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Developments in Legal and Medical Practice Regarding the Unborn Child and the Need to Expand Prenatal Legal Protection

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Abstract

Developments in legal and medical practice in the Netherlands give rise to questions regarding the legal position of the unborn child. This article provides an overview of these developments and argues — in view of developments in other countries — that current Dutch legislation regarding the unborn child is not up to date. In effect, the article challenges the idea that the actual legal protection of the unborn child under positive Dutch law can be considered proportionate, even sufficient. To support this view the author will show that abortion is not the only matter in which clarity as to the legal protection of the viable unborn child is required. This signalisation provides good cause to reconsider the Dutch perspective on the matter, thus offering a point of reference to countries with a similar interpretation of what constitutes an appropriate legal protection of the unborn child.

Keywords

unborn child; viability; foetus; legal personality; children's rights; Dutch jurisprudence; medical practice

1. Introduction

Developments in legal and medical practice in the Netherlands give rise to questions regarding the legal position of the unborn child.[1] The characteristics of this position are unclear due to persisting disharmonies between Dutch civil and penal law on the legal protection of this child. These disharmonies bear consequences for questions relating to an unborn child's interest in prenatal legal protection and, particularly, to which extend such an interest needs recognition

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1) Generally, the issue is discussed by A.C. Enkelaar and A.M.I. van der Does, 'Ouderlijke (on)verantwoordelijkheid, al voor de geboorte', *Tijdschrift voor Familie — en Jeugdrecht* (2009) 3, 4-9; in response A. Huygens, K. Blankman and J.G. Sijmons, *Tijdschrift voor Familie — en Jeugdrecht* (2009) 3, 10-16; A.J.K. Hondius and T.E. Stikker:' Zwangerschap en dwangtoepassing', *Journaal Ggz en recht* (2007) 7, 123-128; A.J. Schneider, M.E. Raats, M.J.C.E. Blondeau and E.A.P. Steegers,' Zwangere, verslaafde prostituees: soms gedwongen opname in het belang van het kind', 148 *Nederlands Tijdschrift voor Geneeskunde* (2004) 1949-1952; M. Kollen, A. Heida, A. Huisman and M.E.T.M. Müller, 'Klinische lessen: Gravida en wilsonbekwaam', 146 *Nederlands Tijdschrift voor Geneeskunde* (2002) 745-747.

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under positive law. A well-founded answer to these questions obviously relates to whether or not the unborn child has legal personality and to the normative meaning of the unborn child's viability.

This article provides an overview of developments in Dutch jurisprudence and Dutch medical practice, which demonstrate — in view of developments in other countries — that current Dutch legislation regarding the unborn child is not up to date. In fact, Dutch positive law does not keep pace with the kind of legal protection magistrates in court increasingly attribute to the unborn child. This leads to the question whether the actual Dutch legal protection of the unborn child is proportionate, even sufficient. Furthermore, this overview will show that abortion is not the only matter in which clarity as to the legal protection of the viable unborn child is required. Serving as a point of reference the Dutch perspective on the matter seems illustrative as well as alarming to countries with a similar — non-explicit — interpretation of what constitutes an appropriate legal protection of the unborn child.

2. The Legal Framework

The legal framework with regard to the legal protection of the unborn child involves international and national regulations. As far as the international point of view is concerned human rights instruments are highly important to this matter. Of special interest is the United Nations Convention on the Rights of the Child (CRC). Under Dutch law the legal position of the unborn child is basically determined by four statutory regulations. The starting point of all these regulations is the recognition of the inherent dignity and worth of all members of the human family and respect for all human life.

2.1 *International Human Rights Law*

According to the drafting history of Article 3 of the Universal Declaration of Human Rights (UDHR) the right to life was introduced as the successor of an earlier "right to existence".[2] The starting point of this "existence", however, was not explicated.[3] During the drafting of Article 2 of the European Convention on Human Rights and fundamental freedoms (ECHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) — the Conventions' provisions containing the right to life — little attention was paid to the position of the unborn child. In connection with Article 2 ECHR the unborn was not even

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[2] UN Doc. E/CN.4/AC/.1/3.

[3] A. Verdoodt, *Naissance et Signification de la Déclaration Universelle des Droits de l'Hommes*, Warny: Louvain, 1964, pp. 95-100.

addressed at all.[4] During the drafting of Article 6 ICCPR some States' delegates suggested to establish in paragraph 1 that protection of the right to life starts from the moment of conception. Yet, the proposal was dismissed because of the difficulty for States Parties to determine the moment of conception and the variety of legislation on this matter existing in the various countries.[5] Nevertheless, it was not excluded that Article 6 ICCPR extends to the unborn child.[6]

Be this as it may, the heart of the matter is that these human rights instruments do not define the words 'everyone' and 'human being'. This leaves room for the traditional view that the unborn child is not covered by these instruments and does not derive any legal protection from them. In its decision in the case of *Vo v. France* the European Court of Human Rights in Strasbourg has confirmed[7] that 'everyone' in Article 2 ECHR does not include the unborn child. Remarkable though, is that this case was not about whether or not abortion is compatible with the right to life.[8]

