

SA de Freitas

A critical retrospection regarding the legality of abortion in South Africa

Abstract

Abortion touches at the heart of the commencement of life, and therefore has to be approached accordingly. In this article, the South African jurisprudential debate on the legality of abortion, including the judgment in *Christian Lawyers Association of SA v Minister of Health* and the *Choice on Termination of Pregnancy Act*, is critically investigated. In conclusion, a proposed point of departure is postulated, with the aim of shedding more light on foetal status. In this regard, it is argued that, as part of the primary enquiry, morality and science, with special emphasis on fertilization, will have to play a more integral role.

'n Kritiese terugblik insake die regsgeldigheid van aborsie in Suid-Afrika

Aborsie raak aan die wese van die aanvang van lewe, en daarom moet dit dienooreenkomstig benader word. In hierdie artikel, word die Suid-Afrikaanse regsleer in die konteks van die regsgeldigheid van aborsie, insluitend die uitspraak in *Christian Lawyers Association of SA v Minister of Health* en die *Wet op die Keuse van Swangerskapbeëindiging*, krities ondersoek. Ten slotte word 'n voorgestelde vertrekpunt gepostuleer, met die doel om meer lig op fetale status te werp. In hierdie verband, word daar aangevoer dat, as deel van die primêre ondersoek, moraliteit en die wetenskap, met spesiale klem op bevrugting, 'n meer integrale rol sal moet speel.

1. Introduction

Criticism regarding the approach by the judiciary and legislation in South Africa, to foetal protection and therefore by implication the legality of abortion,¹ deserves appreciation.² However, the absence of substantial and critical pro-life abortion jurisprudence in South Africa, and the fact that criminal law regards foetal life as worthy of protection,³ calls for further debate regarding this issue. There is also the proposal that there is no reason why in certain circumstances and for private law purposes, legal subjectivity cannot be conferred upon an unborn person in terms of the *nasciturus* rule.⁴ What is rather disconcerting regarding the beginning phase of contemporary South African abortion legislation is that though the *ad hoc* Select Committee on Abortion and Sterilisation (The Committee's recommendations culminated in the *Choice on Termination of Pregnancy Bill*), preferred the position of the pro-choice lobby, it did not seem to appreciate the importance of supporting its recommendations by arguments, and that many of the recommendations were made without any supporting reasons. The Committee recommended that abortion be available on request in the first 14 weeks of pregnancy. It also recommended that abortion be available from 14 to 24 weeks on specified grounds. The Committee however, did not provide the grounds.⁵ There is the possibility in this regard, that by leaving the right to life unqualified in the Constitution, the framers hereby intended to leave the determination of the constitutionality of abortion to the Constitutional Court.⁶ In fact, concerning the abortion issue in the light of the South African Law Commission's draft Bill of Rights it is stated:

The abortion controversy is therefore not dealt with by either the ANC or the Law Commission although both discussed the issue and did not want to deal with it. How these clauses, if adopted, will impact on abortion is unclear.⁷

This adds to the judiciary's responsibility to approach abortion legislation with credible reasoning.

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- 1 Or the "termination of pregnancy" as some would prefer.
 - 2 See Naudé 1999:541-563 and Van Oosten 1999:60-76.
 - 3 This was overlooked by the judgment of *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (hereafter referred to as "CLA"); Naudé 1999:546.
 - 4 See Du Plessis 1990:58. Van der Vyfer states: "... the *nasciturus* rule does not in fact predate the birth of a child, but realistically affords to the unborn child, as from the date of his conception, legal subjectivity attended by those rights of a person *in esse* which come within the range of the rule. The law pertaining to the commencement of legal subjectivity can be summarized by saying that a person with concomitant rights and obligations comes into being at the moment of birth, or, alternatively, if it would be in the interest of the person concerned, on the date of his conception", *The Right to Life of the Unborn in South African Law*, 8.
 - 5 See Ngwena 1998:43-44.
 - 6 See De Waal *et al.* 137, for the application of this insight in the context of the death penalty as dealt with in *S v Makwanyane* 1995 (3) SA 391 (CC).
 - 7 Sarkin-Hughes 1993:91.

A survey of international human rights instruments and jurisprudence reveals a considerable lack of agreement among states on inclusion of the foetus as a person or human being for purposes of human rights protection, and even greater controversy over the question of whether, if foetal rights do exist, these are outweighed by the mother's rights to privacy and family life.⁸ International jurisprudence has thus far avoided answering the question of whether the foetus is included in the universal guarantees of the right to life. Added to this is the disparity between domestic legal systems and the sometimes competing views between majority and minority judgments, regarding the legal status of the foetus. Beckwith and Geisler correctly state that if "no one knows when life begins, that it is as good a reason as any to prohibit abortion, for when an abortion is performed it is possible that a person is killed, since no one knows when life begins".⁹ Martyn states that it is perhaps because we have, at present, no clear answer to the question of when human life begins, that we want to protect a potential life and adds:

To the extent that we are unsure where human life begins, however, we may want to allow the states to restrict abortion during the period of uncertainty.¹⁰

Surely this doubt and lack of agreement should support added sensitivity and scrutiny regarding the legality of abortion by the judiciary, among others.

Bearing the above in mind, strict scrutiny and sensitivity need to be applied by the judiciary regarding the rights and/or legal interests of the foetus, which also implies the reviewing of certain sections in the *Choice on Termination of Pregnancy Act*,¹¹ to determine whether the provisions in the Act provide the necessary respect towards the foetus. This is especially true, taking into consideration Van Oosten's view that the *Choice Act* is little more than the decriminalisation of abortion, and that the Act bristles with lacunae, contradictions, inconsistencies and incomprehensibilities, also demonstrating an inexplicable ambivalence on the issue of abortion.¹² In addition to Van Oosten's comments on the *Choice Act*, further scrutiny should be applied regarding the stipulation that a pregnancy may be terminated upon request of a woman from the 13th up to and including the 20th week of the "gestation period" if a medical practitioner, after consultation with the pregnant woman, is of the opinion that the continued pregnancy would significantly affect the *social or economic circumstances* of the woman.¹³ Should social or economic circumstances really favour an abortion? Even if the answer is in the affirmative, reference to significant social and economic requirements is susceptible to wide construction or

8 See Shelton 1987:1-15.

9 Beckwith and Geisler 1991:58. Also see Rice 1973:310-311.

10 Martyn 1982:1205.

11 92 of 1996 (hereafter referred to as the *Choice Act*).

12 Van Oosten 1999:76. Van Oosten adds: "The present Act, for one, has clearly opted for the view that the life of an unwanted embryo yields, in pursuance of 'the values of human dignity' and the 'advancement of human rights', to the freedom of the pregnant woman to elect a termination of her pregnancy for whatever reason she considers fit or for no reason at all" (1999:64).

13 Section 2(1)(b)(iv) of the *Choice Act*.

interpretation, hereby allowing unrestricted access to abortion. Also the reference in the *Choice Act* to the woman's "physical or mental health" as justification for abortion after the 12th week of the gestation period requires further analysis.¹⁴ The *Choice Act*'s "counselling" provision¹⁵ is rather brief especially when compared to other jurisdictions.¹⁶ It should not be assumed that pregnant women approaching an abortion are truly aware of the foetus's structure, development, and worth. Abortion can be painful and humiliating for the very reason that the woman was not truly informed regarding the foetus and its biological nature. Also, although the term "foetus" is referred to in the *Choice Act*,¹⁷ it is not defined in the *Choice Act*.

Therefore, this article pleads for the substantial development of abortion jurisprudence in South Africa. To complement this, certain contemporary abortion

14 Section 2(1)(b)(i) of the *Choice Act* states: "... a pregnancy may be terminated — (b) from the 13th up to and including the 20th week of the 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 ...". In this regard, the risks regarding such broad references to health requires emphasis — namely that such a vague measure of "health" abortion is indistinguishable from "elective" abortion; see Beckwith and Geisler 1991:50-52.

