

Onuegbulam

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Comparative Analysis of the Legal Status of an Unborn Child in Criminal Law in Nigeria, America, United Kingdom (Uk), and India

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Abstract

The Universal Declaration of Human Rights (UDHR) 1948 inspired all other human rights conventions and declarations adopted since after its proclamation by the United Nations General Assembly. Though most International and domestic Human Rights instruments lack a universal inclusion of the fetus as a person for the purposes of human rights, they provide for the protection of the same unborn child as a member of the human family. The American Convention on Human Rights for example guarantees the right to life and to the physical and mental integrity of the unborn child. Most countries have adopted it in providing legal measures for the protection of human fetus under the law. Progressively, Target-4 of the third Sustainable Development Goal (SDG 3.4) is positive on the point with an agenda of “leaving no one behind” and that of course includes the unborn child. Regrettably, some countries have consciously deviated from providing such protective laws for the rights of an unborn child. This research aims at analysing comparatively the legal status of an unborn child in criminal law in four common law countries. The objective is to highlight the need for both international and domestic recognition for the right of an unborn child. The study adopts doctrinal designs using comparative approaches with reliance on Statutes, case law, law reviews and data in web-based sources. The research found that except in America, the unborn child has no legal right. Consequently, there is need to guarantee the legal personality of the unborn child globally.

Key Words: Comparative Analysis, Legal Status of an Unborn Child, Criminal Law, Common Law Countries

1. Introduction

The efficacy of the Universal Declaration of Human Rights (UDHR) 1948 cannot be over emphasised. It discussed in its preamble the equal and inalienable rights of all members of the human family and states that “Everyone” has the right to life¹, and that “Everyone” has the right to recognition everywhere as a person before the law.² The declaration further made it clear that “All” are equal before the law and are entitled without any discrimination to every protection of the law.³ Instructive as it is interesting, there is no age limit attached to these human right protective declarations and no category of persons is exempted in the protection. The UDHR is an all inclusive declaration that obviously considered the unborn child as a member of the “human family” in the Preamble, and among the “everyone” in Articles 3, and the “All” in Article 7 of the same Statute. It is as if the UDHR provided a rationale for binding conventions on the general human rights provisions of the UN Charter, which mentions no specific rights. Indeed, many delegations to the United Nations would have preferred some mention that the right to life began ‘from conception,’ thereby protecting the foetus⁴. The Declaration of the Rights of the Child 1959 in its preamble significantly affirmed that the child, by reason of his physical and mental immaturity, needs special safeguards and care, **including appropriate legal protection, before as well as after birth**. Speaking the mind of the General Assembly the Declaration affirmed that taking into consideration the fact that the need for such special safeguards has been...recognized in the Universal Declaration of Human Rights and in the statutes of specialised agencies and international organizations concerned with the welfare of children..., the General Assembly...calls upon...national

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¹Universal Declaration of Human Rights (UDHR), Article 3.

² Ibid , Article 6. See also: Patrick J. Flood,(2006) ‘Does International Law Protect the Unborn Child? Life and Learning XVI’. www.uffl.org.>vol16>flood06 p. 4. visited February 10, 2022.

³Article 7.

⁴ William A. Schabas,(1997), *The Abolition of the Death Penalty in International Law*, 2nd ed. (Cambridge UK: Cambridge Univ. Press,) 25.

Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken.⁵

According to the United Nations Convention on the Rights of the Child (UNCRC) 1989, a child for the purposes of the Convention, means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier⁶. Conscious of the unborn child as part of the human family the Convention in Paragraph 9 of its preamble states: “bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child”, by reason of his physical and mental immaturity, needs special safeguards and care, **including appropriate legal protection, before as well as after birth**”. The phrase “every human being below the age of eighteen years” does not exclude the unborn, as it does exclude human beings who have attained the age of eighteen. In legal interpretation, the express mention of one thing is to the exclusion of the other. The Vienna Convention on the Law of Treaties established the general rule of interpretation to be followed in ascertaining the meaning of a binding international instrument. To that effect, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose⁷. Therefore, applying the rules of interpretation of the Vienna Convention on the Law of Treaties concerning the ordinary meaning of the words in their context and the context of the treaty including the preamble, one finds strong grounds for States Parties to the treaty to maintain that the Convention guaranteed protection to the unborn child. The UNCRC speaking on the right to life of the child, provides that State parties recognise that every child has the inherent right to life⁸ and that State parties shall ensure to the maximum extent possible the survival and development of the child.⁹

Recently, the United Nations in 2015 came up with 17 Sustainable Development Goals (SDGs), as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. The SDGs are all-

⁵ The Preamble to the Declaration of the Rights of the Child 1959

⁶ Article 1 of the

⁷ Article 31 (1) of the Vienna Convention on the Law of Treaties

⁸ Article 6 (1)

⁹ Article 6 (2).

inclusive global goals that gear towards achieving a safer, healthier and peaceful world by Year 2030 with an agenda building on the principle of “leaving no one behind”. Target-4 of the third Sustainable Development Goal (SDG 3.4) which is aimed at promoting both the reduction of premature mortality and ensuring mental health and well-being further underscores the sacredness of human life. This includes that of the unborn child beginning from its formative stages during pregnancy until birth. Though most International and domestic Human Rights instruments provide for the protection of the unborn child as a member of the human family, but they lack a universal inclusion of the fetus as a person for the purposes of human rights. It is however impressive to say that the American Convention on Human Rights guarantees the right to life and to the physical and mental integrity of the unborn child. Most countries have adopted it to an extent in providing legal measures for the protection of human fetus under the law, while others have consciously deviated from providing such protective laws for the unborn child. This research intends to comparatively analyse the legal status of an unborn child in criminal law within four common law jurisdictions precisely Nigeria, America, United Kingdom (UK), and India. The essence is to bring to limelight the need for a global statutory provision for the protection and enforcement of the rights of the unborn child. It will be a good check on abortion. If nothing is done globally to accord legal personality to unborn children, the consequence is obvious and may be horrendous and tragic. There will be triple increase in the already escalated global rate of abortion and typical complications include secondary infertility, incomplete removal of the fetus, cervical or vaginal lacerations, haemorrhage, bowel or uterine perforation, sepsis and secondary reproductive tract infections; there can sometimes be long-term consequences such as chronic pelvic inflammatory disease, and there are occasions where the small intestine would be found dangling between the vagina. Any of these complications, if not promptly and effectively treated, can lead to the lady (victim) suffering severe impairment or painful death.

