

Feticide: Continuing the search for a unified approach to the unborn

C Pickles

LLB LLM LLD

Post-doctoral Research Fellow, South African Institute for Advanced Constitutional, Public, Human Rights and International Law, University of Johannesburg

OPSOMMING

“Feticide”: Die soeke na ’n eenvormige benadering tot die ongeborene duur voort

Die artikel oorweeg die vraagstuk van “feticide” en die moontlike toepassing daarvan in Suid Afrika binne die konteks van geweld teen swanger vroue wat lei tot die beëindiging van ’n swangerskap. *S v Mshumpa* 2008 1 SACR 126 (OK) bevestig dat die gemeenregtelike misdaad, moord, nie op ongeborenes toepassing vind nie. Sedert hierdie beslissing was daar al verskeie beroepe op regshervorming. Een akademikus voer aan dat die ongeborene afsonderlike beskerming in die konteks van geweld teen swanger vroue benodig en stel voor dat die statutêre misdaad “feticide” in Suid-Afrika ingestel word. Deur gebruik te maak van die Wet op Keuse oor die Beëindiging van Swangerskap 92 van 1996 en die grondwetlike waarde van menswaardigheid, poog dié skrywer om ’n eenvormige benadering met betrekking tot die ongeborene ten aansien van aborsie en “feticide” te ontwikkel. Hierdie artikel is krities met betrekking tot die voorgestelde “feticide”-wetgewing en dui aan hoe die voorgestelde misdaad van “feticide” nie ooreenstem met die huidige wetgewing en die Grondwet nie. Eerstens, om die ongeborene as ’n entiteit afsonderlik van die swanger vrou te benader, is in konflik met die Wet op Keuse oor die Beëindiging van Swangerskap en bied dus nie ’n eenvormige benadering ten aansien van die ongeborene nie. Tweedens, toon hierdie artikel aan dat nie op die grondwetlike waarde van menswaardigheid gesteun kan word ten einde afsonderlike regsbeskerming van die ongeborene te verleen wanneer daar geen grondwetlike regte is wat uitgelê of beperk kan word nie. Verder, deur die ongeborene slegs te beskerm ten opsigte van die gedrag van ’n derde, word die waarde van menswaardigheid ondermyn aangesien die waarde daarvan gekoppel word aan ’n spesifieke verhouding waarin ’n persoon tot die ongeborene staan. Derdens, deur te steun op die Verenigde State se ervaring ten opsigte van “feticide”-maatreëls, toon hierdie artikel dat “feticide” nie regtig geweld teen vroue beperk nie. Gevolglik bied “feticide” ook nie veel beskerming vir die ongeborene nie. Die artikel verwerp die behoefte aan afsonderlike beskerming vir die ongeborene en stel voor dat die ongeborene beskerming deur middel van die swanger vrou geniet. Hierdie artikel gebruik vroue se grondwetlike reg tot reprodktiewe beheer as die basis om die leed wat beide die swanger vrou en die ongeborene aangedoen word, reg te stel. Hierdie artikel toon dat dié benadering in ooreenstemming is met die Wet op Keuse oor die Beëindiging van Swangerskap en die grondwetlike waarde van menswaardigheid.

1 INTRODUCTION

Generally, feticide concerns the “killing” of the unborn through the infliction of violence and today it is a fairly common statutory crime found throughout the

United States.¹ Feticide is yet to take root in South Africa, but academics² are calling for its introduction after *S v Mshumpa*.³ In *Mshumpa*, the court found that the common law crime of murder does not apply to those who are not yet born.⁴ In essence, the judgment emphasises that there is no crime assigned to conduct that terminates a pregnancy without a pregnant woman's consent and this position stands irrespective of whether the foetus is viable or not.⁵

Some academics are calling for law reform in so far as South African criminal law should recognise the crime of feticide.⁶ The calls for reform are all in reaction to the perceived injustice stemming from *Mshumpa*, in that the law failed to recognise the loss of prenatal life as a result of unlawful violent conduct inflicted on a pregnant woman. This article will focus on Kruuse's law reform suggestions and serves as a response to her argument that a statutory crime of feticide should be introduced in South Africa.

Kruuse argues that before we look at how to best protect the unborn from violent pregnancy terminations, it is first necessary to develop a "unified approach" to viable foetuses in law.⁷ Kruuse⁸ suggests that a unified approach can be secured if, when developing feticide legislation, we avoid a foetal-rights approach and adopt the same approach to the unborn as applied in the Choice on Termination of Pregnancy Act.⁹ Kruuse uses Meyerson's¹⁰ value of dignity arguments to support the position that the unborn should and could be protected as separate victims of crime.¹¹ According to Meyerson, the constitutional value of dignity serves as a constitutional constraint in the context of Choice on Termination of Pregnancy Act.¹² She argues that the value of dignity, rather than constitutional rights, vests in the unborn because even though they are not yet born, the unborn still form part and parcel of humanity and are vested with intrinsic worth.¹³ Meyerson asserts that if the value of dignity informs the interpretation and limitation of constitutional rights, the constitutional value we vest in the unborn can limit women's rights to access abortion as pregnancies progress up to foetal viability and beyond.¹⁴ Kruuse draws on Meyerson's

1 The National Conference of State Legislatures indicates that at least 38 states have foetal homicide laws; see <http://bit.ly/2aOarIE> (accessed 22 July 2016).

2 Kruuse "Fetal 'rights'? The need for a unified approach to the fetus in the context of feticide" 2009 *THRHR* 126; Du Plessis "Feticide: Creating a statutory crime in South African law" 2013 *Stell LR* 73.

3 2008 1 SACR 126 (E).

4 149D–F.

5 According to *Mshumpa* 148C–D, "foetal viability" refers to the survivability of the foetus and the court accepted that a foetus is viable at 25 weeks' gestation. For more on foetal viability, see Cohen and Sayeed "Fetal pain, viability and the Constitution" 2011 *J of Law, Medicine & Ethics* 235; Pickles "Personhood: Proving the significance of the born-alive rule with reference to medical knowledge of foetal viability" 2013 *Stell LR* 146.

6 Kruuse 2009 *THRHR* 126; Du Plessis 2013 *Stell LR* 73.

7 Kruuse 2009 *THRHR* 128.

8 *Idem* 134–136.

9 Act 92 of 1996.

10 Meyerson "Abortion: The constitutional issues" 1999 *SALJ* 50.

11 Kruuse 2009 *THRHR* 135.

12 Meyerson 1999 *SALJ* 55–56.

13 *Idem* 56.

