenged on the basis that foetal viability "[a]t best...is a clinical estimate that can only be verified at birth", given the many variables that also have to be taken into consideration.<sup>33</sup>

## 5. The Constitution

Section 11 of the Constitution simply states that "[e]veryone has the right to life".

Several other provisions in the Constitution may allude to a right to abortion.

Section 9 (equality clause) which provides for protection against unfair discrimination on grounds of, amongst others, religion, conscience and belief, but also includes grounds like marital status, culture, sex, gender and pregnancy (sections 9(3) and (4)); section 10 (human dignity); and section 12 (freedom and security of the person). The Constitution does not expressly provide for the right to an abortion (on request).

Section 12(2)(a) explicitly recognises the right to make decisions concerning reproduction, as part of the right to bodily and psychological integrity, and guarantees the reproductive rights and health of women.<sup>34</sup> Reproductive rights are then construed to include abortion. A pregnant woman is only granted the constitutional right to reproductive autonomy which comes very close to her being afforded a right to abortion. Such a reproductive right can rightly be construed as overriding the rights of the unborn

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<sup>31</sup> In *S v Mshumpa* 2008 (1) SACR 126 (E), the Court did not extend the definition of murder to include a viable foetus and ruled instead that the perpetrators may at most only be prosecuted for an assault on the prospective mother.

<sup>32</sup> See C Pickles 'Personhood: Proving the significance of the born alive rule with reference to medical knowledge of foetal viability' *Stell LR* (2013), 146-164, p.149.

<sup>33</sup> See Pickles *ibid*, p.164.

<sup>34</sup> See Du Plessis 1990, p. 72-73 for details.

that she may be carrying if her right to abortion is exercised within the first trimester of her pregnancy, as provided for in the CTOPA. In the remaining two trimesters, such a right is not absolute and may be challenged and/or limited. When this happens, and the *nasciturus* rule is applied to afford the unborn human rights, there may be a conflict between the right of a prospective mother and her prospective (unborn) child and other interested parties. A case could be made for a prospective father whose marriage may have ended, or is in the process of ending in divorce, who is of financial means and who wants to be given the opportunity to adopt a prospective child once the first trimester has passed and the (former) wife has failed to exercise her choice to abort. A similar argument could be made for parents of pregnant minors wishing to adopt a potential grandchild. A prospective father or partner's right to contribute to reproductive decisions may not necessarily always have to be limited and may even be justifiable in some instances, especially given that the constitutional rights to dignity, privacy and gender equality apply equally to, and can be invoked by, both sexes.

The human rights, contained in the Bill of Rights, are not absolute. Section 7(3) provides that they are subject to the limitations contained in section 36 (general limitation clause), or elsewhere in it. Given that she is not expressly guaranteed a right to an abortion in the Constitution, and that her right to an abortion after the first trimester is not absolute or a decision that is hers alone to make, in terms of the CTOPA, an argument can be made for such right to be limited in terms of section 36 in order to protect pre-natal life.

A further conflict is evident in section 15(1) of the constitution, which provides that "everyone has the right to freedom of conscience, religion, thought, belief and opinion". This provision appears to be wide enough to be invoked by all interested parties who may raise valid objections to an abortion. Section 15 may hold special significance for objecting health care providers who can only rely on the CTOPA for an inferred right to object given that, as professionals, they are expected to provide abortion services. This is quite unlike the situation of other objectors who may voice moral objections to, or theorise about, abortion services but who can safely ignore their views in their private and/or professional lives. While objecting providers may be able to invoke section 15 or section 23 (1) (unfair labour practice) of the Constitution, their right to object may be limited by section 36 (general limitation clause) when compelling medical situations or emergencies necessitate that abortions be performed.