It is instructive that even in a civilized country like America irrespective of the decision in *Reo v Wade*¹⁰ since the 70s,¹¹ there is still statutory provisions

¹⁰410 U.S. 113

protecting the rights of a fetus. More recently in a historic and far-reaching decision, the U.S. Supreme Court officially reversed *Roe v. Wade*, and declared that the constitutional right to abortion, upheld for nearly a half century, no longer exists. Writing for the court majority, Justice Samuel Alito held that the 1973 *Roe* ruling and repeated subsequent high court decisions reaffirming *Roe* “must be overruled” because they were “egregiously wrong,” the arguments “exceptionally weak” and so “damaging” that they amounted to “an abuse of judicial authority.”¹²

The research is divided into three main sections. Section one is the introduction while section two comparatively analysis the legal status of an unborn child in criminal law in Nigeria, America, United Kingdom (UK), and India. Precisely, it examined the Nigerian Criminal Law and the Legal status of the Unborn Child; the legal status of an unborn child in America under the American Convention on Human Rights; the European Convention on Human Rights (ECHR) 1949 and the Legal Status of an Unborn Child in United Kingdom (UK); and the legal status of an unborn child in India. Section three is the conclusion and recommendations.

2. Comparative Analysis of the Legal Status of an Unborn Child in Criminal Law Nigeria, America, United Kingdom (UK), and India.

(a) The Nigerian Criminal Law and the Legal status of the Unborn Child

Nigeria is one of the common law countries in Africa. Nigeria has long ratified the Universal Declaration of Human Rights (UDHR) 1948. The African Charter on Human and Peoples’ Rights 1981 states that:

“Every individual” shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without **distinction of any kind** such as race, ethnic group, color, sex, language, religion, political or any other

¹¹On January 22, 1973, the Supreme Court issued a 7–2 decision holding that the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a fundamental “right to privacy”, which protects a pregnant woman's right to an abortion.

¹²*Roe-v-Wade* overturned- leaked- decision-supreme-court-abortion <http://www.npr.org> 22/06/4, accessed 27 June, 2022.

opinion, national and social origin, fortune, **birth or other status**.¹³

According to the Charter, **birth or other status** should not be a ground for denying every individual the enjoyment of any right recognised and guaranteed in the charter. Hence, The African Charter further states that “Every individual shall be equal before the law” and that “Every individual shall be entitled to equal protection of the law”¹⁴. It emphasized that human beings are inviolable and that every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.¹⁵ It is noteworthy that the unborn child is inclusive in the “Every individual” that shall be entitled to equal protection of the law and in the “No one” that may be arbitrarily deprived of this right on grounds of birth or other status under articles 2, 3 and 4 of the Statute.

The African Charter on the Rights and Welfare of the Child 1990 is another comprehensive legal instrument that sets out rights and defines universal principles and norms for the status of children. The charter and the convention on the rights of the child are the only international and regional human rights treaties that cover the whole spectrum of civil, political, economic social and cultural rights. The charter defines a “child” as a human being below the age of eighteen years¹⁶. It recognizes the child’s unique and privileged place in African society and that African children need protection and special care. It also aims to protect the private life of the child and safeguard the child against all forms of economic exploitation and against work that is hazardous, interferes with the child’s education or compromises his or her health or physical, social, mental, spiritual and moral development. The Charter came up because the member States of the AU believed that the CRC missed important socio-cultural and economic realities particular to Africa. As of 2016, it has been ratified by 47 of the 54 states of the African union. The charter also states that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the

¹³ The African Charter on Human and Peoples’ Rights 1981, Article 2.

¹⁴ Ibid Article 3.

¹⁵ Ibid Article 4.

¹⁶ Article 2 of ACRWC 1990.

primary consideration¹⁷. It further provides that State parties to the charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular; ¹⁸(a) Those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status, shall be prohibited and effective action, including legislation, shall be taken to address child abuse in member nations.

The Constitution of the Federal Republic of Nigeria 1999 (fourth alteration)¹⁹ provides that “No citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstances of his birth”. By extension the unborn child of a Nigerian parent is a Nigerian citizen by birth and therefore within the contemplation of the section 42(2) of the constitution. In Nigeria, apart from the constitution, the Criminal Code, the Penal Code and the Administration of the Criminal Justice Act, 2015 are the main Statutes regulating the Nigerian criminal law.

According to the Criminal Code²⁰, an “unborn child” is a child not yet born, in other words he has not completely proceeded in a living state from the body of his mother²¹. The Criminal Code recognises an unborn child as a person but not one capable of being killed. However under section 228 and 229 of the same Code, the unborn child can be aborted and aborting him in the manner so stated by the Criminal Code is criminal. For example Section 228 of the Criminal Code provides that:

Any person with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or

¹⁷Article 4 Ibid.

¹⁸ Article 21 Ibid.

¹⁹ Section 42(2)

²⁰ The Criminal Code Schedule to the Criminal Code Act. Cap. C38 *Laws of the Federation of Nigeria (LFN)*

2004, applicable to Southern Nigeria, (to be herein referred to as the C. C) s. 307.

²¹ See also: C.O. Okonkwo; *Okonkwo and Naish: Criminal Law in Nigeria*, 2nd edn. (Ibadan: Spectrum Law Publishing, 2000) 212.

other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and liable to imprisonment for fourteen years.

Similarly, the Penal Code frowns at causing miscarriage of an unborn child, injuries to unborn children, exposure of infants, cruelty to children and concealment of births.²²Under the Nigeria Criminal Law therefore, the unborn child is recognised as an entity with life worthy of legal protection but ironically this child is denied legal personality and has no right to sue and be sued even when assailed by invaders. Though the Nigerian criminal law especially sections 228 and 229 of the CC and section 233,234,235 and 236 of the Penal Code frown at abortion, including attempts to procure abortion, and regards it as a felony in Nigeria. Yet, ironically under section 307 of the same Criminal Code, taking the life of an unborn child is not an act of murder as long as the unborn child has not completely proceeded in a living state from the body of its mother and therefore not yet a person capable of being killed. The act is abortion simpliciter. This implies that the unborn child does not have right to be represented in any action through his/her *guardian ad litem*, until in the language of the code he/she completely proceeds in a living state from the body of his/her mother unlike in America. According to *R v Edgal & Ors.*²³, it is unlawful in Nigeria to destroy the unborn child except for the purpose of preserving the mother's life. Thus, section 297 of the Criminal Code removes criminal liability for death resulting from reasonable surgical operation to save the life of the mother or the child. However, according to section 307 of the Criminal Code, a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of his mother, whether it has breath or not, whether it has an independent circulation or not, and whether the naval-string is severed or not. Furthermore, by section 328 of the Criminal Code, any person who when a woman is to be delivered of a child prevents the child from being born alive by any act or omission of such a nature that if the child had been born alive and had then died,

²²The Penal Code Cap. 89 *Laws of Northern Nigeria* 1963, applicable to Northern Nigeria (to be herein

referred to as the P. C) ss. 233,234,235 and 236.