15 Section 4 of the Act merely states: "The State shall promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy."

16 For example, Belgium requires that abortions be performed under "good medical conditions" in a facility with adequate means of providing the woman with counselling and information on the public support to which she would be entitled should she deliver and elect either to keep the baby or put it up for adoption, Rahman *et al.*, <http://www.agi-usa.org/pubs/journals/2405698.html> (cited on 09/10/2004). Also in Belgium, a woman may not have an abortion until 6 days after a physician has informed her of the procedure's risks and alternatives to abortion. In Germany, an abortion may only be performed three days after counselling. Likewise, the US Supreme Court upheld a state's mandatory 24-hour waiting period, and a number of other US states have similar requirements, Rahman *et al.*, <http://www.agi-usa.org/pubs/journals/2405698.html>. Some commentary on *City of Akron v Akron Center for Reproductive Health* 462 US 416 (1983), 103 S. Ct. 2481, also provides views to be considered, for example, the relevance of the requirement that the attending physician provide the pregnant woman with detailed information, including anatomical and physiological descriptions of the unborn foetus at different stages of development, as well as the availability of several agencies providing birth control and adoption information. In this regard, see Bridenhagen 1984:410-411. Regarding the German context, Smit observes that compulsory counselling was accepted as the key to allowing the state to fulfil its obligations while retaining the fundamental right of the woman to make her own decision during the first 12 weeks of pregnancy. A termination of pregnancy could not be legal, except in very narrowly defined circumstances. Nevertheless, the state was not under an absolute duty to criminalise all illegal terminations of pregnancy. It could create a strict system of counselling which was explicitly designed to persuade the pregnant woman to carry the foetus to term. If notwithstanding such counselling, the woman insisted on having the pregnancy terminated, the law could provide that the termination would not be a criminal offence (Van Zyl Smit 1994:312). Also see Van Zyl Smit 1994:316.

17 See sections 2(b)(ii), 2(c)(ii) and 2(c)(iii) of the *Choice Act*.

issues will be critically reviewed with the aim of emphasising (albeit not exhaustively) remaining fundamental issues requiring attention. In this regard, the *CLA* judgment serves as a catalyst regarding the need to contribute positively to the needed progression of abortion jurisprudence in South Africa. The role of science regarding the abortion debate will also be investigated.

2. Towards the development of abortion jurisprudence in South Africa

Courts have certain capacities for dealing with matters of public morality that legislators and executives lack. The process of reasoning adopted by judges must be informed by the eventual goal of reaching a judgment that may command the allegiance, upon deeper reflection, even among those who find a result disagreeable.¹⁸ The importance of developing scrutiny of substantive national moral issues by the judiciary requires emphasis, something that is especially true regarding foetal status and human rights protection. When voting and political debate cannot resolve the issue of abortion, parties cease to do battle with one another and ultimately seek to persuade the courts of the merits of their moral positions. In the South African context, this is what happened in the *CLA* judgment.¹⁹ However, when the judiciary's treatment of abortion lacks credibility, then it needs to be confronted yet again with the abortion issue. The only legitimate tool left once voting and political debate regarding the validity of abortion have failed to reach consensus, is that of constitutional litigation.²⁰ Consideration that constitutional jurisprudence and the interpretation of fundamental claims are not supported by a concise and complex theoretical foundation and a long history of judgments,²¹ is another reason to support the development of abortion jurisprudence in South Africa.

From a comparative point of view, the US judiciary, although remaining within a generally similar view on foetal legal status, exhibits active debate regarding the legal foundations of abortion. The same applies to German abortion jurisprudence. Davis states that the tension between the foetus's right to life and a woman's right to choose exists across international boundaries. German abortion law differs from US abortion law in the nature of the interest in foetal life and the role the state plays in the formulation of abortion morality. However, both countries seem to remain continually locked in a battle to forge an accepted balance between a woman's right to choose and the foetal right to life.²² The attempt to forge a balance between a woman's right

18 Du Plessis 2002:33-34.

19 Ngwena 1998:50.

20 Ngwena 1998:50.

21 See Boshoff 2001:292.

22 Davis 2002:185. In her critical commentary with reference to the *CLA* judgment, Naudé states that it is strange that the *CLA* judgment emphasised that foetal life is recognised as an "independent legal value" worthy of protection in Germany and that the German court sought to strike a balance between "the State's obligation to protect foetal life" and the autonomy of the woman, yet did not consider whether the same should be done in South Africa (Naudé 1999:549).

to choose and the foetus's right to life is indicative of the importance of the issue at hand. It is also indicative of the seriousness of the issues related to the sanctity of life.

No body of doctrine is born fully developed. This is as true of constitutional law as it is of theology. The provisions of the South African Constitution²³ state profound but simple and general ideas. The law laid down in Constitutional provisions gradually gains body, substance, doctrines, and distinctions as judges, equipped at first with only those ideas, are forced to confront new situations and changing circumstances. The concept of original understanding itself gains in solidity, in articulation and sophistication, as we investigate its meanings, implications, and requirements.²⁴ Therefore, the courts in South Africa need to apply proportionate attention to issues of morality, and the legal concern regarding the foetus is no exception. The court is the branch of government best suited to fathom the values embodied by the Constitution. The court's inability to enforce its decisions directly, however, makes its ability to govern dependent upon its ability to persuade, and continued adherence to an unpersuasive solution will result in the court losing control over the controversy to a less suitable branch of government.²⁵ An underestimation of the abortion issue by the judiciary runs the risk of disrespect for life even in the context of an absolute separation between the foetus and life. This underestimation will occur if the judiciary does not approach the abortion issue with the necessary reasonableness, sensitivity and coherence, coupled with an ever-vigilant suspicion regarding the temptations of expediency, utilitarianism and pragmatism.

Ngwena rightly states that the *CLA* judgment fell short of a comprehensive enumeration of rights to abortion under the Constitution and that:

the task is one that can only be authoritatively discharged when the court with ultimate jurisdiction in constitutional matters, the Constitutional Court, is seized of the matter.²⁶

This is especially true in the sense that the Constitutional Court is cast in the role of educator involving national moral issues.²⁷ The Constitutional Court's judgments are, in the words of Du Plessis:

not cast aside as matters of dry law, setting technical disputes. Rather, they have the potential to stimulate debate and reflection, and to draw praise and criticism, becoming part of a rich and varied dialogue about ongoing moral and political issues within South Africa.²⁸

23 Act 108 of 1996.

24 Bork 1990:352.

25 Coleman 1984:41-42. Even if the legislature has a "rational basis" for adopting legislation, "One's right to life, liberty, and property and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections", Irons 1998:710.

26 Ngwena 1998:57-58.

27 Du Plessis 2002:28.

28 Du Plessis 2002:28-29.

Judge McCreath's predominantly text-based approach to constitutional interpretation, which according to Naudé, is the central shortcoming in the *CLA* judgment,²⁹ confirms the need for the South African judiciary, and preferably the Constitutional Court, to deal with the reviewing of abortion legislation. In fact, a text-based approach introduces the temptation to separate the law from morality, religion, philosophy and science. In this regard, Judge McCreath's opinion was that the answer to whether "everyone" or "every person" applies to an unborn child "from the moment of the child's conception", does not depend on medical or scientific evidence as well as on religious and philosophical grounds, but that the issue "is a legal one to be decided on the proper legal interpretation to be given to section 11" (of the Constitution).³⁰ By stating that the issue is a legal one to be decided on the proper legal interpretation to be given to section 11 of the Constitution, Judge McCreath, is himself relying on a philosophical approach that views the law as separate from science, medicine and religion. This application of exclusive positivism, which is hyper-critical towards the presence of morality in the law, is not in accordance with the contemporary Constitutional approach in South Africa. In other words, law in general is made conditional upon meeting certain *value and moral (also political)* requirements. This is typical of the familiar constitutional provisions (and of modern legal systems) conditioning the validity of all legislation on meeting certain prescribed *value, moral and political* arguments, such as whether a clause in an act or the act in its entirety, fulfils the requirements of fairness, equality, human dignity, the value of life and so forth.