14 *Idem* 57.

explanation of the approach adopted by the Choice on Termination of Pregnancy Act and applies it to the unborn in the context of feticide.

While this article supports Kruuse's call for a unified approach to the unborn, it questions whether Kruuse achieves this end. Further, it critiques Kruuse's arguments that the unborn are separate from pregnant women and that feticide legislation is the necessary law reform required to protect the unborn. The article starts by briefly examining the current legal position of the unborn in relation to the common law crime of murder, abortion and the *Mshumpa* decision. It then considers the arguments that Kruuse advances to justify the introduction of feticide legislation, and against this backdrop, Meyerson's interpretation of the Choice on Termination of Pregnancy Act is also considered. After reviewing Kruuse's approach, the article offers alternative considerations to take into account when seeking to develop a way forward regarding redress in cases where a pregnancy is lost as a result of an assault, attempted murder or murder of a pregnant woman.

2 FOETUSES AND THE COMMON LAW CRIME OF MURDER, ABORTION AND *MSHUMPA*

Murder concerns the "unlawful and intentional causing of the death of another human being".¹⁵ "Human being" refers to someone who is alive, or someone who is born alive.¹⁶ Section 239(1) of the Criminal Procedure Act¹⁷ provides that a child will be deemed to have been born alive if it is proved that the child breathed. The common law crime of murder is not applicable to the unborn.¹⁸ Under the common law, the termination of prenatal life constituted criminal abortion. According to Gardiner and Lansdown, the "crime of procuring an abortion is committed by any person who, with the intent of defeating the ordinary course of gestation, wilfully applies to a pregnant woman any means by which the untimely expulsion of the foetus is effected".¹⁹ Women who consented to abortion, and those who assisted, could be prosecuted for criminal abortion.²⁰ Further, a third party who inflicted harm on a pregnant woman with the intention of terminating her pregnancy, but without her consent, could also face prosecution for committing an abortion.²¹

The common law crime of abortion was replaced²² by the Sterilization Act.²³

15 Snyman *Criminal law* (2014) 437. See also Burchell *Principles of criminal law* (2016) 580.

16 Snyman (2014) 438; Burchell (2016) 580.

17 Act 51 of 1977.

18 There is one exception to this position: see *AP v S* (1895) 2 Off Rep 103. In this case, it was held that according to Roman-Dutch law, the crime of infanticide can be committed against a foetus. Hoctor "Specific crimes" 2008 *SACJ* 207 212 considers the role of this case in South Africa and asserts that the decision has never been followed in South Africa. He further alludes to Milton's argument that the decision originates from a lack of distinction between abortion and infanticide (being the murder of a newborn infant). See Milton *South African criminal law and procedure: Common law crimes* (1996) 357.

19 Lansdown *et al* (eds) *South African criminal law and procedure: Specific offences* (1971) 1598.

20 There were limited grounds of justification; see Straus "Therapeutic abortion and South African law" 1968 *SALJ* 435.

21 Milton *South African criminal law and procedure: Common law crimes* (1982) 311.

22 *S v Kruger* 1976 3 SA 290 (O); *S v Collip* 1981 1 SA 150 (A) 153H.

23 Act 2 of 1975.

The Sterilization Act was later repealed by the Choice on Termination of Pregnancy Act,²⁴ and nothing in the Act demonstrates the intention to revive the common law crime of abortion.²⁵ Therefore, it can be accepted that the common law crime of abortion no longer exists under South African law. Unfortunately, in the process of securing safe access to abortion and promoting women's rights to reproductive autonomy, the Choice on Termination of Pregnancy Act inadvertently removed the only possible avenue to prosecute a third party who terminates a pregnancy without a woman's consent. Aside from the *Mshumpa* case, the issue of terminating a pregnancy without a woman's consent has not received judicial attention.

Mshumpa concerned a violent assault on Ms Shelver who was 38 weeks pregnant at the time of the incident.²⁶ Mr Best was her partner and the soon-to-be father.²⁷ The state argued that Mr Best was involved in another relationship and did not want Ms Shelver to continue her pregnancy.²⁸ With the help of Mr Mshumpa, Mr Best staged a robbery with the intention to terminate Ms Shelver's late-term pregnancy.²⁹ Ms Shelver was shot in the stomach twice during the staged robbery and this resulted in the emergency caesarean-section delivery of a stillborn child.³⁰ Ms Shelver survived the attack.³¹ Mr Best and Mr Mshumpa were charged with multiple charges but for purposes of this article, they were also charged with the "murder of the unborn child in the womb of its mother".³²

In its quest to secure a conviction of murder for the stillbirth of Ms Shelver's child, the state demonstrated that the foetus was viable and alive *in utero* and died as a result of being shot.³³ On that basis, the state argued for the development of the common law crime of murder to include a viable foetus within its definition.³⁴ The court refused to do so for a number of reasons and ultimately, found that:

"Failure to develop the law in order to include the killing of an unborn child as murder will not leave such an act unpunished and thus bring the law into disrepute. The act may still be punished as part of the offence committed against the mother, whether that may be murder, attempted murder or any other kind of assault upon the mother. The aggravation of the assault on the mother, in the form of harm to the foetus in her stomach, may suitably be taken into consideration at the sentencing stage."³⁵

The court's approach was founded on the "unique togetherness" shared between the foetus and the pregnant woman, and it found that as a result of their unique togetherness, "[a]n assault by an outsider on one is at the same time an assault on

24 In so far as it related to abortion, see the Preamble to the Choice on Termination of Pregnancy Act.

25 See s 12(2) of the Interpretation Act 33 of 1957; Kruuse 2009 *THRHR* 129.

26 133B–F.

27 133C.

28 134D.

29 134E.

30 133E 133G–H.

31 133F.

32 134B–D.

33 148C–H.

34 149A.