²³ (1938) 4 WACA 133 @ 137.

he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable for imprisonment for life²⁴. The Penal Code has similar provision in sections 235 and 236. A woman who procures abortion to kill the unborn child can be sued, and another person who unlawfully procures the killing of the unborn child on the woman, can be sued for carrying out that act on the woman not necessarily on the unborn child. Arguably, under the Criminal Code, the law is unconsciously according the unborn child the right to have his interest protected and be represented by someone else who could be referred to as his *guardian ad litem*. Nonetheless, such argument or interpretation may not succeed as a case of murder in the face of section 307 of the Criminal Code. This is because section 307 C.C says that a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of his mother. It can only succeed as it is. It is submitted that Nigerian laws should boldly accord legal personality to the unborn child as is the case in America²⁵. In the United States, majority of the states provide certain level of criminal protection for the unborn, as well as laws that protect the foetus from conception until birth²⁶. All US States either by statute, court rule or case law permit a guardian *ad litem* to represent the interests of the unborn.

Furthermore, to emphasis the keen interest of the law in protecting the unborn child, section 230 of the Criminal Code states that any person who unlawfully supplies to or procures for any person anything whatever, he knows that it is intended to be unlawfully used to procure the miscarriage of a woman, whether the woman is or is not with child is guilty of a felony, and is liable to imprisonment for three years. In other words, mere supply of the substance knowing that it will be used for the unlawful purpose is criminal. Thus, by the phrase whether “she is or she is not with child” it is immaterial whether the

²⁴ See also: Emmanuel Olawuyi Fakayode; *The Nigerian Criminal Code Companion*(Benin; Ethiope Publishing Corporation,2000) 65.

²⁵Paul Benjamine Linton, ‘The Legal Status of the Unborn Child under State Law’ *St. Thomas Journal of Law & Public policy*[vol. 6:1) (2011) 7. <http://www.researchgate.net>, visited March 6, 2022.

²⁶ See also: Paul Benjamine Linton, ‘The Legal Status of the Unborn Child under State Law’ *St Thomas Journal of Law & Public policy* [vol. 6:1) (2011) 7. <http://www.researchgate.net>, visited March 6, 2022.

woman is pregnant or not provided the act is done unlawfully with the intention of terminating a pregnancy. Thus, procuring abortion is unlawful except for the purpose of preserving the life of the mother. A combined analysis of section 230 and the decision of the court in *R v Edgal&Ors.*²⁷, it necessarily follows that there may be a procurement of abortion which is lawful. In explaining the circumstances where the procurement of abortion may be unlawful the judge said: “my view is that ...it has always been the law that on a charge of procuring abortion the crown has to prove that the act was not done in good faith for the purpose of preserving the life of the mother.” It is submitted that according legal personality to an unborn child in Nigeria will add value to sections 228 and 229 of the Criminal Code and make them functional for the safety and wellbeing of the unborn child.

In Nigeria, the law is more comfortable in calling the unlawful act of terminating the life of an unborn child abortion but not “killing” since the child has not proceeded completely from the body of the mother. Thus, the act of abortion is criminal as long as it was done unlawfully outside the context of preserving the life of the mother. The negative effect is that such interpretation seems to have reduced or may likely reduce the weight of guilt/blameworthiness attached to the crime and act of abortion in the country. This is because, abortion and unwarranted miscarriages abound today in the country, the life of the unborn child is always under constant threat of termination and extinction, and there is hardly any prosecution of acts of abortion in any of the courts in Nigeria. The reason is obvious. Though the unborn child is accorded legal protection mainly by the Nigerian criminal laws, his legal personality is not recognised under the Nigerian Laws.

(b) Legal Status of an Unborn Child in America under the American Convention on Human Rights

The legal system in the United States is a common law system with the exception of Louisiana, which has a mix of civil and common law. In America, the

²⁷ Supra.

American Convention on Human Right (CHR)²⁸ recognises legal protection of the unborn child from conception. Article 4(1) of the Convention specifically states that: “Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

More than two-thirds of States in America have enacted statutes that define the killing of an unborn child as a form of homicide²⁹ to the extent that some States have included gestational requirements, such as viability,³⁰ “quickening” or some other stages of pregnancy. However, the most common approach, adopted in most of the States, is criminalising the killing of an unborn child without regard to any arbitrary gestational age.³¹ In Nigeria however, an unborn child cannot be killed but aborted since he has not proceeded completely from the mother’s womb. Thus, in the United States, majority of the states provide certain level of criminal protection for the unborn, as well as laws that protect the fetus from conception until birth. All US States either by statute, court rule or case law

²⁸American Convention on Human Right 1978. It specifically provides for the right to life and accords every person with the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. See also: Sunanda Bharti, “Legal Personality of Unborn: a Jurisprudential Analysis”, Ph. D. Thesis, Faculty of Law, University of Delhi, Delhi. p. 16.

²⁹Paul Benjamine Linton, ‘The Legal Status of the Unborn Child under State Law.’ *St. Thomas Journal of Law & Public policy* [vol. 6:1) (2011) 7. <http://www.researchgate.net>, visited March 6, 2022.

³⁰According to the Michigan and Indiana statutes ‘Viability’ is between the twenty-third and twenty-fourth weeks of pregnancy, when the child is capable of sustained survival outside of the mother, with or without medical assistance. See also: Linton, (supra) 3.