## **6. Case law prior, and subsequent, to the CTOPA and the Constitution**

Prior to the enactment of the CTOPA and the Constitution, courts were consistent in upholding the private law position that a foetus was not a legal subject and accordingly could not have a right to life that can be enforced on its behalf. Such cases include the judgment in *Christian League of South Africa v Rall*<sup>35</sup> where it was held that the *nasciturus* rule could not be invoked to found a right to prevent a lawful abortion under the old abortion law (the ASA). The Court conveyed the view that the protection of a foetus is founded on a fiction.<sup>36</sup> In *G v Superintendent, Groote Schuur Hospital*<sup>37</sup>,

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<sup>35</sup> [1981] (2) SA 821 (O). For further examples of such earlier cases see Heaton 2012, p. 23-24.

<sup>36</sup> Ibid, at 829G-830B.

<sup>37</sup> 1993 (2) SA 255 (C) at 259D.

Seligson AJ, in an obiter dictum, questioned the correctness of the *Christian League* decision as follows:

‘there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened’.

In the above two decisions, the judges came to different conclusions as to whether or not an unborn may have an interest capable of protection where abortion was contemplated

The above decisions may only be of historical value given the replacement of the ASA by the CTOPA. Since the CTOPA operates within a trimester approach, the *nasciturus* rule may be relevant.

After the introduction of the Constitution, with a justiciable Bill of Rights, it was inevitable that the CTOPA, given its liberality, would face constitutional challenges as conflicting with, or limiting, rights contained in the Constitution.

In 1998 (the CTOPA came into operation in 1997) a Christian pro-life group unsuccessfully challenged the constitutionality of the CTOPA in the High Court, in *Christian Lawyers Association of SA and Others v Minister of Health and Others*<sup>38</sup>, on the ground that it violated the right to life of the foetus.

McCreath J rejected the challenge on the basis that the word, “everyone”, used in section 11 (the right to life) of the Constitution did not include a foetus within its ambit and that a foetus was not a bearer of rights. The Judge did not find it “...necessary to make any firm decision as to whether an unborn child was a legal persona under the common law [but did indicate that] [s]ome recent decisions and academic writings had revealed a move towards an acceptance of the capacity of the foetus to be the bearer of certain rights.”<sup>39</sup>

McCreath J further held that “[t]here is no provision in the Constitution to protect the foetus...Section 12(2) provides that everyone has the right to make decisions concerning reproduction and to security in and control over their body. Nowhere is a woman’s rights in this respect qualified in terms of the Constitution in order to protect the foetus. This does not, of course, mean that the State is prohibited from enacting legislation to restrict and/or regulate abortion.”<sup>40</sup> As Meyerson<sup>41</sup> observes, the following excerpt from his judgment can lead one to believe that the outcome may have been different had the plaintiffs not adopted such an exacting approach as they did:

“It is convenient at this stage to point out that the plaintiffs have framed their cause of action in absolute terms - namely, that the foetus is a person and that the Act must therefore be struck down in its entirety. The particulars of claim do not suggest that there are competing rights and that a balance must be struck between the rights of a woman and that of a foetus.”<sup>42</sup>

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<sup>38</sup> [1998] (11) BCLR 1434 (T) 1435.

<sup>39</sup> Ibid.

<sup>40</sup> Op.cit (n 38) 1441-1442.

<sup>41</sup> D Meyerson ‘Abortion: The constitutional issues’ SALJ (1999) 50-59, p. 54.

<sup>42</sup> Christian Lawyers 1998 case pp1443.

Case law, subsequent to the CTOPA and the Constitution, makes it clear that the right to life of an unborn is not included within the ambit of “everyone” and therefore such claim will not succeed if it based on Section 11 of the Constitution. Although section 12 (2) of the Constitution may not qualify a woman’s reproductive right to abortion, the same cannot be said of the CTOPA which, given its trimester approach, does appear to limit her right to do so through her choice alone or unqualifiedly (without a reason) after the first trimester. This may give rise to a conflict between the constitutional rights of an unborn and those of a pregnant woman if the *nasciturus* rule is applied. Since the CTOPA only allows abortions in exceptional cases in the third trimester, the possibility that the State may have a “constitutional *duty*”<sup>43</sup> to protect the developing human life of an unborn, once it has reached the stage of “legal” foetal viability, may also not be entirely ruled out. This is especially so since there has as not been a Constitutional Court decision which pertains directly to abortion and which provides the last word on it.