35 150F–G.

both, in their togetherness.”³⁶ Thus, since the common law already provides protection to pregnant women, it by implication protects the unborn too.³⁷

Even though the court did not extend the application of the common law crime of murder to viable fetuses, it did accept that there may be merit in criminalising “killing” the unborn, but that the legislature is better positioned to affect such sweeping law reform.³⁸

According to Kruuse, the state had a mixed response to the judgment.³⁹ The state approached the South African Law Reform Commission for purposes of creating a separate statutory offence for instances akin to *Mshumpa* and it also prepared to challenge the correctness of the court’s decision in terms of section 333 of the Criminal Procedure Act.⁴⁰ As Kruuse points out, these are contradictory responses: Approaching the South African Law Reform Commission implies that viable fetuses are not persons for purposes of murder and therefore, there is a need for a unique form of statutory protection, but challenging the correctness of the court’s decision implies that the state views viable fetuses as persons with legal subjectivity for purposes of murder.⁴¹ It is in this context that Kruuse emphasises that “South Africa lacks a theoretically-unified approach to the question of fetal rights and/or protection.”⁴²

3 KRUUSE’S SEARCH FOR A UNIFIED APPROACH TO THE UNBORN

Kruuse is critical of the court’s “unique togetherness” approach in *Mshumpa*.⁴³ While she accepts that there is a unique relationship between pregnant women and the unborn, she argues that the existence of this relationship does not mean “that they should be treated as one person in circumstances such as these”.⁴⁴ She argues that addressing the harm caused to the unborn through the pregnant woman is “inadequate and unsatisfactory” since it fails to address the circumstances where perpetrators direct their harmful conduct at the unborn and not only the pregnant woman.⁴⁵ This approach is said to be unsatisfactory because a foetus is a distinct or separate organism and the termination of its life is regrettable, and this position stands irrespective of what happens to the pregnant woman carrying it.⁴⁶ Ultimately, Kruuse stresses that the unique relationship between pregnant women and the unborn should not cloud the fact that the unborn are separate from pregnant women and this view is supported by our

36 151I.

37 151I.

38 152D.

39 Kruuse 2009 *THRHR* 128.

40 *Ibid.* S 333 provides: “Whenever the Minister has any doubt as to the correctness of any decision given by any superior court in any criminal case on a question of law . . . the Minister may submit such decision . . . to the Appellate Division of the Supreme Court and cause the matter to be argued before that Court in order that it may determine such question of law for the future guidance of all courts.”

41 Kruuse 2009 *THRHR* 128.

42 *Ibid.*

43 *Idem* 131.

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*

improved knowledge of foetal development.⁴⁷ Accordingly, indirect protection of this separate entity will not do and she argues that the unborn should be recognised as separate victims of criminal conduct.⁴⁸

Disappointed with *Mshumpa*, Kruuse searches for possible avenues for direct protection of viable foetuses. Kruuse rejects constitutional rights as being necessary for the protection of the unborn because it would create a conflict between pregnant women and the unborn they carry.⁴⁹ For instance, Kruuse recognises that using foetal rights as the foundation to protect the unborn would create an environment where a woman's right to terminate her pregnancy would be in competition with the unborn's right to life.⁵⁰ This is problematic for Kruuse because she acknowledges that "many of us share a general belief that abortion in circumstances where the child will suffer severe abnormalities or circumstances that threaten the life of the child are nonetheless justifiable."⁵¹ However, Kruuse also emphasises that later-term foetuses are undoubtedly human and she questions whether it is possible to provide direct protection without affording the unborn legal subjectivity and associated human rights.⁵² Kruuse⁵³ suggests that feticide legislation can be enacted on the basis of the constitutional value of dignity, and for support she relies on Meyerson's⁵⁴ commentary regarding the value of dignity and its applicability in relation the Choice on Termination of Pregnancy Act.⁵⁵

47 *Idem* 131–132. Kruuse adopts the same justification as the state did in *Mshumpa*, see 148C–H. Those who argue for individual foetal protection tend to emphasise the "humanness" of the unborn and use technological advancements to support their position. Technologies such as ultrasonography and similar obstetric developments not only identify the unborn, but also support the notion that the unborn should be treated as individuals. Terms such as "fetal patienthood" and "fetal personality" have become relatively common. See Oakley *The captured womb* (1984) 155–189; Lupton *The social worlds of the unborn* (2013) 3. Developments such as four-dimensional scans are clear and no longer require medical professionals to interpret the scans. As a result of removing the need for clinical interpretation, these images are able to be consumed by the general public and this feeds perceptions of foetal autonomy. See Palmer "Seeing and knowing: Ultrasound images in the contemporary abortion debate" 2009 *Feminist Theory* 173–175–177.

48 Kruuse 2009 *THRHR* 132.

49 *Idem* 133.

50 *Ibid.* In fact, a clash with women's abortion rights is one of many possible clashes. See, eg, generally Roth *Making women pay: The hidden costs of fetal rights* (2000). Roth reveals that conflicts may arise when seeking employment, during employment, when engaging in certain conduct during pregnancy or when in need of medical care. These instances go far beyond abortion.

51 Kruuse 2009 *THRHR* 133. While s 2(c) of the Choice on Termination of Act supports this statement, these arguments should be used with caution. Recently, abortion on the basis on certain abnormalities has served as the justification for arguments supporting "abortion after birth". See Giubilini and Minerva "After-birth abortion: Why should the baby live?" 2013 *J of Medical Ethics* 261.

52 Kruuse 2009 *THRHR* 134.

53 *Idem* 133–136.

54 See, generally, Meyerson 1999 *SALJ* 50.

55 Kruuse also relies on Dworkin *Life's dominion: An argument about abortion, euthanasia, and individual freedom* (1994). However, Dworkin is not considered here because he does not use South African legal principles. Meyerson does, and this discussion is limited to Meyerson's arguments.

The Constitution of the Republic of South Africa, 1996 makes provision for human rights and constitutional values, and one such value is the value of human dignity.⁵⁶ Meyerson accepts that the unborn do not have the right to life but, she argues, the value of human dignity vests in the unborn because they are part of humanity.⁵⁷ A similar argument has been advanced by a retired Constitutional Court judge, Ackermann. Ackermann recognises that dignity is synonymous with human worth and he asserts that dignity accrues to all members of humanity.⁵⁸ Being part of humanity offers helpful benefits, he asserts: “In order to protect the dignity of all members of the species, it is necessary that protection be given (not necessarily absolute protection) in certain circumstances to a member even before birth and even after death.”⁵⁹ Ackermann’s more recent publication supports Meyerson’s assertion that the value of dignity vests in the unborn and this brings with it certain protections. Ackermann did not expand on how the unborn should receive protection,⁶⁰ but Meyerson did.