³¹Some of the American States Laws with Homicide Laws that recognise Unborn Children as victims throughout the period of Pre-natal development include -Alabama Code 2006 section 13A-6-1, Alaska Statutes 2006, Arizona Revised Statutes 2005, Florida Unborn victims of Violence Act 2014, Kentucky 2004, etc, Nevada, Rhode Island Washington have homicide laws that recognise unborn children as victims but only during the period of pre-natal development. New York has conflicting statutes. Under New York statutory law, the killing of an unborn child after 24 weeks of pregnancy is homicide. See New York. Penal Law s 125.00. But under a separate statutory provision a person that is the victim of a homicide is statutorily defined as a “human being who has been born and is alive”See: New York Penal Law s 125.05.

permit a guardian *ad litem* to represent the interests of the unborn.³² This can as well help to check domestic violence on women.³³ Among the thirty-three US States that have retained the death penalty for certain criminal offenses, about twenty-three of them, by statute, prohibit the execution of a woman while she is pregnant. The sentence of death is suspended until the woman is delivered of her baby. Killing of a pregnant woman is an aggravating factor that may justify imposition of a death sentence. In the USA and the UK, though abortion laws are lenient than that of India, there are regulations pertaining the same.

Despite repeated challenges on the fetal homicide statutes on a variety of Federal and, a few State cases, on constitutional grounds, the fact remains that no fetal homicide statute has ever been struck down.³⁴ Considering these challenges, the U.S. courts have uniformly held that nothing in *Roe v Wade*³⁵ stops them from treating the killing of an unborn child outside the scope of abortion as a form of homicide. The Supreme Court in *Roe v Wade*, held that a State has a legitimate interest in protecting the potentiality of human life. The Court also concluded that the constitutional right to privacy protects a woman's decision to terminate her pregnancy. Balancing a mother's constitutional right to privacy in her body, and a state's interest in protecting potential life, the Court held that a State's interest in protecting potential life becomes compelling only at the point of viability. Thus, a State may regulate or proscribe abortion subsequent to viability. However, a State may not prohibit an abortion necessary to protect the life or health of the mother unlike in Nigeria where such reason makes abortion lawful on the point. Despite a State's interest in protecting potential life, the health of the mother is placed above the potential life of the fetus. The United States Supreme Court further held

³²Linton, ,supra 8.

³³*R v King* [2004] NSWCCA 444, 7 December 2004.

³⁴In Ohio for example. See: *State v Coleman*, 705 N.E.2d 419, 420–21 (Ohio Ct. App. 1997); *Coleman v DeWitt*, 282 F.3d 908, 911–13 (6th Cir. 2002); *State v Alfieri*, 724 N.E.2d 477, 483 (Ohio Ct. App. 1998); *State v Moore*, No. 97 CA 137. States remain free to punish feticide so long as they don't try to punish a woman who exercised her constitutional right to abort her fetus, the physician who performs the abortion, or the hospital or other facility, even if public, in which the abortion is performed.

³⁵410 U S (1973).113, 93.

in *Roe v. Wade*³⁶ that a pregnant woman has a fundamental right to privacy derived from section one of the Fourteenth Amendment, to obtain an abortion.³⁷

The Fourteenth Amendment, states among other things that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law³⁸.

However, it is good to note that such right must correspond with the compelling State's interests in the health of the pregnant woman and the "potential life" of her unborn child at different stages of pregnancy. Thus, the State's interest in the health of the woman does not become compelling and therefore, strong enough to support regulation of the abortion procedure, until the end of the first trimester of pregnancy. Obviously, at this stage, the risks associated with undergoing an abortion are approximately equal to the risks associated with carrying the child to term.³⁹ Furthermore, the State does not have a compelling interest in the "potential life" of the unborn child strong enough to support a prohibition of abortion until the child is viable.⁴⁰ Nonetheless, the States may not even prohibit an abortion after viability if the procedure is necessary to preserve the pregnant woman's life or health. In *Doe v Bolton*,⁴¹ a companion case of *Reo v Wade*, the Court held that the medical judgment as to whether an abortion is necessary may be exercised in the light of all factors namely physical, emotional, psychological, familial, and the woman's age which are relevant for proper diagnosis of the woman.⁴² In *Planned Parenthood v. Casey*,⁴³ the Court in the majority opinion

³⁶ Supra.

³⁷*Roe v wade* 410 U S 179 (1973). 163; *People v. Campos*, 592 N.E.2d 85, 97 (Ill. App. Ct. 1992).

³⁸ The Fourteenth Amendment Constitution US Law Section 1. See also: 14th Amendment Constitution US Law LII/ Legal <https://www.law.cornell.edu>, accessed March 25, 2022.

³⁹*Roe v Wade*(n 112 above)155,163-164.

⁴⁰ By viability it means capable of sustaining survival outside the mother with or without medical assistance.

⁴¹410 U S 179 (1973).

⁴²*Doe v Bolton* (above) 192.

⁴³505 U S 833 (1992) 869-79.

abandoned the “trimester scheme” set forth in *Roe v. Wade*, tacitly downgraded the nature of the right recognised in *Roe*, and adopted a new standard for evaluating abortion regulations. The court rather held that a regulation of abortion is constitutional unless it imposes an “undue burden” on the woman’s choice to obtain an abortion. This undue burden exists where the regulation in question has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. In *Casey*, the Court reaffirmed the viability rule in *Roe* not minding whether exceptions are made for particular circumstances. In other words, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.⁴⁴ In summary therefore, the decision in *Casey* implies that States have broader authority to regulate abortion throughout pregnancy but no authority to prohibit abortion before viability and their authority to prohibit abortion after viability remains unclear. *Roe* and *Casey*, of course, were limited to laws prohibiting and regulating abortion. Although, in *Roe*, the Court held that the unborn child is not a person within the meaning of section one of the Fourteenth Amendment, it has been argued that neither *Roe* nor *Casey* purported to address the States’ authority to define the legal status of the unborn child outside the context of abortion or to confer legal rights upon the unborn child that do not interfere with the exercise of the abortion liberty recognised in *Roe*.⁴⁵ Indeed, the Court has held that, apart from the regulation of abortion, nothing in *Roe* precludes the States from extending the protection of the law to unborn children.

In the USA therefore, due to the efforts of the Judiciary and Legislature the trend towards recognising fetal rights in the arena of Criminal Law has been progressive. In 1999, the Unborn Victims of Violence Act was introduced as a bill into United States Congress.⁴⁶ It was passed into law in 2004 as “Unborn Victims of Violence Act 2004.”⁴⁷ The Act defines violent assault committed

⁴⁴ See also Linton, (n 105 above)142-143

⁴⁵Linton, ,supra 12.

⁴⁶ This Regulation treats as a separate federal crime, injury or death to an unborn child caused by a third party while committing a federal offense against the mother.