For the proponents of abortion the question: "What is man?" need not be answered as they seem content to bypass what strikes them as fruitless speculation of a metaphysical sort. The relativity of morals, the subjectivity of knowledge, the lack of agreement on ethical principles, all these cautionary epistemological axioms, are deployed to turn off discussion of abortion by those who pronounce with conviction on the morality of war, the rights of conscientious objectors, and the wrong of capital punishment. In not responding when the question of personhood is raised in relation to abortion, they make their own decision as to who a person is.³¹ The inclusion of a moral angle will provide the need to provide credible evidence in order to confirm the rightness or wrongness of abortion. As a consequence, science will have to be applied.

Morality is difficult to exclude, bearing in mind that in the development of a legal rule, where there is a gap or a possible choice within the legal system, moral or other extra-legal pressures may cause that gap to be filled or the choice to be determined in one way or another. In the context of the legality of abortion, this is especially true when interpreting vaguely stipulated human rights clauses, such as the sections on the right to life, and the right to freedom and security of the person in the South African Constitution. Contrary to the view followed in *Tremblay v Daigle*³² that: "Decisions based upon broad social,

29 See Naudé 1999:549-550.

30 *CLA* 1118B-D.

31 Noonan 1970:xvii.

32 (1989) 2 S.C.R. 530, 62 D.L.R. (4th) 634. To justify the positivistic approach, the *CLA* judgment relied heavily on this decision by the Supreme Court in Canada.

political, moral and economic choices are more appropriately left to the legislature”;³³ the South African Constitutional order views broad social, political, moral and economic choices as appropriate for the judiciary. As Van Blerk rightly states, the constitutional requirement that the courts promote “the values which underlie an open and democratic society based on freedom and equality” implies that the interpretive task will be radically different from what it was under the doctrine of parliamentary sovereignty.³⁴ The duties imposed by section 39(1)(a)³⁵ and 7(1)³⁶ of the Constitution of South Africa compels courts to make value choices and to make those values *explicit* through *clear* and *transparent articulation*.³⁷ Implicated in this is the relevance of science and medicine.

Judges on the Constitutional Court have explicitly adopted a moral reading of the Constitution. This means that judges construe the Constitution on the basis of its structure and text as well as its history, spirit and context, and on the basis of their interpretation of South African political culture and practice.³⁸ Ngwenya comments that in South Africa it would be unwise to assume that judges in the Constitutional Court will detach the question of morality from abortion, and adds that:

it would be *contra boni mores* to ignore the fact that, whether on account of religion, humanitarianism or science, the majority of people would be uncomfortable with a law that only concerned itself with the interests of the woman to the total exclusion of the foetus.³⁹

It is generally accepted that the Constitutional Court must protect individual rights from public opinion. This has implications for the protection of the foetus in South Africa, because although South African society is fervently supportive of a liberal “pro-choice” argument, the Constitutional Court must heed the interests of the foetus, the reason being that, at minimum, such “entity” interests are on the periphery of life, personhood and humanity. On the other hand, South Africa also has a significant segment of the population exhibiting substantial opposition to a “pro-choice” view, and in this regard the Constitutional Court also needs to formulate a credible argument which should at least substantially stimulate pro-life opinion. There is also the understanding that a diverse community, consisting of a multiplicity of cultural, political and social groups, does not necessitate an unrealistic perception of judges as socially and culturally neutral super-beings who are capable of giving

33 Shaffer 1994:68.

34 Van Blerk 1996:25.

35 “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.”

36 “The 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.”

37 Van Blerk 1996:25.

38 Boshoff 2001:291-292. Also see Du Plessis 2002:28-29.

39 Ngwenya 1998:61.

“correct” decisions in all situations.⁴⁰ This gives rise to the all-important principle that the expectation is rather that judges admit their own context and hereby pave the way for serious and constructive dialogue with role-players from other points of reference,⁴¹ for example, the scientific and medical fraternity.

3. The *CLA* judgment and foetal status

A fundamentally inhibiting factor in the development of South African abortion jurisprudence was Judge McCreath’s comment in the *CLA* judgment, that because the plaintiffs pleaded that the *Choice Act* must be struck down in its entirety, it could not decide on a cause of action different from that which was pleaded for purposes of alternative relief, namely that a certain section of the Act was invalid.⁴² Therefore, the court could not enter into debate concerning the presence of competing rights and the striking of a balance between the rights of a woman and that of a foetus.⁴³ Naudé rightly states that since the court denied that the foetus could be the bearer of constitutional rights, the decision on this point must be obiter.⁴⁴ Naudé further scrutinises this line of argument by commenting that section 172(1) of the South African Constitution empowers a court considering a constitutional matter to declare any law invalid to the extent of its inconsistency, and that if a whole statute is challenged, the court must consider whether each section thereof is constitutional (unless they are denied standing or if the issue is not “ripe” or is “moot”).⁴⁵ In contrast, Ngwenya states that the court in *CLA* was not asked to determine the extent to which the Constitution permits abortion or whether the substantive provisions of the 1996 Act are consistent with it — “In framing the question narrowly and absolutely, the plaintiffs derived a narrow answer. The court was thus denied an opportunity to pronounce on the wider permutations of the legality of abortion under the Constitution. Indeed, though the learned judge noted that there were other provisions of the Constitution that impacted on abortion and the issue of the personhood of a foetus, such as the rights to equality, privacy and security of the person, he found it unnecessary to pronounce on them for the reason that they were outside the scope of the plaintiff’s question.”⁴⁶ Naudé is correct, in that the *CLA* court should have scrutinised the said Act to determine whether all its provisions were consistent with the Constitution. In following this route, the Court would have had to confront the question of whether the foetus has constitutional rights and legal interests, or whether there are competing interests during for example, the third trimester.⁴⁷

40 Boshoff 2001:292.

41 Boshoff 2001:292.

42 *CLA* 1123G-J.

43 *CLA* 1123G-J.

44 Naudé 1999:548. Also see Meyerson 1999:54, in support of Naudé’s understanding.

45 Naudé 1999:548.

46 Ngwenya 1998:55.

47 Had the Court followed this route, it is unlikely that it would have absolutely denied both that the foetus has constitutional rights and/or legal interests, and that there are competing legal interests during pregnancy; as this would have been contrary to abortion case law and legislation in general. This approach represents

A more subtle flaw in the *CLA* judgment is that it gives the *impression* that rights⁴⁸ and principles⁴⁹ are invoked as absolute vindication of the woman's choice to have an abortion without first giving regard to foetal status in the context of rights and/or the protection of legal interests. In this regard, it is important to place the primary emphasis on the legal status of the foetus "itself". The various rights and principles applied in a pro-choice approach, need to be preceded by an enquiry as to what the foetus precisely is (however complex this may turn out to be). In other words, another standard is sought for, in this further enquiry, which should be the scientific enquiry (dealt with below). The following are examples of the premature handling of rights and principles in the *CLA* judgment:

Against the background of an egalitarian society, Judge McCreath states that proper regard must be paid to the rights of women as enshrined in the Constitution.⁵⁰ Judge McCreath adds:

I agree also that to afford the foetus the status of a legal *persona* may impinge, to a greater or lesser extent, on these rights.⁵¹

This formulation still begs the important question as to the legal status and interests of the foetus because it assumes that the woman's right to equality must prevail even before the required determination as to the nature of the foetus is determined. In other words, it is unconvincingly assumed that the foetus is not human, or "something" not similar enough to being human, or that it is a foetus but with no legal interests, or that it is a foetus but does not qualify for legal personality. The same problem arises in the view of the *CLA* judgment, where section 12(2) of the South African Constitution provides that everyone has the right to make decisions concerning reproduction and to security in and control over their body, and that "nowhere are a woman's rights in this respect qualified in terms of the Constitution in order to protect the foetus".⁵² Once again, the problem about abortion cannot be resolved independently of the determination of the nature of the foetus. Before considering whether

a failed opportunity of what could have been a more substantive judicial debate regarding abortion jurisprudence, and in which scientific and medical aids would have had to be applied.