Since the Constitution mandates interpreting or limiting human rights in accordance with the value of dignity (together with other values),⁶¹ Meyerson argues that the value of dignity can serve as a “constitutional constraint” on abortion legislation in South Africa.⁶² According to Meyerson, this approach prevents competition between the unborn’s right to life and a woman’s right to bodily and psychological integrity, but allows a balancing of competing considerations instead.⁶³ This approach creates the space to recognise the unborn in law.⁶⁴ Meyerson then finds that in effect, the Choice on Termination of Pregnancy Act uses the value of dignity vested in the unborn to limit women’s abortion rights in later-term pregnancies because as a foetus reaches viability and beyond, its termination is increasingly regrettable.⁶⁵ Aborting late-term pregnancies threatens the value of dignity.⁶⁶ Ultimately, Meyerson demonstrates how to apply the Constitution to the unborn without invoking a foetal-rights discourse.⁶⁷

56 The value of dignity is found in ss 1, 7(1), 36(1) and 39(1) of the Constitution.

57 Meyerson 1999 *SALJ* 56.

58 Ackermann *Human dignity: Lodestar for equality in South Africa* (2012) 4 52. See also Barak “Human dignity: The constitutional value and the constitutional right” in McCrudden *Understanding human dignity* (2013) 362 who states that “human dignity as a constitutional value is the humanity of each person as a human being”.

59 Ackermann (2012) 52.

60 Ackermann seems to have avoided this issue by stating that dignity’s protection will be available in only “certain circumstances” and later he states that “only certain aspects of human dignity pre-date birth”. See Ackermann (2012) 52.

61 See ss 36 and 39 of the Constitution.

62 Meyerson 1999 *SALJ* 56.

63 *Idem* 56–57. This is because the right to life will almost always outweigh a woman’s right to bodily and psychological integrity, which in relation to life, seems less important.

64 *Idem* 57.

65 *Ibid.*

66 *Ibid.*

67 This is particularly important given that the South African courts have found that constitutional rights do not vest in the unborn. See *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (A). More recently, the Constitutional Court has stated that constitutional rights supporting a child’s “wrongful life” claim only apply after birth. “If the child was not born there would have been no claim.” See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 51. Ultimately, this demonstrates that constitutional rights only become applicable upon birth.

Relying on Meyerson, Kruuse suggests that:

“In the context of feticide then, the emphasis should be placed on the value of dignity in our Constitution which calls us to respect and to value the intrinsic humanness of the fetus and its potential to become a human person . . . By using the value of dignity to protect the fetus, issues around abortion are avoided: When it is not the fetus’s *right to life* which is at stake, but the value of human dignity, this value (unlike the right to life) is capable of being weighed against – and outweighed by – the pregnant woman’s rights. At the same time, the recognition of this value allows us to recognise and protect the fetus.”⁶⁸

Kruuse is satisfied with this approach since it does not deny women their rights and it allows us to recognise and protect the unborn in law.⁶⁹ Therefore, she perceives it as providing her sought-after unified approach to the unborn in law. She consequently accepts that the value of dignity can serve as the basis for introducing feticide legislation aimed at protecting the unborn as separate victims of crime. Having identified the value of human dignity as the reason the law should directly protect the unborn (as opposed to *Mshumpa*’s indirect approach), Kruuse stops there and she leaves the “practicality” of formulating a definition of the crime of feticide to the legislature.⁷⁰

4 A CRITIQUE OF THE APPROACH ADOPTED BY KRUUSE

Kruuse construes the maternal/foetal relationship as constituting two legally separate entities, pregnant women on the one hand and developing foetuses on the other. According to Halliday, the separate-entities approach regards pregnant women and foetuses as distinct entities.⁷¹ This approach emphasises the unborn’s separateness and justifies independent legal protection.⁷² In line with this approach, Kruuse explicitly rejects the notion that the “unique togetherness” feature of a pregnancy is an essential element of the pregnancy relationship.⁷³ Using Meyerson’s commentary on the Choice on Termination of Pregnancy Act, Kruuse attempts to develop the necessary framework which will ensure that when we approach the topic of feticide in South Africa we do so in a manner that is consistent with current abortion legislation.⁷⁴ However, the aim for consistency is frustrated at the start because Kruuse relies on the Choice on Termination of Pregnancy Act which, arguably, does not adopt a separate-entities approach to the maternal/foetal relationship.

The Choice on Termination of Pregnancy Act can be interpreted as rejecting the separate-entities approach because there is no mention of the unborn, or their rights, in the Act. Further, the Choice on Termination of Pregnancy Act was not enacted for the primary purpose of protecting developing foetuses, as separate individuals. Instead, the Preamble provides: “This Act . . . promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy

⁶⁸ Kruuse 2009 *THRHR* 135; emphasis in the original.

⁶⁹ *Ibid.*

⁷⁰ *Idem* 136.

⁷¹ Halliday *Autonomy and pregnancy: A comparative analysis of compelled obstetric intervention* (2016) 175–176. See also Seymour *Childbirth and the law* (2000) 190–194.

⁷² Halliday (2016) 175–176; Seymour (2000) 190.

⁷³ Kruuse 2009 *THRHR* 131.

⁷⁴ *Idem* 135.

according to her individual beliefs.” However, in light of Meyerson’s arguments, it is clear that the unborn are not entirely overlooked.

As an alternative to the separate-entities approach, the Choice on Termination of Pregnancy Act can be interpreted as framing pregnant women as embodying not only one entity but not two completely separate entities either, and this is recognised as the not-one-but-not-two approach to pregnant women and the unborn.⁷⁵ According to Seymour, this approach recognises the unborn as distinct entities, but it also expresses an unequivocal reminder of the inseparable relationship shared between pregnant women and the unborn.⁷⁶ It acknowledges that the unborn have interests (not rights), but that these interests can only be acted on in a way that acknowledges women’s rights.⁷⁷ Similarly, Halliday states that the not-one-but-not-two approach is a nuanced approach which

“recognises that the woman and foetus are connected to each other, that there is more than a mere physical bond between them, but also that this is not a symmetrical relationship of equals with equal rights. Thus, it recognises the inherent value of the foetus, without requiring the sacrifice of the pregnant woman’s autonomy.”⁷⁸

The Act can be interpreted as recognising the unborn through the process of limiting women’s right to access abortion late in gestation.⁷⁹ However, this recognition is limited in the sense that the Act does not completely prohibit women from terminating their pregnancies.⁸⁰ Consequently, this approach does not deny the unborn’s existence but does not fully recognise their independence either. This understanding of the Choice on Termination of Pregnancy Act is supported by *Christian Lawyers Association v Minister of Health*.⁸¹

Christian Lawyers Association recognised the importance of women having a right to terminate their pregnancies, and that this right is founded on section 12(2) of the Constitution.⁸² Despite the fact that the unborn are not vested with rights,⁸³ the court nevertheless found that the “state has a legitimate role, in the protection of pre-natal life as an important value in our society, to regulate and limit the woman’s right to choose” to terminate her pregnancy.⁸⁴

75 Pickles “Approaches to pregnancy under the law: A relational response to the current South African position and academic trends” 2014 *De Jure* 21 39; Pickles *Addressing the tension between female reproductive autonomy and foetal interests during pregnancy and birth* (LLD thesis UP 2015) 210–223. This is not a new approach found in the context of laws regulating abortion. See Halliday (2016) 183 who identifies the German Constitutional Court as adopting the same approach in its second abortion case (BVerfGE 88 203) where the court reportedly emphasised “duality in unity”.