⁴⁷This law was passed in 2004 after the murder of Laci Paterson and the fetus she was carrying. The Unborn Victims of Violence Act 2004 was enacted by the Legislature amending Title 18 of the United States Code by inserting a new Chapter--90A that entails section 1841 –

against pregnant women as a crime against two victims: the woman and the fetus she carries. The Federal Unborn Victims of Violence Act 2004 recognises an unborn child as a separate victim of criminal violence and treats the killing of an unborn child as a form of homicide. In 2002, former US President George W Bush announced a plan⁴⁸ to ensure health care coverage for fetuses under the State Children's Health Insurance Program. Recently on June 24, 2022, the U.S. Supreme Court released its decision in *Dobbs v Jackson Women's Health*⁴⁹, and in a historic and far-reaching decision, the U.S. Supreme Court officially reversed *Roe v. Wade*,⁵⁰ and declared that the constitutional right to abortion, which has been upheld for nearly a half century, no longer exists. The court held that the 1973 *Roe* ruling and repeated subsequent high court decisions reaffirming *Roe* "must be overruled" because they were "egregiously wrong," the arguments "exceptionally weak" and so "damaging" that they amounted to "an abuse of judicial authority."⁵¹

It is submitted that the law that accords legal personality to the unborn child in the USA seems to be only with respect to violent assaults against pregnant mother. There seems to be no liability for violent assault by the pregnant mother on the unborn. Thus, before *Dobbs v Jackson Women's Health*⁵², the pregnant mother is excluded from criminal liability if she harms the unborn child under cover of regulated abortion. Such law is very unfair to the unborn child because it leaves the unborn child's fate to live at the mercy of the mother who often times

protection to unborn children. The UVVA, 2004 is more commonly known as 'Laci and Conner's Law. The unique name comes from the names of the victims--a pregnant Laci Peterson of California who was eight months pregnant with a son who was to be named Conner. She was murdered in 2002 by her husband, Scott Peterson, in that pregnant stage. See also: Sunanda Barhti, (n 22 above).

⁴⁸(SCHIP) The Bush Administration's Plan for Fetal Care, <http://www.onpointradio.org/show/2002>. accessed April 20, 2022.

⁴⁹No.19-1392, 597US 2022.

⁵⁰*Jane ROE, et al., Appellants, v. Henry WADE* 410 U.S. 113

⁵¹*Roe-v-Wade* overturned- leaked- decision-supreme-court-abortion <http://www.npr.org> 22/06/4, accessed 27 June, 2022.

⁵² *supra*

when not ready for the pregnancy may subject the unborn child to substance abuse of various kinds.⁵³ The mother will now determine whether the unborn child will live or not. Hence, abortion remains the highest threat the unborn child is facing globally against the wish of the unborn child to live. Life has no duplicate and must be guarded jealously⁵⁴ including those of the unborn children. Today this unborn child craves for recognition as a legal person for adequate protection of his right to life.

(c) The European Convention on Human Rights (ECHR) 1949 and the Legal Status of an Unborn Child in the United Kingdom (UK)

Generally in Europe, Article 2 of the European Convention on Human Rights (ECHR) 1949 defends the right to life and prohibits the use of death penalty. It provides that (1) everyone has the right to life, and (2) No one shall be condemned to death penalty, or executed. Under European law, the unborn child is generally regarded as part of the mother and thus its rights are held by the mother. The European court of Human Rights has held that the right to life does not extend to fetuses under Article 2 of the European Convention on Human Rights although it does not confer on the European Court of Human Rights the authority to impose relevant laws on European Union Member States.

In *Vo v France*,⁵⁵ the European Court of Human Rights considered whether the embryo/fetus enjoys the protection of the right to life provided by Article 2 of the European Convention on Human Rights. The case is about an application made by one Mrs. Thi-NhoVo, who in November 1991 visited the General Hospital of

⁵³The harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs. Even her refusal to take medical treatment could be to the detriment of the unborn child.

⁵⁴*Mrs Georgiana Ahamfule v Imperial Medical Centre and Dr Alex K Molokwu*; Suit No: ID/1627/2000(unreported) Lagos High Court Ikeja, (2004) 7 KLR (Pt 183)1913 CA Lagos cited in Joy Ngozi Ezeilo, Domestic Implementation of International Instruments Relating to Women's Human Rights in Nigeria, (Ph. D Thesis) Department of Public and Private Law, Faculty of Law, University of Nigeria Enugu Campus. March 2011, 56 www.nails-nigeria.org, accessed 22 April, 2022.

⁵⁵*Vo v France*, Judgment of 8 July 2004, no. 53924/00, not yet published, available at: <http://hudoc.echr.coe.int>.

Lyon for a medical examination scheduled during the sixth month of pregnancy. On the same day and at the same hospital another woman, Mrs. Thi Thanh Van Vo, was due to have a coil removed. Due to a Mix-up caused by the fact that both women shared the same surname and that Mrs. Thi-NhoVo was unable to communicate in French, the gynecologist pierced the applicant's amniotic sac, making a therapeutic abortion of the fetus unavoidable. The applicant in 1991 lodged a criminal complaint and the doctor was charged with involuntary homicide. In June 1996 the Criminal Court of Lyon acquitted the doctor, declaring that there was no legal rule determining that a fetus is already a person in the sense of the French Criminal Code.⁵⁶ In view of this lack of a legal definition, the Criminal Court found it necessary to return to the “known scientific facts.” In the opinion of the Court it had been scientifically established that a fetus becomes viable at six months. As the Court felt obliged to show some respect for that fact⁵⁷ it declared that it could not create law on an issue which the legislators had not yet succeeded in defining. Consequently, at 20 or 21 weeks a fetus has to be considered to be a human being.

However, in March 1997 the Lyon Court of Appeal overturned this judgment, and declared that the issue of viability at birth is scientifically uncertain and consequently devoid of all legal effect. Considering a viable fetus as a person, the Court of Appeal convicted the doctor of involuntary homicide and found the doctor guilty of unintentional homicide. It imposed a six-month suspended prison sentence and a fine of FRF10,000. The Court held:

“... In the instant case Dr G.’s negligence is characterised in particular by the fact that the patient’s knowledge of French was insufficient to enable her to explain her condition to him, to answer

⁵⁶ See also: Eur. Court. H.R., *Vo v France*, Judgment of 8 July 2004, no. 53924/00, available at: <http://hudoc.echr.coe.int.accessed> April 20, 2020, Paragraph 19. The issue before the criminal court is whether the offence of unintentional homicide or the unintentional taking of the foetus’s life is made out when the life concerned is that of a fetus and if a 20 to 21 week-old foetus is a human person. The Court held that a foetus becomes viable at the age of 6 months; a 20 to 21 week-old foetus is not viable and is not a ‘human person’ or ‘another’ within the meaning of former Article 319 and Article 221-6 of the Criminal Code.