### **7. A balanced approach to abortion and foetal protection**

A cursory examination, of some of the broader discourses on abortion, highlights reasons which may justify why the CTOPA has to remain unchanged and why stigmatic perceptions of abortion have to be avoided when dealing with foetal protection. In doing so, a more nuanced and balanced perspective is offered.

It appears that the large number of illegal abortions may have been the main motivating factor for introducing the CTOPA<sup>44</sup>. Newspaper reports and research studies highlight that they continue unabatedly<sup>45</sup>.

Both the CTOPA and the Constitution do not guarantee access to a legal abortion. The section 27(1)(a) right to access health care services is dependent on the availability of State resources (section 27(2)) and may be limited when these are lacking. This may imply that the State cannot be held accountable for unnecessarily prolonging the life of an unborn, when lack of access may be found to be the cause of delaying an abortion to the second trimester.

The CTOPA was amended in 2004<sup>46</sup> and 2008<sup>47</sup> to make provision to extend access to abortion by expanding both the pool of trained health care providers (doctors, midwives and nurses) and types of designated public health facilities (State hospitals and clinics) that may offer free abortion services throughout South Africa’s nine provinces. It appears that restrained practical access to abortion services continues.<sup>48</sup>

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<sup>43</sup> See the view of such a duty expressed by I Currie & J De Waal (2013), *The Bill of Rights Handbook* (6 ed) Juta: Cape Town, p.266 in the context of the 1998 *Christian Lawyers case*.

<sup>44</sup> See JJ Sarkin-Hughes *The Effect of a Constitution and Bill of Rights on Abortion in South Africa: A Comparative Study* (1995) unpublished LLD dissertation, Bellville University of the Western Cape, p. 63.

<sup>45</sup> See R Hodes ‘The Culture of Illegal Abortion in South Africa’ *Journal of Southern African Studies* Vol.42 No.1 (2016) 79-93, p. 79-93.

<sup>46</sup> Choice on Termination of Pregnancy Amendment Act 38 of 2004.

<sup>47</sup> Choice on Termination of Pregnancy Amendment Act 1 of 2008.

<sup>48</sup> In 2012 only 40 per cent of designated abortion facilities were operational. See B Ludman ‘Laws may allow abortion, but it’s much harder to change attitudes’ *Mail & Guardian Online* (16 November 2012), viewed at 25 October 2016, <http://mg.co.za/article/2012-11-16-00-laws-may-allow-abortion-but-its-much-harder-to-change-attitudes>.

Research, conducted in the Western Cape Province, highlighted that the prevalence of failed attempts at self-induced unsafe abortions persisted during the first trimester and resulted in increased numbers of second trimester legal abortions<sup>49</sup>. In 2010, second trimester abortions accounted for 25 per cent of all abortions.<sup>50</sup>

Some of the reasons why women wait until the second trimester, to have an abortion, include their lack of awareness of the CTOPA<sup>51</sup> and fear of abusive treatment at public health facilities by judgmental nurses and hospital staff.<sup>52</sup>

There has been an increase in pregnancies among adolescent girls.<sup>53</sup> In 2013, the then Minister of Health expressed the view that young girls are “using abortion as contraception”<sup>54</sup>. The State’s allegation that girls are using abortion as a means of contraception needs to be critically evaluated. There is a need for first trimester abortion not to be eliminated. Women sometimes, for a variety of reasons, may begin a pregnancy by wanting to have a baby but then change their minds because they may be going to divorce and suffer economic restraint and this must be respected by the State. Available research supports arguments that call for adopting a more nuanced position – one that militates against advancing a negative stereotyping of young women who seek abortions – in that there may be more to this issue than proving fertility. Factors include, but are not limited to, the following: that some girls do not enjoy equality in sexual relationships; they may have little say over whether to have sex and may not be able to negotiate condom use.