76 Seymour (2000) 200. Halliday (2016) 183 explains that this approach emphasises the interdependency shared between pregnant women and the unborn, and it recognises that the unborn are more than a mere body part.

77 Seymour (2000) 200.

78 Halliday (2016) 184.

79 S 2(1)(c) of the Choice on Termination of Pregnancy Act.

80 S 2(1)(a) and (b) of the Choice on Termination of Pregnancy Act.

81 2005 1 SA 509 (T).

82 527D.

83 As established in *Christian Lawyers Association of SA* 1121–1122 1124B. The court found that the Choice on Termination of Pregnancy Act does not infringe the unborn’s right to life and that; under the Constitution, the unborn is not a “legal person”.

84 527D. It is noteworthy that the court did not divulge which value society is concerned with. Nevertheless, it must be a constitutional value because the court recognised that regulating or limiting access to abortion must be in line with s 36(1) of the Constitution: 527E.

This case can be interpreted as adopting the not-one-but-not-two approach to pregnancy in the context of abortion because the value in prenatal life is explicitly acknowledged. However, the value vested in the unborn does not confer on the unborn an entire separate status in law or constitutional rights.⁸⁵ A separate legal status is avoided because the court did not suggest that the value that society vests in the unborn translates into foetal rights or independent legal existence. It merely found that this value can serve to justify the limitation of pregnant women's rights in relation to access to abortion services. The court clearly acknowledges the existence of a foetus but only in relation to the pregnant woman and her existing rights.⁸⁶ This supports the claim that the Choice on Termination of Pregnancy Act relies on maternal/foetal connectedness, as opposed to separateness, to protect the unborn as pregnancy progresses closer to birth.

Kruuse's separatist approach is not compatible with the above interpretation of the Choice on Termination of Pregnancy Act. This is because Kruuse moves away from maternal/foetal connectedness as a source of protection for the unborn when she argues that the unborn are separate from pregnant women and that they should be protected irrespective of what happens to the women carrying them.

Furthermore, the notion of uniformity is interrupted when Kruuse uses the value of dignity as the primary source for direct protection of a separate, non-constitutional entity. Using the value of dignity as the only basis for the enactment of legislation leads to the understanding that Kruuse is adopting the value of dignity as a means to create enforceable claims in law. According to Kruuse, if the value of dignity can be used to protect the interests of the unborn in the context of abortion, then it can also be used in the context of creating a statutory crime of feticide.

While Meyerson and Ackermann demonstrate that the value of dignity is relevant in the context of the unborn, it is questionable whether constitutional values on their own lead to enforceable claims. On this basis, it is also doubtful that the value of dignity as applied in the Choice on Termination of Pregnancy Act is being applied in the same way that Kruuse is attempting to use it in advocating for the crime of feticide. In order to distinguish between the use of the value of dignity in the context of abortion and its use in the context of feticide, it is necessary to briefly go back to the basics concerning dignity as a constitutional value.

When looking at the role that the constitutional value of dignity plays, Woolman⁸⁷ directs us to Chief Justice Chaskalson's finding in *Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders*.⁸⁸ Chief Justice Chaskalson, responding to the applicants' argument

S 36(1) of Constitution specifically requires limitations that are in line with the constitutional values of dignity, equality and freedom.

⁸⁵ Pickles 2014 *De Jure* 21 39.

⁸⁶ *Ibid.*

⁸⁷ Woolman "Dignity" in Woolman *et al* (eds) *Constitutional law of South Africa* (Revised service 3) 36-23.

⁸⁸ 2005 3 SA 280 (CC).

that the values mentioned in the founding clause of the Constitution are absolute and not subject to limitation, stated:⁸⁹

“The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights.”

Woolman interprets this quote as meaning: Values are one thing, rights are another. He explains that the difference between constitutional values and constitutional rights is that rights give rise to rules and enforceable claims, while values do not.⁹⁰ Accordingly, as a constitutional value, dignity comes into play when constitutional rights are involved, usually when they are being interpreted or limited – a rights element is necessary.

Bringing these findings into the context of the unborn in law, the value of dignity offers us a device to recognise the value we vest in the unborn generally, since the concept of dignity is synonymous with human worth which attaches to all human life.⁹¹ However, the Constitutional Court’s application of the value does not allow for the value we vest in prenatal life generally to be translated into enforceable legal claims. On its own, the value of dignity does not provide the unborn with an individuated legal claim to protection from another’s conduct.⁹²

Accordingly, Kruuse’s argument that the value of dignity is an adequate ground for the introduction of a statutory crime to allow for the independent protection of the unborn is difficult to accept. Even though dignity does inform the way forward, it will have the desired impact in law only if we engage with women as rights bearers. By focusing on the separateness of the unborn, Kruuse removed the relevant rights-bearing agents in relation to the unborn, being pregnant women. She effectively removed the rights element required by the Constitutional Court. Consequently, it can be argued that feticide legislation based on the value of dignity alone, as applied in Kruuse’s separatist approach, may not stand.

The Choice on Termination of Pregnancy Act can be seen as being in contrast with Kruuse’s feticide approach in that the Act is based on women’s rights.⁹³ In determining the scope of women’s rights to terminate their pregnancies, the value of dignity comes in as an interpretative tool, thus providing the opportunity to give legal credence to the value vested in the unborn through the application of the constitutional value of dignity. Therefore, the value of dignity will only find application where maternal/foetal connectedness is recognised and at least one agent in the relationship is vested with constitutional rights.

⁸⁹ Para 21.

⁹⁰ Woolman (Revised service 3) 36-23.

⁹¹ See Meyerson 1999 *SALJ* 56-57; Ackermann (2012) 51-52.

⁹² However, see Barak (2013) 362. Barak points out that the constitutional value of dignity also serves as the foundation for human rights. Thus, it can be argued that as soon as we recognise that the unborn are vested with dignity, their claims for protection should be recognised too. It is questionable whether this approach is accepted in South African context, especially in light of the Constitutional Court’s approach to constitutional values.