⁵⁷Viability at six months.

his questions or to give him the date of her last period, circumstances that should have further impressed upon him the need for a thorough clinical examination. The assertion that he was entitled to rely on the medical records alone shows that, though an able scientist, this young doctor was nonetheless unaware of one of the essential skills of the practice of medicine: listening to, getting to know and examining the patient. Indeed, before this Court Dr G. said that the accident had impressed upon him how vital it was to take precautions before operating.”⁵⁸

In convicting the doctor of unintentional homicide, the appellate court noted that Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6 of the International Covenant on Civil and Political Rights recognise the existence for all persons of a right to life protected by law. The appellate court stated that the Voluntary Termination of Pregnancy Act VTPA⁵⁹ establishes the rule that the life of every human being must be respected from the beginning of life. That rule is now restated in Article 16 of the Civil Code following the 1994 amendment. The appellate court went on to state that, by operating without performing a prior clinical examination, the doctor was guilty of a negligent act or omission that had a definite causal link with the death of the child the patient was carrying.

Upon an appeal on points of law at the instance of the doctor, the court of last instance on 30 June 1999, reversed the judgment of the Lyons Court of Appeal and ruled that there was no reason to remit the case for retrial. In reversing the judgment of the Court of Appeal, the court of last instance refused to consider the fetus as a human being entitled to protection under criminal law. According to the

⁵⁸The court found that there is a clear causal link between the Doctor’s negligent act and omission and the death of the child MrsVo was carrying. The accused himself acknowledged, with commendable honesty, that a clinical examination would have alerted him that the patient was pregnant and had been mistaken for another patient.

⁵⁹of 17 January 1975.

court,⁶⁰ the rule that criminal statutes must be construed strictly pleads against extending the scope of the relevant provision of the French Criminal Code. In the French Criminal Code, involuntary homicide is an offence and it covers both unborn children whose legal status is governed by special provisions concerning embryos and fetuses and other human beings.⁶¹ The court held that when the matters of which the defendant was accused did not come within the definition of the offences set out in former Article 319 and Article 221-6 of the Criminal Code, the Court of Appeal misinterpreted the aforementioned provisions.⁶²

Mrs. Vo appealed to the European Court of Human Rights in December 1999. In May 2003 the Chamber transferred jurisdiction to the Grand Chamber.⁶³ In the majority decision, the court in the first part of the judgment restricted itself to relevant existing case law, including cases decided by the Commission. The Commission initially found it unnecessary to decide whether the unborn child is protected by Article 2, on the ground that the term “**everyone**” in several Articles of the Convention could not ordinarily apply prenatally, but in a rare case, specifically in regard to Article 2, it can apply.⁶⁴ It seems however that this opinion necessarily leads to the objection that abortion does not constitute one of the exceptions expressly listed in Article 2, paragraph 2 of the convention and would therefore have to be forbidden if Article 2 applies to the fetus. In considering this argument the Commission held that abortion is compatible with Article 2, paragraph 1 in the interests of protecting the mother’s life and health.⁶⁵ This is because the provision assuming the applicability of Article 2 at the initial stage of the pregnancy contains an implied limitation on the fetus’s right to life,

⁶⁰The French court of last instance.

⁶¹ French Criminal Code Art 221-6.

⁶²*Vo v France*, supra 10.

⁶³According to Article 43 of the European Convention, a case shall be referred to the Grand Chamber if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

⁶⁴*See also European Commission on Human Rights, Brüggemann and Scheuten v the Federal Republic of Germany*, Decision of 17 March 1978, para. 60.; *Eur Comm H R, H. v Norway*, Decision of 19 May 1992, Decision and Reports vol. 73, 155, 167, para 1.

⁶⁵*Eur. Comm. H.R., X. v the United Kingdom*, Decision of 5 November 1981, Decision and Reports vol. 19, 252-53, para. 22.

to protect the life and health of the woman at that stage. The commission having regard for the need to protect the mother's life rather ruled out an absolute right to life of the fetus.⁶⁶ The Commission is of the view that giving priority to the protection of the fetus would mean that the life of the fetus was highly regarded in value than the life of the pregnant woman. On the issue of when life begins, the Commission in *Eur. Comm. H.R., H. v. Norway*⁶⁷ noted diverging viewpoints and conceded some discretion in this area to the Contracting States.

The European Court of Human Rights, held that the applicant in *Vo* case could have brought an action for damages in the administrative courts which would have had a reasonable prospect of success. In conclusion the court held that the unborn child was consequently not deprived of all protection under French law, and therefore no need to institute criminal proceedings. The court accordingly found by 14 votes to 3 that even assuming that Article 2 was applicable in the case before it, there had been no violation of that provision. The case of *Vo v France* is as interesting as it is controversial. While 14 Judges voted in favour of the finding that there has been no violation of Article 2 of the Convention, among the said 14 judges, there were two separate opinions by 7 judges⁶⁸(5to 2) with respect to the argument in arriving at the same finding. There were 3 dissenting opinions from Judge Ress and Judge Mularoni joined by Judge Strážnická. However, the contributions of the judges though intriguing, they are very instructive as they are persuasive.

Though for Rozakis J, there has been no violation of Article 2 of the Convention in the instant case. However, his assessment of the law is at variance with that of the majority. He reasoned in line with Caflisch J, Fischbach J, Lorenzen J and Thomassen J, and declared that Article 2 does not apply to the fetus.⁶⁹ This is

⁶⁶ Eur. Comm. H.R., *X. v the United Kingdom* above 252, para. 19.

⁶⁷ *Eur. Comm. H.R., H. v. Norway*, Decision of 19 May 1992, Decision and Reports vol. 73, 250, para.12.