48 For example, the right to freedom and security of the person, the right to reproductive choice, and the right to privacy.

49 For example utilitarianism, feministic egalitarianism, exclusive positivism, rape, incest, a deformed foetus, threat to the health of the mother, the risks of backstreet abortions, and so forth.

50 *CLA* 1123C-F. These rights are, according to Judge McCreath, the right to equality (section 9), which includes the full and actual enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone, *inter alia*, on the grounds of sex, the right to freedom and security of the person (section 12), including, *inter alia*, the right to make decisions concerning reproduction and the right to security and control over the body, and the rights in respect of human dignity (section 10), life (section 11), privacy (section 14), religion, belief and opinion (section 15), as well as, health and care (section 27).

51 *CLA* 1123G.

52 *CLA* 1121H-J.

the woman has the rights contained in section 12(2) of the Constitution, the Court first has to explain why the following proposition is not true, namely that:

It is wrong for x to perform an abortion upon y, even when x is a licensed physician and y a consenting mother (who may also have the consent of the father), and it is wrong because this act would be the taking of an innocent human life.

The reason for this is that if the falsity of this statement is not proved, then one cannot assume that the woman has sole right over her body. In other words, in claiming allegiance to section 12(2) of the Constitution in the context of the *CLA* court's approach to this section, would mean that the destruction of the foetus is nothing more than the destruction of some part of a woman's body. Therefore, such an argument has a *premise* incompatible with the view that abortion is the taking of a human life. Is the foetus not human? Is the foetus not an organism that is substantially representative of a human being? The legality of abortion cannot be resolved independently of an investigation regarding foetal legal status and the related principles, values and so forth.⁵³ Whilst the arguments for or against abortion cannot be proved as an objective truth, the fact remains that emphasis must also be given to the foetus and related principles and values.

The *CLA* judgment adds that section 12(2) of the South African Constitution does not imply that the State is prohibited from enacting legislation to restrict and/or regulate abortion. The Court found that:

The state may invoke s 36 for that purpose 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' and taking into account all relevant factors, including those specified in the section.⁵⁴

However, the *CLA* judgment does not further explain this proposition. In fact, the limitation test may not commence if the determination of foetal status has not yet been completed. Naudé enquires whether the outcome intended by section 12(2)(a) really confirms that foetal life is not protected by the Constitution, in other words that a woman has a constitutional right to have an abortion on demand up to the moment of birth. This would mean that legislation encouraging the use of abortion as contraception even in the last trimester of pregnancy cannot be declared unconstitutional.⁵⁵ In fact, the court did not really consider

53 See Brody 1971:357-369, especially 357-358, 362-363, and 368-369. It may be that the determination of foetal status is intertwined with some or other presupposed point of departure, but this does not negate at least a reasonable effort by the judiciary to convince that the foetus is either a mere conglomeration of cells or that "it" is "something" of greater value. An important measure to be applied in the context of a scientific enquiry should provide more light regarding this matter (see below).

54 *CLA* 1121J-1122B.

55 See Naudé 1999:553. Naudé also states that a contextual approach should not allow a court interpreting the right to life to look at the right to bodily integrity, freedom, equality, human dignity and privacy of pregnant women only, whilst leaving the object of the right to life out of consideration, 1999:551.

whether section 12(2)(a) creates a constitutional right to have an abortion on demand up to the moment before birth, or only a “qualified” right to have an abortion on certain grounds and up to a certain stage of foetal development.⁵⁶ This criticism can be taken a step further, in that it is doubtful whether section 12(2)(a) really confirms that foetal life is not protected by the Constitution from the moment of fertilization.

The argument that if abortion were legal then this would lead to abortion being prohibited where the woman has been raped, where incest has been committed or where serious physical and/or mental abnormality will be the result,⁵⁷ is also indicative of a premature reliance on principles related only to the woman. This gives the impression that an analysis of the status of the foetus is irrelevant. On the premise, that it is wrong for a woman to have an abortion because this act would be the taking of an innocent human life (or the getting rid of an organism that is substantially representative of a human being), it can be argued that we should not solve our social problems by allowing some people to take the lives of other innocent people (or by getting rid of a biological organism that is substantially representative of a human being) — should poverty justify theft? In other words, rape *per se* may not be applied as justification for abortion without also taking into consideration the status of the foetus. Concentrating only on rape tends to create the perception that the foetus is not part of the equation. Principles constituting a validation for the legalisation of abortion (egalitarianism, safety and security of the person, and rape or incest) cannot be applied to the exclusion of the application of factors constituting criteria regarding the true nature of the foetus (for example, medical or scientific knowledge), although these principles themselves may be ideological or value-laden. In other words, irrespective of the various views on foetal status (which differ from person to person and court to court, according to some or other presupposed point of view), it would be unfair to expose only the woman to certain principles or measures, and not the foetus. From the *CLA* judgment, the impression is created that the principles related to the justification of not aborting the foetus are negated by the emphasis on principles and rights justifying the woman’s right to abort. The *CLA* judgment assumed that rape and incest are grounds for abortion without even contemplating the true status of the foetus for purposes of legal protection.⁵⁸

Furthermore, the *CLA* judgment made it clear that if the drafters of the Constitution wished to protect the foetus, they would have done so in terms of section 28, which specifically protects the rights of the child, yet there were

56 Naudé 1999:547. Naudé also points to certain implications regarding the limitation clause and abortion in that section 36 is only applicable if “a right in the Bill of Rights” has been infringed or threatened, and consequently that the court may consider whether the limitation clause saves the legislation involved in view of relevant factors (1999:558). In any event, the application of the limitation clause will require analysis regarding foetal status. Therefore, application of the limitation clause will merely be another way of determining foetal status and the accompanying rights and/or legal interests.

57 *CLA* 1122J-B.

58 *CLA* 1122J-1123B.

clear indications that the safeguards in the latter section did not extend to protection of the foetus. A child was defined as a person under the age of 18 years. Age commenced at birth and a foetus was not a “child” of any “age”.⁵⁹ The Court’s reluctance to delve deeper into the issue regarding the relationship between age and foetal status is worthy of note. Does section 28 imply the negation of potential foetal interests? Why did the drafters of the Constitution not explicitly exclude foetal interests? Was there perhaps an underlying sensitivity to foetal status? Section 28 most certainly does not exclude respect regarding the legal interests of the foetus at any period of the pregnancy. An overview of the *CLA* judgment also makes it clear that the Constitution does not indicate expressly, with any assurance, “possible pre-natal application” of the term “person”, but then fails to point out that the Constitution does not exclude the possibility either. For example, Judge McCreath states that:

I proceed to a consideration of the provisions of the Constitution itself. There is no express provision affording the foetus (or embryo) legal personality or protection. It is improbable, in my view, that the drafters of the Constitution would not have made express provision therefore had they intended to enshrine the rights of the unborn child in the bill of rights, in order to cure any uncertainty in the common law and in the light of case law denying the foetus legal personality.⁶⁰

However, one could argue that it is probable that the drafters of the Constitution did not make express provision in this regard for the very fact of uncertainty concerning the rights of the unborn child! According to Judge McCreath’s opinion in this regard, one could also argue that because sections 10, 11 and 12 of the Constitution contain no express indication in opposition to the death penalty, that therefore the death penalty is constitutional!⁶¹

Against the background of the law being the mere provision of a blunt instrument which imposes a solution consistent only with its own internal values, Ngwenya states that:

In the absence of an express provision in the Constitution protecting the foetus, a purposive interpretation of the Constitution, buttressed by the antecedent common law legal fiction of the *nasciturus*-rule, dictated ineluctably that the plaintiffs’ proposition be answered in the negative.⁶²

This view requires explanation, as purposive interpretation can have various points of departure. In addition, it may be that the Constitution provides no express indication regarding the possible pre-natal application of the term person, but this is not to say that the Constitution is clear on the fact that the term “person” is not to be understood in a pre-natal context. Regarding the *nasciturus* rule, Judge McCreath states:

59 *CLA* 1122B-F.