⁹³ The Act makes reference to a number of women’s rights, these include the rights to make reproductive decisions, to security and control over their bodies and to access to reproductive health care.

This discussion demonstrates that violence against pregnant women that causes the termination of their pregnancies is more complex than merely arguing that the unborn are recognisable human beings and we should therefore protect them as separate individuals under the umbrella of dignity.

There is a further issue regarding the argument for separate protection of the unborn as individual entities. Limiting the scope of the crime of feticide to third parties only is flawed, especially if the motivation for reform lies in the prevention of harm to the unborn. Women who terminate their pregnancies and third parties who assault women and thereby terminate pregnancies, both bring about the same result – harm to the unborn. Limiting the application of the crime of feticide to third parties is hard to justify as legitimate. This stance essentially values the unborn on the basis of a particular relationship being shared with the foetus in different scenarios. For instance, if the scenario involves a woman's violent conduct in relation to her own foetus, despite the fact that the unborn is a human being, no criminal liability will vest. This suggests that the unborn, in relation to the woman carrying it, is vested with very little value, if any at all, thereby creating a category of human being that is valueless. The value of the unborn is wholly overlooked when considered in relation to pregnant women. If the scenario involves a third-party's violent conduct in relation to the unborn, criminal liability will vest. This suggests that the foetus, in relation to a third party, is comprehensively valued as a human being in the context of feticide laws.

A consequence of this anomaly is that the value of the foetus as a human being is being determined only by the fact that a woman intends to continue her pregnancy. Thus, only where there is intentional continuation of a pregnancy does the fact that the foetus represents a human being become an influential factor in determining another's criminal liability. This is quite contradictory to the premise of valuing the unborn on the basis of their humanity. This is problematic. The unborn are not valued because they represent a particular relationship being a wanted or continued pregnancy, but they are valued because they form part of humanity.

While Kruuse stresses the need to protect the unborn from third-party violence she concludes her piece by stating: "Given that South Africa has a disturbing high rate of violence against women, this legislation is sorely needed to cover situations like *Mshumpa*."⁹⁴ This too is imbued with a certain degree of contradiction. Feticide legislation is focused on harm inflicted upon the unborn as separate victims of harmful conduct, irrespective of what happens to the pregnant women carrying them.⁹⁵ Feticide legislation will not necessarily address violence against women which is the root issue in *Mshumpa*.

This position is supported by the United States' experience of feticide or foetal homicide laws. The United States offers valuable insight given that feticide measures have been in place since the early 1980s⁹⁶ and research indicates that

⁹⁴ Kruuse 2009 *THRHR* 136.

⁹⁵ *Idem* 131.

⁹⁶ California was the first state to amend its statutory crime of murder to include feticide. Other states followed, either through specific enactments or wide judicial interpretations of existing homicide statutes. See Barrazotto "Judicial recognition of feticide: Usurping the power of the legislature?" 1985 *J of Family Law* 45 51.

the statutory crime of feticide, as an extension of the crime of murder, is unique to that jurisdiction. According to Paltrow and Flavin, the original incentive for advancing feticide laws was to tackle domestic violence against pregnant women by their partners which resulted in adverse pregnancy outcomes.⁹⁷ However, their study of over 419 cases involving arrests of and forced interventions on pregnant women who experienced miscarriages or stillbirths demonstrates that this outcome has not materialised. Paltrow and Flavin reveal that pregnant women are being charged under feticide measures in cases where they experience miscarriages or stillbirths.⁹⁸ Of further concern is the fact that:

“Even when women are not charged directly under feticide laws, such laws are used to support the argument that generally worded murder statutes, child endangerment laws, drug delivery laws, and other laws should be interpreted to permit the arrest and prosecution of pregnant women in relationship to the embryos or fetuses they carry.”⁹⁹

Furthermore, a 2011 study of the causes of maternal mortality indicates that pregnancy-associated homicide as a result of intimate partner violence is one of the leading causes of maternal mortality in the United States.¹⁰⁰ Palladino *et al* demonstrate that pregnancy related homicide rates had increased compared to those indicated in 1999 studies.¹⁰¹ This can be interpreted as indicating that the threat of criminal prosecution and the development of the foetus as a separate victim of crime have done little to protect women and the unborn from violence. This may be the position because the context in which harm is being caused has been removed through the process of narrowly focusing on the unborn. Context is so far removed that these United States feticide measures, which render the unborn separate victims of violence, have essentially removed women as victims as well.¹⁰² Interestingly, Palladino *et al* do not suggest increasing criminal prosecutions for feticide, they suggest that the underlying social concerns that foster abusive conduct receive increased attention.¹⁰³ This would necessarily require broadening the focus to include pregnant women and their social contexts, thus emphasising the central role of maternal/foetal connection.

A final concern in relation to Kruuse’s approach to the unborn and feticide is her assertion that avoiding a foetal-rights discourse removes the inevitability of a

97 Paltrow and Flavin “Arrests of and forced medical interventions on pregnant women in the United States, 1973–2005: Implications for women’s legal status and public health” 2013 *J of Health Politics, Policy and Law* 299 323.

98 *Ibid.* See also Proel “Pregnancy crimes: New worries to expect when you’re expecting” 2013 *Santa Clara LR* 661; Tsao “Fetal homicide laws: Shield against domestic violence or sword to pierce abortion rights” 1998 *Hastings Constitutional LQ* 457. High profile cases include *McKnight v State* 661 SE 2d 354 (SC 2008); *Shai v State* 966 NE 2d 619 (ind App 2012).

99 Paltrow and Flavin 2013 *J of Health Politics, Policy and Law* 323.

100 Palladino *et al* “Homicide and suicide during the perinatal period” 2011 *Obstetrics & Gynecology* 1056–1057. It is noteworthy that Wallace *et al* “Pregnancy-associated homicide and suicide in 37 US states with enhanced pregnancy surveillance” 2016 *American J of Obstetrics & Gynecology* 1.e1 1.e6 have found evidence suggesting that the risk for homicide may be elevated during pregnancy. This is despite the introduction of feticide measures across the United States.