It is an offence to abandon a child.<sup>55</sup> Yet, many unwanted children are still abandoned.<sup>56</sup>

Adoption is an attractive alternative to abortion since it will allow both wanted and unwanted children the prospect of thriving in a variety of family forms, with single or unmarried parents, with same-sex couples in civil unions, with multiple caretakers in polygynous marriages or in traditional two-parent families. It will also allow a woman to continue with her career rather than opting for a social abortion for that reason. A balanced approach to adoption would also consider the impact of adoption decisions on the woman who gave birth: she may not have wanted the pregnancy to be common

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<sup>49</sup> See D Constant, D Grossman, N Lince & J Harries ‘Self-Induction of Abortion among Women Accessing Second-Trimester Abortion Services in the Public Sector, Western Cape Province, South Africa: An Exploratory Study’ Vol.104 No.4 South African Medical Journal (2014) 302-304.

<sup>50</sup> R Boland ‘Second Trimester Abortion Laws Globally: Actuality, Trends and Recommendations’ Reproductive Health Matters Vol.18 (2010) 1–23.

<sup>51</sup> See RK Jewkes, T Gumede et al ‘Why are women still aborting outside designated facilities in metropolitan South Africa?’ BJOG Vol.112 1236-1242 (2005), p.1241.

<sup>52</sup> This phenomenon is widely documented. See the online articles by D Grossman et al, ‘Surgical and medical second trimester abortion in South Africa: A cross-sectional study’ *BMC Health Services Research* Vol11, No.224 (2011). See also J Harries et al, ‘Health care providers’ attitudes towards termination of pregnancy: A qualitative study in South Africa’ *BMC Public Health* Vol.9 No.296 (2009).

<sup>53</sup> G Mchunu, K Peltzer et al, ‘Adolescent Pregnancy and Associated Factors in South African Youth’ *African Health Sciences* Vol.12 (4) (2012), 426–434.

<sup>54</sup> See C Halata “Teens using abortion as contraception” (29 July 2013), viewed at 25 October 2016, [http://www.iol.co.za/lifestyle/family/kids/teens-using-abortion-as-contraception-1.1554238#.U\\_T2nVeH9w1](http://www.iol.co.za/lifestyle/family/kids/teens-using-abortion-as-contraception-1.1554238#.U_T2nVeH9w1).

<sup>55</sup> See Children’s Act 38 of 2005, section 305 (3)(b).

<sup>56</sup> It is estimated that “more than 3500 babies were abandoned in SA in 2010. [Although][t]here are no current statistics detailing the number of children who are abandoned in South Africa on an annual basis...most child protection organizations believe that the numbers have increased significantly over the past decade.” D Blackie ‘Fact Sheet on Child Abandonment Research in South Africa’ (20 May 2014), National Adoption Coalition South Africa, viewed at 24 October 2016

knowledge for a variety of reasons; she may be stigmatised as having abandoned her child; she may fear for the safety of her child if she does allow it to be adopted, although the option of open or disclosed adoption may be a possible solution.

Although the State provides support for abandoned children, through a Foster Child Grant (FCG), a similar system does not appear to be available to people who may want to adopt children but cannot afford it. The trend, to adopt children, appears not to be common in South Africa and there are already very many children in South Africa, many of them AIDS orphans who live in State funded foster homes and orphanages, who would welcome being adopted.<sup>57</sup>

Current provisions, pertaining to adoption, may be in need of revision to facilitate adoptions. Simplifying the lengthy and complicated process and requirements for legal adoption, as set out in Chapter 15 of the Children's Act, could be the place to start, in order to change the current culture. Doing so will provide many people, both locally and abroad (inter-country adoption), with the opportunity of parenthood.