60 *CLA* 1121G-H.

61 See Buelow III 1998:988 for a similar argument regarding *Roe*.

62 Ngwenya 1998:54-55.

One of the requirements of the protection of the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.⁶³

However, when dealing with this rule, one could also argue that there is no provision in the Constitution that prohibits the protection of the foetus.

The jurisprudential argument for the justification of abortion should not begin from the view that only the pregnant woman has certain rights or interests and is protected by certain principles. The important question to pose in this regard, is what the foetus will be viewed as in the event of all rights and principles being removed from the equation. In other words, what will the determination of foetal status be from the pro-choice stance in the absence of the woman's rights and principles which are normally called upon as justification of abortion? As discussed earlier, the *CLA* judgment's emphasis on certain rights and principles pertaining to the woman gives the impression that a determination as to the nature and status of the foetus is irrelevant. In the *CLA* judgment the Constitution is also called upon in justifying no express references to foetal protection, but neither does the Constitution provide express references to abortion. Even the *CLA* judgment's investigation into whether the foetus is a person with legal personhood, implies the exclusion of the primary determination as to the true nature of the foetus, especially when taking into consideration that the general contemporary jurisprudential view is that the legal status of the foetus does become more and more important as the pregnancy progresses. This determination will assist in the identification of all the competing entities with "their" corresponding rights and/or interests, as well as the balancing between the woman's legal rights and foetal interests and the limitation of these rights/interests.

In addition, an arbitrary reference to, for example the woman's right to privacy in order to justify abortion, has questionable implications regarding the content of such a right. In ignoring an accurate investigation regarding the nature of the foetus, the judiciary can read anything it wants into a right, such as the right to privacy, in order to accommodate the pregnant woman's wishes. In this regard, Haley states that medical, moral and legal certainty must first be pursued in order to clarify the nature of the foetus in the context of life.⁶⁴ The scientific approach will play an important role in this regard, which will raise the legal status of the foetus in the context of attaching rights to the foetus rather than merely interests. This is an important distinction in the sense that:

Dogs are not 'persons in the whole sense', nor have they constitutional rights, but that does not mean that the state cannot prohibit killing them⁶⁵ [...] Dogs, draft cards, and post offices all enjoy the law's protection from destruction even though none are 'persons in the whole sense', and even though none have constitutional rights.⁶⁶

63 *CLA* 1121H-J. Van der Vyfer's criticism regarding this understanding of the *nasciturus* rule should also be noted, see note 4 above.

64 Haley 1974:183.

65 Haley 1974:163.

66 Coleman III 1984:17.

4. The scientific enquiry

4.1 Introduction

In commentaries on the legal aspects of abortion in South Africa, there is some indication of the relevance of science to abortion jurisprudence. However, no attempt has been made to delve deeper into the scientific enquiry. For example, Meyerson refers to a foetus as “not just being a bit of human tissue”, but that it is a “living organism”, and adds that:

the foetus becomes more developed, and particularly as it becomes capable of feeling pain and approaches the point of viability or the capacity to live an independent existence, the reasons for its destruction become intractably disputed views, and the weight to be accorded human dignity in competition with women’s rights becomes less controversial.⁶⁷

Du Plessis states that:

Birth is not the beginning of life; it is simply a drastic switch in lifestyle. This is borne out by medical science. As knowledge of the foetus increases, its individuality and humanness become increasingly obvious, from a very early stage of its development.⁶⁸

Naudé proposes (on the assumption that only born human beings can be bearers of the right to life) that the value that the state must promote is at least born human life, and that to do this the state must review relevant legislation to ensure compliance with this duty otherwise:

the state could freely allow the termination on demand of a form of biological life with a clear connection to born human life (and which looks very much like born human life at some stage).⁶⁹

Van Oosten fleetingly refers to the importance of the viability of the child in his adept criticism of the *Choice Act*.⁷⁰ Ngwena states that viability seems to provide a basis upon which people with differing views on abortion may agree that access to abortion may be restricted to protect the interests of the foetus.⁷¹

Taking into consideration (i) the confirmed necessity, in the context of Constitutional interpretation, for science to assist in issues of national morality, (ii) the tendency by contemporary abortion jurisprudence to apply science as an important measure (in whatever form this may be), as well as (iii) the relevance of science *per se* in the abortion issue, there needs to be a more concerted enquiry as to the application of science and medicine in the determination of foetal status. Abortion remains a highly contentious theme among the numerous ideologies that determine when life truly begins (not

67 Meyerson 1999:56.

68 Du Plessis 1990:58. Also see Du Plessis’s reference to Bertrand’s view in this regard, 1990:59.

69 Naudé 1999:556.

70 Van Oosten 1999:74.

71 Ngwena 1998:61.

to mention whether the principle regarding the beginning of life is the true measure to guide such an issue in the first place). The “entity” formed at fertilization and ending at birth is given various names, for example, “foetus”, “biological organism”, “unborn organism”, “unborn infant”, “developing life”, and “potential life” (only to name a few). An unfortunate repercussion of this is that the content of scientific disciplines, *inter alia*, that of legal ethics and human rights theories, will always consist of varying degrees of differing perceptions regarding abortion. This implies that the determination of the foetus as a competing entity with its relevant interests, will be exposed to a plethora of various opinions. However, this does not justify negation of the seemingly impossible quest to scrutinise foetal status in a legal context. If this is not followed, it will result in a negative impact on the sensitivity that the judiciary must show regarding the sanctity of life and humanity (as well as anything on the periphery of such sanctity).

Naudé provides some helpful aids against the background of section 11 read with section 7(2) of the South African Constitution regarding a duty for the state to promote the right to life. Naudé emphasises the important duty by the state to protect *developing* human life by way of legislation, and the court’s reviewing of such legislation, based, of course, on the assumption that only born human beings can be bearers of the right to life. According to Naudé, it is also important for courts to be allowed to review such legislation,

otherwise the state could freely allow the termination on demand of a form of biological life with a clear connection to born human life [...] without a court being able to declare such legislation unconstitutional.⁷²

From this arises the added view that the courts must use scientific and medical expertise in order to limit the state’s approval of the termination of the foetus on demand. This vague measure will require further scrutiny, also bearing in mind that it is not sufficient merely to refer to potential or developing life as reason for the protection of the foetus, because potential or developing life can span the period from fertilization to birth of the foetus.⁷³ Some state of foetal development will first have to be relied upon, moving the argument from *potentiality* to *actuality* and in this regard, medical and scientific evidence needs to be considered. The duty that the state has according to section 7(2) of the Constitution, to promote the right to life, entails more than working on the assumption that the foetus represents potential or developing life. Naudé states that if section 12(2)(a) of the South African Constitution does create a nuanced right to have an abortion on certain grounds at certain stages of foetal development, medical evidence is relevant to determine the boundaries of that right, which in turn influences the interpretation of section 11.⁷⁴ Naudé adds that abortion legislation is based on medical knowledge regarding the development of the foetus, and that the *Roe* decision very prominently took

72 Naudé 1999:556.

73 See Glover 1977:122. Even the egg cell or spermatozoon can for example, be viewed as potential/developing life.

74 Naudé 1999:554, fn. 62.

into account the medical view that pregnancy can be divided into trimesters.⁷⁵ Naudé also comments that it was not convincingly argued by the *CLA* court that medical evidence is irrelevant.⁷⁶ In addition, the onus is on those who view the foetus as potential life, to explain why *potentiality* of life is present and not *actuality*, which will necessitate some or other scientific explanation.