101 Palladino *et al* 2011 *Obstetrics & Gynecology* 1061.

102 See Flavin *Our bodies, our crimes* (2009) 101.

103 Palladino *et al* 2011 *Obstetrics & Gynecology* 1062.

clash between pregnant women and the unborn they carry.¹⁰⁴ It is not necessarily a foetal-rights discourse that creates an opportunity for conflict between the unborn and pregnant women, it is the process of separating the unborn from pregnant women that serves the basis for conflict in law. Returning to Paltrow and Flavin's study, the authors assert that prosecutors, judges and hospital counsel attempt to use civil and criminal laws (intended for purposes other than punishing pregnant women for poor pregnancy outcomes) as the basis for arresting or forcing interventions on pregnant women, and they cite feticide statutes and other laws which treat the unborn as "legally separate" from pregnant women as legal authority for those actions.¹⁰⁵ Therefore, it is the process of separating the unborn from pregnant women in law which ignites legal conflicts,¹⁰⁶ assigning rights merely perpetuates the conflict. South African abortion legislation denies the possibility for legal conflict because it does not frame the unborn as an entity which is legally separate from the pregnant woman carrying it.

Despite the above reservations, Kruuse does raise an import factor to consider: If the crime of feticide is recognised, it should be framed in a unified manner in that it should not contradict South African abortion legislation and it should not clash with the rights of women or girls. However, Kruuse's refusal to recognise the fundamental role of pregnant women in securing the legitimacy of the unborn's protection impedes the development of a workable solution.

5 GOING FORWARD

When contemplating how to position the foetus in law in relation to violence that terminates a pregnancy, MacKinnon's article on sex equality under the law is central.¹⁰⁷ In this respect it is noteworthy that Kruuse referenced (albeit indirectly) MacKinnon's description of the unique relationship shared between a foetus and the woman carrying it.¹⁰⁸ Kruuse quotes MacKinnon from Dworkin:¹⁰⁹ "More than a body part but less than a person, where it is, is largely what it is. From the standpoint of the woman, it is both me and not me".¹¹⁰ As a result of not considering MacKinnon's work directly, it is arguable that Kruuse misinterprets MacKinnon's position as supporting the *Mshumpa* outcome in so far as the court used "unique togetherness" as the basis to deny the unborn protection from violent bodily intrusions.¹¹¹ A detailed analysis of MacKinnon's work provides a different perspective.

In the context of the right to equality in reproductive control, MacKinnon recognises that the relationship between pregnant women and the unborn is

104 Kruuse 2009 *THRHR* 135.

105 Paltrow and Flavin 2013 *J of Health Politics, Policy and Law* 322–323.

106 Halliday (2016) 175 also alludes to this issue but in the context of compelled obstetric interventions. She demonstrates that the separate-entities approach is at the centre of compelled obstetric intervention and this approach serves as the foundation for a conflict between pregnant women and the unborn they carry.

107 MacKinnon "Reflections on sex equality under the law" 1991 *Yale LJ* 1281 1313.

108 Kruuse 2009 *THRHR* 130.

109 Dworkin (1994) 55.

110 Kruuse 2009 *THRHR* 130.

111 *Mshumpa* 1511.

unique and is one which the law has failed to properly conceptualise.¹¹² She argues that this is the case because our methodology in law is to proceed on the basis of analogy and distinction and when faced with a pregnancy, we almost always attempt to slot the maternal/foetal relationship into legal spaces allocated to other existing relationships recognised in law.¹¹³ She argues that had women participated equally in formulating laws, we might have ended up comparing other relationships to the maternal/foetal relationship (as the norm or benchmark) rather than comparing the maternal/foetal relationship to other existing relationships.¹¹⁴ This traditional process has “othered” the pregnancy relationship and, according to MacKinnon, “the fetus has no concept of its own, but must be like something men have or are: a body part to the Left, a person to the Right. Nowhere in law is the fetus a fetus.”¹¹⁵

Not having a space in law for a foetus to be a foetus comes with distinct concerns. MacKinnon points out that understanding the foetus to be a “body part” is arguably the closest analogy that recognises the reality of the dependent nature of gestational life and protects a pregnant woman’s autonomy at the same time, this is because the woman is able to maintain control over her body and all relevant “parts”.¹¹⁶ However, MacKinnon rightly recognises that the unborn are not body parts, she views the foetus as “a unique kind of whole that, after a certain point, can live or die without the mother”.¹¹⁷ Having said that, MacKinnon also rejects the notion that the foetus is a person or an entity vested with separate status as this is far from the biological fact of pregnancy. She asserts:

“Separate fetal status of any sort, in a male-dominated legal system in which women have been controlled through the control of their procreative capacity, risks further entrenchment of women’s inequality . . . Indeed, the only point of recognizing fetal personhood, or a separate fetal entity, is to assert the interests of the fetus *against* the pregnant woman.”¹¹⁸

It is after these arguments that MacKinnon describes the unborn as “me and not me” and she explains that this means that the unborn does, to a certain extent, constitute part of a pregnant woman’s body but it is more than just a mere body

112 MacKinnon 1991 *Yale LJ* 1313.

113 *Idem* 1314. Some of these relationships include the employer and employee, termites in the ground and tumours in bodies.

114 *Ibid* 1314.

115 *Ibid*. Karpin “Legislating the female body: Reproductive technology and the reconstructed woman” 1993 *Columbia J of Gender and Law* 326 326–327 asserts a similar argument: “Attempts by science and the law to legislate the female body as a separate and adversarial container for the fetus are attempts to reconstruct woman in a system of patriarchal description and control. There is no scientifically verifiable ‘fact’ that designates woman and fetus as separate. There are only scientific descriptions that hypothesize a notion of separateness, and certain descriptions are being privileged over others. For example, the scientific ‘fact’ that the fetus and mother are genetically different does not answer the question of whether the description of them as separate is appropriate.” Her footnote linking to this states: “In fact the imperative to describe the mother and fetus as either one being or two, but not both one and two, indicates the limitations of logocentric and phallographic discourse.”

116 MacKinnon 1991 *Yale LJ* 1314.

117 *Ibid*.

118 *Idem* 1315–1316; footnote omitted and emphasis in the original.

part of pregnant woman because of its individual wholeness.¹¹⁹ MacKinnon argues: “In a legal system that views the individual as a unitary self, and that self as a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her fetus with her.”¹²⁰ MacKinnon takes the position that the legal status of the unborn cannot be considered separately from the pregnant women who carry them and that the unborn should be defined in relation to pregnant women.¹²¹

MacKinnon recognises that maternal/foetal relationships and status of the unborn have been informed by the politics of abortion and the perceived notion that what is good for pregnant women is in conflict with what is good for the unborn they carry.¹²² She emphasises that abortion is only a small portion of the reproductive lives of women and their right to reproductive control.¹²³ Reproductive control should be enjoyed during pregnancy continuation too. From this perspective, MacKinnon argues that when pregnant women miscarry or experience stillbirths as a result of assault, their reproductive lives are negatively impacted and they are dispossessed of reproductive control.¹²⁴ Equality in the context of reproductive control demands that laws regulating this area should be interpreted in a way that advances women’s equal enjoyment of reproductive control.¹²⁵ Laws that support this approach would also provide the foundation to support the fetus through supporting women.¹²⁶ The link between reproductive control during pregnancy continuation and foetal support is particularly obvious when we consider the positive impact access to prenatal care, maternity leave and access to proper and individualised nutritional, alcohol and drug addiction counselling have on pregnancies.¹²⁷ Both pregnant women and the unborn benefit. Viewing the maternal/foetal relationship beyond abortion and in the context of reproductive control provides a perspective that facilitates the inclusion of the unborn without the relationship being marred in conflict.