⁶⁸ Rozakis, J joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen(4), and Judge Costa and Judge Traja(2)

⁶⁹ Rozakis is of the view that the potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom – require protection in the

because, though unborn life is considered to be worthy of protection, this protection, however, is distinct from that given to a child after birth. He criticized the fact that the majority's procedure, in applying repeatedly the "even assuming" formula, presupposes the *prima facie* applicability of Article 2 to a fetus.⁷⁰

Costa, J⁷¹ and Traja J, are of the opinion that Article 2 is applicable to the fetus but with some reservation. Costa explained that if Article 2 had been considered to be entirely inapplicable, it would not have been necessary to examine the possible violation of Article 2 in any of the decisions of the Commission and the European Court of Human Rights that used the "even assuming" formula. On objections that the right to abortion is under threat, he referred to courts in Germany, Norway and Spain that recognize the right to life of the fetus and held that the national legislation on voluntary termination of pregnancy is consistent with the relevant domestic Constitution, and even with Article 2 of the Convention. She is of the view that the present inability to reach a consensus on what is a person does not prevent the law from defining these terms, because it is the task of lawyers, and in particular judges especially human right judges to identify the notions that correspond to the words in the relevant legal instruments.⁷² For Costa J, the court should deal with such terms as "everyone" and the "right to life" in the same way it has done from its inception with terms such as "civil rights and obligations", "criminal charges" and "tribunals", even if

name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2" see: paragraph 84 of the judgment.

⁷⁰ According to him, this protection though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope. It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to postnatal life, and, therefore, does not enjoy a right in the sense of "a right to life", as protected by Article 2 of the Convention. Hence, there is a problem of applicability of Article 2 in the circumstances of the case.

⁷¹ One of the judges that decided the case of *Vo v France*. Though they also voted in favour of the majority finding but in their separate opinion they would have preferred the Court to hold that Article 2 was applicable, even if such a conclusion is not self-evident. This is because perhaps there exists a right for a potential person to a potential life; for lawyers, however, there is a world of difference between the potential and the actual.

⁷² The Separate Opinion of Costa J in of *Vo v France* , Paragraph 7.

the court in the instant case is mainly concerned with philosophical and not technical, concepts.

Ress J, in his dissenting opinion rejected the majority's opinion that an action for damages in the administrative courts is equivalent to criminal proceedings. According to Ress, it is not retribution that makes protection by the criminal law desirable, but deterrence. He approved the applicability of Article 2 to the fetus. With regard to the “even assuming” formula, Ress J, explained that specific laws on voluntary abortion, as they exist in all the contracting states, would not have been necessary if the fetus did not have a life to protect.

Mularoni J and Stráznická, J ⁷³ in another dissenting opinion argued that based on the European Court of Human Right’s view of the necessity of an evolutive interpretation of the Convention as a living instrument which is to be interpreted in light of present day conditions, the fetus has right to life. With regard to the *Vo’s*Case, Mularoni J says that the interpretation of Article 2 must evolve so that the great dangers currently facing human life, such as genetic manipulation and the risk that scientific results will be used for a purpose undermining the dignity and identity of the human being, can be confronted.⁷⁴ She further argued that the French legal system did not afford the applicant any “effective” remedy. She therefore found that Article 2 of the Convention is applicable in the *Vo’s* case and has been violated, as the right to life of the fetus has not been adequately protected by the law of the respondent State.⁷⁵

It is submitted that in spite of the fact that the European Court of Human Rights has failed and/ or neglected to capture the unborn child as part of the “everyone” within the purview of Article 2 of the convention, the unborn child is accommodated in the word “everyone.” By way of definition “**every**” is used with singular nouns to refer to all the members of a group of things or people; all possible; it is further used to say how often something happens or is done.⁷⁶ The

⁷³The only two female judges out of the 14 judges that presided over the case of *Vo v France*.

⁷⁴Dissenting opinion of Mularoni J, and Stráznická J, paragraph 30.

⁷⁵ Paragraph 31.

⁷⁶ A S Hornby, 7thed, 502.

word “everyone” simply means everybody, every person, all people. The European Court of Human Rights in *Vo’s* case recognised that what is being carried by the pregnant mother is “life” and an “unborn child.” It remains a fact that the difference between a born child and unborn child is just that one is born and the other is yet to be born. The difference is not much since both of them are dependent on the mother for everything. The unborn child is an entity in the womb with soul and body.⁷⁷ Besides, no one person’s life is more important than the other.⁷⁸ All human life is of equal value. The life of the child in the womb is neither more nor less important than that of the mother. There is therefore no moral objection to measures aimed solely at curing a life-threatening condition in an expectant mother, even if this leads to the child’s death. In such circumstances for example, as ectopic pregnancy where the baby is developing in the fallopian tube, treatment that is ethical does not involve deliberate killing of the baby.⁷⁹ If an ectopic pregnancy is mature enough that it can no longer survive comfortably outside the womb, and it is life threatening, the baby can be delivered early and steps taken to sustain the baby's life. If there is disability, social problems or difficult circumstances surrounding the child's conception, the right response is one of compassion for the parents and the child. It can never be compassionate

⁷⁷Birth is not the start point of a new human life--just a change of the baby's environment. A new life actually begins in the womb usually the fallopian tube when a single sperm cell from the father fertilises an egg (*ovum*) from the mother. At fertilisation (conception), a new, unique, living human individual is present. At conception all the hereditary characteristics of the new human being are established, including colour of eyes, gender and build. Nothing more is needed to determine the development of the embryo. All the information about how the baby is to grow and develop is contained in the original single cell at conception. Nothing is added after conception except oxygen and nutrients (food and water), the same essentials that are needed to sustain human life after birth. See also: Society for the Protection of Unborn Children. www.spuc.org.uk accessed April 10, 2022.

⁷⁸ In *R v Dudley and Stephens* (1884) 14 QBD 273, the court held among other things “.... but what measure is the comparative value of lives to be measured? Is it to be strength or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another’s life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be “No....”

⁷⁹ Society for the protection of unborn children information@spuc.org.uk 4, accessed April 12, 2020.

deliberately to take innocent human life. There is a clear difference between abortion *simpliciter* performed just to free a mother from the stress of the so-called “self declared unwanted pregnancy” to help her maintain her good figure and shape, and the fact of losing a life in the cause of administering treatment on a pregnant mother found in critical health crisis and in danger of death in order to save the mother.

In the United Kingdom (UK), the criminal law of the UK bestows some protection to the fetus, but it does so only vaguely and coincidentally rather than cogently and directly.⁸⁰ Quite often, its regard for the fetus is to protect it through the pregnant mother, as her adjunct. The focus of the law is on the requirement of being born alive. Normally, the aspect of viability or quickening is also added as a criterion to ascertain the offenders’ liability. In other words, any pre-natal injury to the fetus would be a criminal offence only after it has attained viability and provided it is born alive.⁸¹ Once this happens, even if it dies one second after, the requirement of Criminal Law to inculcate the offender would be satisfied. In the UK some protection is offered by the Offences Against the Persons Act 1861⁸². Conversely, there would be no crime committed under the UK Criminal Law if the injury happens before viability or if the injury happens after viability but the pregnancy does not result in live birth.