Du Plessis, against the background of contentious case law confronting the Constitutional Court regarding national moral issues, states that the public was corrected through public reasons, which included methods of inquiry and reasoning such as the form of medical proof, criminological and penological research, statistics, or the insights from psychology.⁷⁷ Van der Vyfer states that:

The law is not self-contained. Its tangential juxtaposition within the totality of cosmic reality compels the law to take cognizance of perceptions explored and developed in other ramifications of the world of understanding. Legal arrangements attending biogenetic contingencies rely heavily on scientific data presented by experts in that particular field.⁷⁸

This seems to be an indication that medical and scientific aid is required when dealing with contentious issues of national status such as the validity of abortion. Medical and scientific evaluation should in fact assist the courts to apply a thorough consideration, at the least, of “entities” such as the foetus (“entities” which are located at minimum, on the immediate periphery of life and of being human) – otherwise a radical and free model of judicial interpretation without the judge being able to argue convincingly how the desired outcome had been reached, would be followed.⁷⁹ In fact, as Naudé rightly points out:

the scheme of the abortion legislation is based on medical knowledge regarding the development of the foetus.⁸⁰

It seems realistic to suggest that the judiciary, as it is confronted with more specific information about the identifiable human characteristics and human destiny of the unborn at an early stage, will become less receptive to the position that the mother’s health, broadly defined, is to be given precedence under all circumstances.⁸¹ The courts therefore, have to take cognizance of the relevance of medicine and science in the determination of foetal legal status.

75 Naudé 1999:554, fn. 62. Also see the rest of fn. 62, regarding Naudé’s view as to why the *CLA* judgment did not convincingly explain why medical evidence is irrelevant, as well as Naudé’s criticism of Meyerson’s contradictory remarks regarding the irrelevance of science in determining foetal status.

76 See Naudé 1999:553-554, where the *CLA* judgment is criticised for relying on the Canadian case of *Tremblay v Daigle* to support the view that medical evidence is irrelevant.

77 Du Plessis 2002:28.

78 Van der Vyfer 10.

79 In this regard, see Naudé’s comments against the background of the relevance of medical evidence pertaining to the relevance of the determination of the various stages of foetal development, 1999:553-554. Also see Myers 1987:35; and Rosenblum and Marzen 1987:198, 209.

80 Naudé 1999:554, fn. 62.

81 Myers 1987:34.

Life cannot be defined or disproved scientifically,⁸² and yet science serves as an important measure adding value to the legal protection of the foetus. In this regard, it is worth mentioning that in the US context, *Roe's* denial of personhood to the unborn child runs counter to the general development of the law in this century. In the fields of property, torts and equity, the courts have increasingly harmonised the law with the advancing scientific knowledge of life before birth. In *Bonbrest v Kotz* 65,⁸³ it was noted that:

From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception — which it is in fact.⁸⁴

Science indicates that the foetus is *more* than just a biological organism. Science applied as an interpretive aid is possible, taking into consideration modern day abortion jurisprudence's reliance thereon, whether direct or indirect. Some argue that the pro-life debate views science as an objective basis for arguing that a foetus is a distinct human life from the moment of conception. Science as an objective basis is a myth, taking into consideration that various scientific models are applied by corresponding value judgments; but this does not negate the use of science in the abortion debate. Contemporary liberal abortion jurisprudence does not oppose scientific aids in the form of for example, viability and visible foetal development regarding the organs, limbs and various other body parts. However, there are those who postulate that science should not play a role in law, and that science is in itself normative and open to many interpretations. As previously discussed, science (together with morality, philosophy and religion) does have a role to play in the interpretation of the Constitution. The *CLA* judgment has provided the wrong impression in this regard. Even the pro-choicers (and soft-pro-choicers) will agree that underlying the *Choice Act*, is the *Roe* trimester approach coupled with viability which is indicative of science having a role to play. South African jurists on abortion, in general (as has also been earlier pointed out) have not discounted science in the determination of foetal status.

Mere viability or views that the foetus is a living organism, or that the foetus represents potential life, is not sufficient. If science is relied on, it must be relied on more accurately, concisely and seriously. While contemporary liberal South African abortion jurisprudence does rely on science in the context of the superficial elements such as viability, the physical development of the foetus, reference to the foetus as a biological organism, and even birth, such jurisprudence has yet to present a more concerted effort regarding all the other options that science has to offer. In this regard, the Constitutional Court will hopefully still play an important role. What does science have to offer? A scientific approach includes numerous opinions regarding the point in time from when the zygote, embryo, and foetus should be protected, for example, the capacity of the foetus for feeling or effect (sentience), the ability of the

82 See Du Plessis 1990:56.

83 F. Supp. 138, 140 (D.D.C. 1946).

84 Rice 1973:315-316. For more on the US approach to tort protection and property law pertaining to foetuses see Buellow III 1998:982-984.

foetus to carry on brain activity (psychophysiological unity), the ability of the foetus to live independently from the mother (viability), the fusion of the egg and sperm cell (fertilization), the implantation of the fertilized cell in the uterus (conception),⁸⁵ and even birth. Bearing this in mind, the popular concept of viability needs to be scrutinised and the importance of fertilization requires more emphasis.

4.1.1 Viability

In the South African context, even though viability as a concept seems popular, not much legal research has been done regarding this concept. *Roe v Wade* is deemed the *locus classicus* as authority for viability, where the interests of the state becomes the overriding factor leading to more prominent support regarding the protection of the foetus (whatever the intentions of the state in doing so may be). However, even in the third stage of foetal development (the third trimester), the woman's freedom with respect to the abortion is almost unrestricted — as Justice Blackmun explained, whether the “health” of the woman required an abortion, must be left to the:

medical judgment exercised in the light of all factors (physical, emotional, psychological, familial, and the woman's age) relevant to the well-being of the patient (*Doe v Bolton*, 192).⁸⁶

Therefore, even in those instances where the protection of foetal life constitutes a compelling state interest (which is from the stage of viability — usually associated with the third trimester period), the state may not forbid abortions necessary to preserve the mother's “health”,⁸⁷ whatever “health” in this regard may mean.

In South Africa, viability seems to be a popular yardstick to provide a basis upon which people with differing views on abortion and the status of the foetus may agree that access to abortion may be restricted.⁸⁸ The *Choice Act*, according to Ngwena, appears to align itself implicitly with the concept of viability.⁸⁹ However, one should not be convinced by this yardstick alone. It must be conceded that viability is but one among several competing criteria for balancing maternal and foetal interests.⁹⁰ However, to merely refer to “several competing criteria for balancing maternal and foetal interests” is not sufficient. Do these “criteria” include the rights and principles of the pregnant woman, and if so is the primary enquiry into foetal status not overlooked? Viability must also be approached with certain circumspection. Once the decision is made to select viability as the determinative point in balancing the interests of the woman and the state, there is almost no choice but to include, as the court in *Roe* did, room for technological developments. There could not be any constitutionally

85 See Coleman 1984:19-20.

86 Frankowski 1987:29-30.

87 Bridenhagen 1984:403.

88 Meyerson 1999:56; Ngwena 1998:61 and Van Oosten 1999:74.

89 Ngwena 1998:61.

90 Ngwena 1998:62.

defensible reason for tying a fundamental right to the state of medical technology at some arbitrary date.⁹¹ Nor can the problem be solved by claiming that a foetus is viable only when it has a reasonable likelihood of survival outside the womb *without* technological support. Where would one draw the line? Is an incubator a form of technological support? Is an artificially controlled ambient room temperature a form of technological support? Does a germ-free environment qualify?⁹²