MacKinnon’s work does not support the *Mshumpa* outcome for two reasons. First, the court applied the unique togetherness criterion in a way that removes the existence of the unborn in law. It did this by centring its focus on the harm caused to the pregnant woman concerned and not the fact that the two accused had also caused the loss of prenatal life.¹²⁸ MacKinnon’s application of the unique relationship between pregnant women and the unborn requires the recognition of the unborn and the application of the law in a way that supports the unborn by supporting pregnant women. Introducing measures aimed at supporting the decision to continue with a pregnancy (reproductive control) would achieve this end. Second, the *Mshumpa* judgment did not recognise

119 *Idem* 1316.

120 *Ibid.*

121 *Ibid.*

122 MacKinnon 1991 *Yale LJ* 1317–1318. The conflict is perceived because in many cases abortion is seen as the only avenue to act in the interests of the unborn, particularly when the foetus is expected to be born into a life of hardship such as those shaped by domestic violence or extreme poverty.

123 *Idem* 1318.

124 *Ibid.*

125 *Ibid.*

126 *Idem* 1319.

127 *Ibid.*

128 *Mshumpa* 152H–I.

reproductive control as something more than the right to abortion and this is because of the court's concern about not encroaching on the right to abortion – it shut the door on reproductive control in the context of pregnancy continuation.¹²⁹ MacKinnon reveals that when a pregnancy is terminated as a result of assault, a woman's right to reproductive control is violated in addition to the loss of prenatal life.

Contrary to the conclusion reached by Kruuse, MacKinnon demonstrates that the “me and not me” stance towards pregnancy does not necessarily mean that we cannot adequately protect the unborn in law. The “me and not me” position creates the space to legitimately recognise the unborn and their gestational reality in law and women's right to reproductive control. Further, the “me and not me” view invalidates the notion that there is a gap in the law that can only be remedied by providing the unborn with separate status in law and rendering them separate victims of crime. The most effective way to support the unborn is to support pregnant women and in the context of assault that terminates a pregnancy, the best way to support women is to offer increased protection of their reproductive control.

The “me and not me” view is particularly beneficial in the context of assault that causes stillbirth or miscarriage. It recognises the existence of the unborn and it demonstrates how to view the unborn through the prism of women's rights to reproductive control. This secures the rights element required for purposes of applying the constitutional value of dignity in South Africa.

The South African Constitution protects the right to reproductive control. Section 12(2)(a) and (b) states that everyone has the right to bodily and psychological integrity and this right includes the rights to make reproductive decisions and to security and control of their body.¹³⁰ Meyerson effectively demonstrated that the value of dignity vests in the unborn and this value is given constitutional expression when interpreting and limiting women's rights.¹³¹ It can therefore be argued that, just as the value of dignity serves to limit a woman's right to reproductive control in the context of abortion, the value of dignity can also support an interpretation of section 12 that enhances legal remedies when a woman experiences a miscarriage or stillbirth as a result of an assault, attempted murder or even murder.

The “me and not me” view of pregnancy facilitates the application of the value of dignity because the recognition afforded to the unborn is inextricably linked to pregnant women and their rights. Therefore, a rights element is present. This element was lacking in Kruuse's feticide suggestion because she argued for

129 However, this critique is sensitive to the fact that the court had to reach a decision under a number of constraints such as the obligation to incrementally develop the common law, the principle of legality and the practical difficulties in formulating a reasonably precise, extended definition of the common law crime of murder to include the unborn and the need to reconcile the suggested new crime with current abortion legislation. See *Mshumpa* 149F–G 150G–151E.

130 This right has received very little judicial attention, but it has been recognised in relation to access to abortion in *Christian Lawyers Association* 518D–E; 524I and *Christian Lawyers Association of SA* 1123D–F, in the context of assault in *Mshumpa* 151H; in the context of surrogacy in *AB v Minister of Social Development* 2016 2 SA 27 (GP) paras 90–93.

131 Meyerson 1999 *SALJ* 56.

independent protection of the unborn as separate legal entities. Thus, the value of dignity will support an interpretation of the right to reproductive control which can justify the enactment of legislation aimed at punishing perpetrators who terminate pregnancies through the infliction of violence.

6 CONCLUSION

The issue of violence against pregnant women deserves increased attention in law. The violent termination of a wanted or a consciously continued pregnancy is not only an infringement of pregnant women's right to reproductive control, but also a violation of the value of dignity. However, the introduction of feticide legislation will do little to curb these violations.

This article reveals that feticide legislation premised on the separate status of the unborn contradicts existing legal principles applicable to abortion legislation which is founded on maternal/foetal connection. It also fails to give proper legal effect to the constitutional value of dignity because it lacks a rights element and it seemingly relies on relationships to determine the ultimate value of the unborn. Feticide legislation, which is centred on harm to the unborn, is an ineffective legal avenue if the underlying issue linked to foetal harm is violence against women. This is particularly true if we are sensitive to women's experiences of feticide legislation in the United States, where they become perpetrators against their own foetuses and the rate of pregnancy-related homicide continues to climb.

Drawing inspiration from MacKinnon, this article moves away from the traditional legal approach of "body part" or "person" and suggests recognising pregnant women and the unborn for what they are: interconnected beings or "me and not me". This allows us to understand the unborn in relation to the pregnant women who carry them and therefore allows pregnant women's rights to secure much needed support for the unborn instead of primarily functioning against the unborn.

Any legislation enacted in relation to assault, attempted murder or murder of a pregnant woman which causes the loss of a pregnancy will have to be centred on women's rights and maternal/foetal connection. This connection should be recognised so as to give weight to the loss of prenatal life too. Using women's rights enables this because it allows the constitutional value of dignity to play a role in shaping the law for the benefit of the unborn. This offers a unified approach to the unborn and is aligned with the Choice on Termination of Pregnancy Act and Meyerson's interpretation thereof.