(c) The Legal Status of an Unborn Child in India an Asian Country.

Three legislation made provision for the legal status of the unborn child in India.⁸³ Apart from numerous holistic and religious reasons, prevention of sex selective abortions remains one of the major concerns why abortion has not been legalised in India. Despite protests and demands from pro-choice feminist forum,

⁸⁰With the exception of WD, the position in the UK is clear under civil law-the foetus is not a person until it has achieved live birth: see, for example, *Paton v British Pregnancy Advisory Service Trustees* [1979] Q B. 276. The situation is not so clear however in Criminal Law. Though the law is developing towards a concrete stand ever since Attorney Generals Reference.

⁸¹ Bharti,, supra .

⁸²SS 58 and 59 (unlawfully procuring a miscarriage) and Infant Life Preservation Act 1929, s 1 (child destruction). Cited in Bharti, (n 104 above) 16.

⁸³ The Indian Penal Code 1860, the Medical Termination of Pregnancy Act, 1971 (MTPA, 1971), and the Pre- Conception and Pre-Natal Diagnostic Techniques Act 1994(PCPNDT 1994).

abortion remains heavily regulated and circumscribed through the Medical Termination of Pregnancy Act (MTPA) 1971.⁸⁴ Art 3 (1) of the Act says:

Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

Hence, in India termination of the life of an unborn child is regulated both by law and their religious belief and not a matter of personal choice. From the available literature, it is not an offence to threaten to kill a foetus unless the injury is done with intent to procure a miscarriage and it is not necessarily an offence to injure a foetus, or to kill a foetus.⁸⁵ This is subject to the qualification of legal abortions.⁸⁶ It remains arguable whether it is a criminal offence if an injury received as a foetus causes the death of the child after birth.⁸⁷ It is submitted that this is mere diplomacy. Threat to life is an offence notwithstanding the age of the life threatened. There are hoards of policies and schemes for the welfare of the pregnant mother and her unborn / newborn child conceptualised and implemented by the Indian government.⁸⁸ For instance Article 15(3) of Indian Constitution allows for positive discrimination in favour of women. It states that nothing in the article shall prevent the State from making any special provision for women and

⁸⁴ The Medical Termination of Pregnancy Act, 1971 was enacted by the Indian Parliament with the intention of reducing the incidence of illegal abortion and consequent maternal mortality and morbidity. It regulates the performance of legal abortion by registered practitioners.

⁸⁵ Sections 312 IPC (causing miscarriage), 313 (causing miscarriage without woman's consent)-315 (preventing the child from being born alive or causing it to die after birth), and 316 (causing death of quick unborn child) do provide some instances which offer some protection to the unborn by providing for some punishment to the perpetrator in some instances.

⁸⁶This is not the same as 'on demand' but is meant to cover limited abortion rights of the type recognized in the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), the precondition for which is that the woman requests/agrees.

⁸⁷G Williams, *Textbook of Criminal Law* (2nd edn),(Stevens & Sons Ltd 1983) 289.

⁸⁸For instance the 'Janani-ShishuSurakshaKaryakram' (JSSK), Mamata, in Orissa for the welfare of Pregnant women and newborn. See:Bharti, (n 104 above) 17.

children.⁸⁹ Thus there is the Rashtriya Mahila Kosh,⁹⁰ The Mother and Child Tracking System (MCTS),⁹¹ The Indira Gandhi Matritva SahyogYojana Conditional Maternity Plan (CMP) and The Rajiv Gandhi Scheme for Empowerment of Adolescent Girls. The rationale behind such schemes is to ensure protection for the pregnant mother and to enable her carry her child in a safe and healthy environment. As a natural culmination of this effort, it is only logical that not only the pregnant mother but also the unborn child be legally protected so that perpetrators of crimes against unborn children could be held criminally responsible.

⁸⁹Article 39(a) of the Directive Principles of State policy also directs the state to direct its policy towards securing the equal right of citizens to adequate means of livelihood.

⁹⁰National Credit Fund for Women 1993.

⁹¹The Mother and Child Tracking System(MCTS) launched in 2009, helps to monitor the health care system to ensure that all mothers and their children have access to various services including pregnancy care, medicalcare during delivery and immunisation . the system contains a database of all births and registered pregnancies at health care facilities since 1 December 2009.

3. Recommendations and Conclusion

There is need for a global statutory provision for the protection and enforcement of the rights of the unborn child. Aside other benefits, it will be a good check on abortion as well. If nothing is done globally to accord legal personality to unborn children, the consequence is obvious and may be horrendous and tragic. Abortion will recklessly be the order of the day by the year 2030 with its typical complications including secondary infertility, cervical or vaginal lacerations, hemorrhage, bowel or uterine perforation, sepsis and secondary reproductive tract infections, chronic pelvic inflammatory disease etc. Though countries vary in their mode of according legal protection to the unborn child. It is very instructive to know that the four countries considered above have regard for the fetus and have developed some statutory provisions for the protection of the unborn child. But it was only in America that the unborn child has legal personality so that he can sue through his *guardian ad litem*. While some countries Nigeria and America start from conception to birth and therefore attach criminal liability to acts that aim at terminating the unborn child, others maintain that such criminal liability should start at certain developmental stage not necessarily from conception. Yet, others do not see reason for liability at all in spite of the regard they have for the fetus and the need to protect that entity in his space in the womb. However, with the exception of America where all US States either by statute, court rule or case law permit a *guardian ad litem* to represent the interests of the unborn,⁹² the unborn child, though is considered worthy of legal protection, such legal protection cannot be equated to postnatal life, so as to accord the unborn child a legal right in the sense of “a right to life”. What an irony? There is need to accord the unborn child legal personality at least to reduce the wanton termination of the life of the unborn child against his wish to live. Such legal recognition will go a long way to equally check domestic violence on women and help to actualise Target-4 of the third Sustainable Development Goal (SDG 3.4) by the year 2030. This Sustainable Development Goal (SDG 3.4) aims at promoting both the reduction of premature mortality and ensuring mental health and well-being of both the mother and child. It further underscores the sacredness of human life.

⁹²Linton, supra 8.

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