Criticism regarding *Roe* also states that the net result of what the court did by choosing viability as its standard is to place the focus of the abortion inquiry on the existing state of medical technology, rather than on the state of foetal development. The determining factor is now whether and to what degree the medical profession has the technological capacity to sustain the foetus outside the womb.⁹³ Added to the fact that viability could mean various things and take place at various stages (determined by technology), is that the mere independence of the foetus from the mother as justification for protection of the foetus is not convincing. Even a newborn baby is not able to survive on its own outside the womb. In fact, neither are young children and some adults (such as the severely handicapped, senile, stroke ridden, or quadriplegic) — but all of these are considered human beings with a full right to life.⁹⁴

In *Roe*, the court found that there is a societal interest in protecting potential human life which becomes compelling when the foetus reaches viability. There is, however, nothing in the US constitution to indicate that the concept of viability should carry such weight, and the court gave no reason why the point of viability should be crucial.⁹⁵ Instead, the court merely repeated the definition of viability, and *Roe* has been rightly criticised in the legal literature for confusing a definition with a rationale.⁹⁶ In fact the court substituted a definition of viability for justification as to why it is constitutionally significant.⁹⁷ The court also neglected in explaining why life is less meaningful prior to viability; and by pretending to abstain from answering the question of “when life begins”, the majority effectively denied the personhood of the foetus despite the overwhelming biological, medical, and moral arguments to the contrary.⁹⁸ *Webster v Reproductive Health Services*⁹⁹ was the first sharp departure from *Roe*, in which it was decided that the state has a “compelling interest” in foetal life throughout, and that the trimester framework of *Roe* and its viability line ought to be discarded. *Planned Parenthood of Southeastern Pennsylvania v Casey*¹⁰⁰ was the most significant departure arising from the American judiciary since *Roe*. In addition to overruling *Roe*’s trimester approach, *Casey* overruled the *Roe*-idea that

91 Martyn 1982:1202.

92 Martyn 1982:1202. Also see Frankowski 1987:32.

93 Martyn 1982:1202.

94 Beckwith and Geisler 1991:25-26.

95 Martyn 1982:1210.

96 Martyn 1982:1210.

97 Frankowski 1987:30.

98 Frankowski 1987:30.

99 492 US 490 (1989).

100 505 US 833 (1992).

the state had no interest in the foetus until viability by recognizing the state's interest "from the outset of the pregnancy".¹⁰¹

Bearing the above in mind, there are certain implications for South African abortion jurisprudence. Clearly the *Choice Act* has much in common regarding the trimester approach. It can also be argued that the *Choice Act* has curtailed the complexity of the viability test by making it rather difficult to have a legal abortion from the 20th week of the gestation period of the mother's pregnancy. It is generally accepted that viability commences from the beginning of the third trimester (six months into pregnancy) and therefore, in the South African context, pushing the threshold to a month earlier secures inclusion of the viability period. However, it still needs to be convincingly argued that viability should enjoy preference above all other scientific and medical measures in order to grant the foetus more protection. What makes viability so important and can the *Roe* decision serve as authority for pioneering this measure, especially when taking into consideration the mentioned criticism levelled against its qualification of viability?

In addition, *Roe* coupled the viability measure with the interests of the state. This approach negates the foetus, which should be respected as an "entity" with its own interests. Therefore, the *Roe* approach infers that even a viable foetus is not entitled to constitutional protection in its own right: it must depend on what the state may consider a compelling interest. If the state decides not to protect the "potentiality of life", a viable foetus would not enjoy any protection in the abortion context. The only conflicting interests, as seen by the majority in *Roe*, are those of the woman and of the State. The rights of the foetus (and, possibly, of the father) have been completely ignored.¹⁰² By referring to only the woman and the state to the exclusion of the foetus, the preservation of the autonomy of right is negated, where the state (as representative of the pressures of majoritarian will) no more protects human rights but makes a right subject to the will of another, making it a privilege instead of a right.

4.1.2 Fertilization

Guttmacher states that the human ovum is fertilized by a single spermatozoon which rapidly penetrates the egg capsule as soon as it comes in contact with it. The whole spermatozoon enters the interior of the ovum, and then the middle piece and tail disappear. As soon as the sperm penetrates the egg, the capsule becomes altered and successfully bars entry to all later applicants. The nucleus of the sperm-head, bearing all the hereditary factors which come through the father, becomes indissolubly united with the nucleus of the ovum, bearing all the hereditary factors which come from the mother — "and a new life, a composite of them both is begun".¹⁰³ At fertilization the nature and the unique genetic qualities of each of us as an individual human being are determined. At fertilization, all things are fixed: the colour of the eyes, the

101 Buelow III 1998:990.

102 Frankowski 1987:30.

103 Coleman 1984:21.

hair, the skin, the form of the nose and ears, the strength of the person and all characteristics.¹⁰⁴ Gender is also determined at fertilization.¹⁰⁵ Ramsey states that modern genetics seem to teach that there are “formal causes” immanent principles or constitutive elements long before there is any shape or motion of discernible size or subjective consciousness or rationality in a human being —

not merely potency for these things that later supervene, but in some sense the present, operative actuality of these powers and characteristics. It is now not unreasonable to assert, for the first time in the history of scientific speculation upon this question, that who one is and is ever going to be, came about at the moment an ovum was impregnated.¹⁰⁶

The fact that the fertilized egg is still open to a development toward duplication in twins, and that even one-fourth of the fertilized eggs may perish before implantation in the uterus or during this process,¹⁰⁷ does not negate the importance of ovum impregnation. The same can be said regarding the fact that conferring an elevated legal status to the foetus from fertilization might make the IUD (intra-uterine device) and the “morning-after pill” illegal, or that such an elevated legal status might have dire consequences to the lucrative advantages of genetic engineering, cloning and the storage of embryos for future reproductive purposes. In addition, if a spermatozoon is destroyed, a being is destroyed which had a chance of far less than 1 in 200 million of developing into a reasoning being, possessed of the genetic code, a heart and other organs, and capable of pain. If a foetus is destroyed, one destroys a being already possessed of the genetic code, organs, and sensitivity to pain, and one which had a 80 percent chance of developing further into a baby outside the womb.¹⁰⁸ Gardner states that a person’s constitution is not determined by the genetic material to be found in the fertilized ovum. There is not one “path” for the fertilized egg to travel on its way to full gestation. As cell division proceeds, the pattern of the embryo’s progress toward increasing complexity and differentiation depends not just on the genetic information contained in the original forty-six chromosomes but, in significant part, on the pattern of cells and molecules present in the preceding cell division.¹⁰⁹ However, this does not negate the fact that fertilization heralds the most significant process in the chain of events leading to the eventual birth of the baby, fertilization being the moment at which the male’s spermatozoon and the female’s ovum unite to form a biologically distinct, genetically unique, living organism.¹¹⁰

Morowitz and Trefil refer to the science of parthenogenesis, which deals with the creation of a viable foetus from an unfertilized egg. The authors state that the implications of this science strike at the heart of the “potential-life” argument, because it proves that an unfertilized egg can, “under the right

104 Shaffer 1994:75. Also see Beckwith and Geisler 1991:16.

105 Beckwith and Geisler 1991:17.

106 Ramsey 1970:67.

107 Häring 1970:130.

108 Noonan 1970:57.

109 Tribe 1990:119.

110 Coleman 1984:20.

circumstances”, be as full of life potential as a zygote.¹¹¹ However, the authors do concede that this process can not be stimulated in a natural environment and add:

The problem appears to be that in the absence of sperm, the parthenogenic eggs seem to be unable to induce the proper development of the placenta. It appears that most of the instructions for the development of that particular structure are carried by the sperm, and that these instructions are not available in the parthenogenic egg.¹¹²

The futility of this argument speaks for itself, where the application of this science on the human level has to date not yet been successful, but more importantly, that nature is exceeded by drastic human intervention (unlike that needed for normal fertilization to take place). Parthenogenesis is a science that in itself is open to moral scrutiny, irrespective of the wonders it can potentially produce.