## 8. Conclusion

South Africa is currently one of only five<sup>58</sup> countries in Africa (out of a total of 54) where abortion is legally permitted. The CTOPA was not passed by the South African Parliament without controversy.<sup>59</sup> It also did not receive blanket support from South Africans<sup>60</sup> many of whom may still oppose abortion.<sup>61</sup> The Constitution was enacted after the CTOPA but is expected to provide interpretative guidance with regard to ambiguous or conflicting provisions of the CTOPA. These facts go some way in explaining why the CTOPA may not be without criticism when it comes to the question of foetal protection. Section Seven has highlighted that there can be no denying that the CTOPA already has made a difference in South Africa. A 2012 Report shows that the annual number of abortion-related deaths fell by 91% within a few years of the passage of the CTOPA.<sup>62</sup>

In addition to the reasons outlined in Section Seven, abortion on request in the first trimester has to remain a woman's personal choice until the elimination of other situations, such as the following: husbands or partners who are abusive, and poor providers; husbands or partners who unreasonably withhold consent to an abortion; contraception that may fail even when properly utilised; and the 'prosperity gap' closes between the 20 per cent rich ('overwhelmingly white') and the 80 per cent poor of the

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[http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>57</sup>A summary of statistics on adoption as at November 2013 highlight that there were "... only 29 possible parents for around 429 children registered on RACAP [Registry of Adoptable Children & Parents] [and] [o]nly 1699 adoptions took place in 2013, from 2840 in 2004." Blackie D 2014.

<sup>58</sup> The other countries are Tunisia, Zambia, Cape Verde and Mozambique. See 'Abortion in Africa Fact Sheet' 2016 Guttmacher Institute (May 2016) viewed at 30 September 2016 <https://www.guttmacher.org/fact-sheet/facts-abortion-africa>.

<sup>59</sup> S Guttmacher et al 'Special Report: Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' International Family Planning Perspectives Vol.24 No. 4 (1998), 191-194.

<sup>60</sup> SA Nkomo Republic of South Africa Report of the Ad Hoc Select Committee on Abortion and Sterilization (1995) [C3-95].

<sup>61</sup> B Mncwango & S Rule 'South Africans gainst Abortion' Social Attitudes Survey 6-7' (2008) viewed at 25 October 2016 <http://www.hsrc.ac.za/uploads/pageContent/1607/South%20Africans%20Against%20Abortion.pdf>.

<sup>62</sup> "In South Africa, where the-abortion law was liberalized in-1997, the annual number of abortion-related deaths fell by 91% between 1994 and 1998-2001" ("Facts on Abortion in Africa", Guttmacher Institute (November 2015) viewed at 25 October 2016 [https://www.guttmacher.org/sites/default/files/pdfs/pubs/IB\\_AWW-Africa.pdf](https://www.guttmacher.org/sites/default/files/pdfs/pubs/IB_AWW-Africa.pdf).

South African population.<sup>63</sup> Social scientists have shown (see Section Seven) that there are many reasons which may explain why women have little option but to wait until the second trimester to have an abortion. While this may justify why the present position has to remain, the problem may ultimately lie with an ineffective State which has failed in its duty to provide greater protection to the unborn. This paper has not deliberately tried to locate and pinpoint any weaknesses in the CTOPA or to favour one ideological perspective over another. Instead it has argued for a possible increase in the protection of pre-natal 'human' life, within a framework of legal abortion in South Africa, and to do so through closer cooperation between the different branches of public and private law. Abortion and foetal protection remain an ambiguous and complex topic in South Africa and still hold much current legal relevance and future judicial interest.

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<sup>63</sup> See L. Du Plessis 'The Future of South Africa: Perspectives of Integrating Different Cultures – Means of Law' *Rechtspolitisches Forum* Vol.6 (2002) 3-23 at p.5-6.