Science cannot provide the answer regarding the reasoning why the foetus is human or why it is not. In addition, the question regarding life and/or “being human” is not necessarily the issue to solve. However, science can indicate to us that the foetus is more than merely (i) a foetus, or (ii) an entity with potential life, or (iii) a biological or living organism. Science also teaches that immediately after fertilization we find a “distinct existence”. In fact, it would be ridiculous to speak of a foetus being part and parcel of the pregnant woman’s body, because this would mean that the pregnant woman has four eyes, or four legs, or double the amount of chromosomes that a human normally has. Science also assists in comparing the sub-scientific observations with each other, and choosing the most rational of these. Fertilization, rather than viability, sentience, psychophysiological criteria or even birth, is the most rational argument for indicating that the foetus is, throughout the total period of pregnancy, more than a mere entity with potential life, or a biological or living organism, and that we are dealing with “something” that has a “distinct existence”.¹¹³ Fertilization seems the most plausible argument to separate legal protection of the foetus from the non-legal protection of the foetus. Birth and viability are the two most frequently suggested; but birth is only a change of place and relationship to the mother and to the surrounding world. As for viability, it varies with accidental and external factors. Coupled with this argument, there ought to be an approach that moves away from the possibility and impossibility of proving human life via science, and rather emphasises the fact that science plays an important role in vindicating the importance of foetal interests and protection. The question of when human life truly begins calls for a conclusion as to which characteristics define the essence of human life. While science can tell us when certain

111 Morowitz and Trefil 1992:52.

112 Morowitz and Trefil 1992:52.

113 Gametes are living cells before they join at fertilization. They are parts of larger organisms, and are not organisms themselves. A zygote, on the other hand, is an entire organism. Destroying a gamete does not destroy a human organism; destroying a zygote does. This difference is fundamental in not only confirming “distinct existence” from the moment of fertilization, but also because it determines whether the abortion harms “another”, see Coleman 1984:22-23 in this regard.

biological attributes can be detected, science cannot tell us which biological attributes establish the existence of a human being.¹¹⁴ This however does not mean that mere viability, sentience, psychophysiological establishment, references to the foetus as “potential life” or “something more than a biological organism”, and/or birth, should enjoy superiority above that of fertilization, in providing the foetus with a more elevated legal status.

Coleman rightly states that the only option to a government that truly respects “individual” (or entity rights, for example that of legal persons) rights is to adopt “distinct existence” as the sole criterion for standing as an “individual” (or entity), which means to attach standing from fertilization, when distinct existence begins. Standing based on sentience means sentient individuals (entities) are more worthy than nonsentient individuals (entities). Standing based on psychophysiological unity makes a like distinction based upon brain waves, while viability and birth differentiate based upon independence. Standing based on fertilization, on the other hand, requires no unverifiable judgment to distinguish between worthy and unworthy individuals (entities) — it is the objective beginning of individual existence (or of an entity).¹¹⁵ In the words of Coleman:

Choosing a point that minimizes individual value judgments is itself a value judgment [...] If no standing definition eliminates all individual discretion, the definition that eliminates the most is best. Fertilization eliminates the most discretion because it bases standing upon an event alone rather than upon a judgment.¹¹⁶

Taking into consideration the importance of fertilization, above that of viability, sentience, the psychophysiological factor and birth, as criteria for the legal protection of the foetus, the termination of the foetus should not be allowed from the moment of fertilization.

The negative secondary issues of pregnancy, such as the danger of backstreet abortions, rape, poverty, incest, and the various rights of the pregnant woman, do not justify termination of the foetus during any time of pregnancy. Then there are other factors to also take into consideration, such as a threat to the life of the mother as a result of the pregnancy (and which is a threat directly linked to the foetus), and serious deformity of the foetus. These factors, namely self-defence of the pregnant woman’s life and deformity, are exceptional and require further analysis, because they deal with a threat to the existence of the pregnant mother and/or the foetus. Naudé’s reference to “potential life” (as critically discussed earlier), is also misleading. Fertilization, and that which ensues as a result, should override the “potentiality factor”. If the foetus is a potential person,¹¹⁷ it must be an actual something in order to be a potential

114 See Shaffer 1994:82.

115 Coleman 1984:26.

116 Coleman 1984:26-27.

117 Six days after fertilization, the blastocyst implants itself in the wall of the uterus, and that the term embryo is used to describe the system after implantation; foetus to describe it after six days. Therefore, does this mean that the zygote, blastocyst and embryo do not qualify as potential life?

person, and what is this “something”? By potentiality of personhood, it seems as if more wants to be made concerning the status of the foetus, and to therefore provide credibility to this objective, one would have to be clearer on what the foetus is besides “it” being labelled as a “potential person” or merely a “foetus”. In this regard, fertilization and all that which ensues, plays an important role. According to Naudé, the judiciary should be allowed to review liberal abortion legislation, and if not, the state could freely allow the termination on demand “of a form of biological life with a clear connection to born human life...”, without the judiciary being able to declare such legislation unconstitutional.¹¹⁸ What is a “form of biological life with a clear connection to born human life”? This is the question that needs to be addressed, and in this article it has been argued that this “form of biological life with a clear connection to born human life”, begins at fertilization, as taught to us by science. The soft-pro-choicers are yet to provide a more convincing argument to negate the importance of fertilization regarding the commencement of foetal protection. This will implicate a credible explanation regarding the differentiation between a 12-week-old foetus, and a foetus of 13 weeks, because this difference can either, according to the *Choice Act*, lead to termination or survival of the foetus. Another distinction to be clarified is the distinction between a 20-week-old foetus and one that is 21 weeks old, because this will determine whether the foetus, according to the *Choice Act*, can be terminated or not as a result of social and economic reasons, which as it stands can be interpreted to refer to a plethora of meanings.

For the pregnant mother as well as the foetus, all that is (or seems to be) a human life and all that which is (or seems to be) on the immediate periphery of it (this periphery being more than mere potentiality of life), needs to be protected. For the foetus this can be attained via science which teaches us that the foetus is, from the moment of fertilization until birth, (and at minimum) on this immediate periphery.¹¹⁹ In an age of reason, nothing can make more sense in the context of the legality of abortion, than following the value judgment that seems the most credible and safe solution to such a complicated issue; namely that of fertilization. The time is long overdue that the legal sphere in South Africa should seriously addresses the contemporary rationale regarding the legalisation of abortion, and in doing so science, and in turn the importance of fertilization, will have to be applied more robustly.

5. Conclusion

Philosophical complexities regarding a common view on the legality of abortion should not negate the quest towards the development of abortion jurisprudence in South Africa, an approach which can only be indicative of a true sense of respect regarding the sanctity of life. Morality (especially in the context of countering conservative notions of positivism) as well as science, have an important role to play in this regard. The analysis regarding the nature of the

118 Naudé 1999:556.

119 Although the foetus proceeds the embryonic stage (a few days after fertilization), in this context it refers to the “entity” established at fertilization.

foetus must form part of the primary enquiry, and this enquiry must have a substantial scientific approach in the light of the relevance that science already plays in contemporary abortion jurisprudence. Mere references to the rights of the pregnant woman, the viability of the foetus, or references to the foetus as potential life to be protected by the state, is not enough. In this regard, fertilization should be indicative of the importance of the foetus and the more generous legal protection that "it" should therefore enjoy. Eventually the debate on the abortion issue becomes a confrontation between various values. However, the observation by science regarding fertilization, represents a more credible approach within the contemporary dominant ideology of science and reason. The challenge regarding more clarity on this debate will, hopefully, at some point in the future be put before the Constitutional Court of South Africa.

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