During the drafting of Article 1 CRC (definition of 'child') there was much debate as to whether the unborn child should be brought within the scope of the Convention.[9] Because of strong differences of opinion among the delegates a compromise was reached, according to which the provision's text would contain no clue as to the beginning point of childhood. States Parties were left to decide for themselves which prenatal legal protection under national law they would consider appropriate against the background of CRC. In a rather unusual gesture, however, the Open Ended Working Group — which drafted the Convention's text — agreed to include a preambular consideration of the UN Children's Rights Declaration of 1959 in the ninth preambular paragraph of the Convention. This paragraph now reads:

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4) P.W. Smits, *The right to life of the unborn child in international documents, decisions and opinions*, Scholma Bedum 1992, (diss.) pp. 64-71; J. Van Nieuwenhove, 'Abortion: A right to life for unborn children?', in E. Verhellen (ed.), *Monitoring Children's Rights*, The Hague: Kluwer Law International, 1996, pp. 785-795, in particular p. 787.

5) B.G. Ramcharan, 'The drafting history of treaty provisions on the right to life: B. The drafting history of art. 6 of the International Covenant on Civil and Political Rights — Note by the editor', in B.G. Ramcharan (ed.), *The right to life in international law*, Martinus Nijhoff Publishers, Dordrecht 1985, pp. 48, 51 and 197/198.

6) UN/Doc. A/3764, par. 112. See further M. Nowak, *UN Covenant on Civil and Political Rights*. CCPR Commentary, 2nd revised edition, Kehl: Engel Publisher, 2005, pp. 153-155; S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights*. Cases, Materials, and Commentary, Second edition, Oxford/New York: Oxford University Press, 2004, pp. 189-191.

7) The Strasbourg organs have concluded to this fact several times. See *Paton v. United Kingdom* (8416/78, May 13 1980, D&R 19, p. 244-264), *Hercz v. Norway* (17004/90, May 19 1992, D&R vol 73, p. 155), and *Open Door & Dublin Well Women v. Ireland* (ECHR 7 March 1991, Series A vol. 246-A, par. 37; Judgment of 29 October 1992, ECHR Series A, vol. 246-A, par. 53-80, particularly par. 66).

8) ECHR 8 July 2004 (Appl.No. 53924/00) *Gezondheidszorg Jurisprudentie* 2004/36, annotated by J.H.H.M. Dorscheidt.

9) J.H.H.M. Dorscheidt, 'The Unborn Child and the UN-Convention on Children's Rights: the Dutch Perspective as a Guideline', *The International Journal of Children's Rights* 7 (1999) 4, 303-347.

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1959, "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.

Because of its last phrase the ninth preambular paragraph of the Convention caused some scholars to believe[10] the paragraph holds a guideline for the interpretation of Article 1.[11] This — among other things — resulted in the insertion of an interpretative statement in the Traveaux Préparatoires on behalf of the entire Working Group, reading: "In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties."[12]

2.2 *Dutch Law*

Apart from international human rights law, regulations of national law also hold important clues as to the legal position of the unborn child. A clarification of applicable Dutch regulations in this regard will serve as an example as well as a point of reference for the discussion.

2.2.1 *Article 1:2 CC*

From a civil law perspective the provision that is essential to the legal position of the unborn child is Article 2, Book 1 of the Dutch Civil Code (Article 1:2 CC). This provision states that an unborn child is considered to be born whenever an interest of this child requires this to be so. In case the child is born dead, it is considered never to have existed. The provision does not bring the unborn child within the scope of legal personality, but merely holds a fiction with regard to the instant of birth, which is — at least under Dutch law — the moment when full legal personality of the human person begins. On the basis of this fiction the unborn child nevertheless enjoys a certain legal protection.[13]

The application of the provision requires a legal fact, thus providing a claim to the unborn child when born alive. Whether or not the child is viable at the moment of this particular fact, is irrelevant. Important is that nidation took place.

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[10] For the discussion regarding the insertion of the nineth preambular paragraph in the Convention and its significance, see Ph. Alston, 'The unborn child and abortion under the Draft Convention on the Rights of the Child', *Human Rights Quarterly* 1990, 12, p. 165-172. A counter-response offers P.W. Smits, (diss.), op. cit., p. 48-51.

[11] J.E. Doek, 'The current status of the United Nations Convention on the Rights of the Child', in Sh. Detrick (ed.), *The United Nations Convention on the Rights of the Child*; A Guide to the "Traveaux Préparatoire", Dordrecht: Kluwer Academic Publishers, 1992, p. 635 en 636.

[12] E/CN.4/1989/48, par. 43 en 46.

[13] Pitlo-Gr. Van der Burgh and J.E. Doek, *Personen- en familierecht*, 12th edition, Kluwer: Deventer, 2002, pp. 2-4; J.E. Doek and P. Vlaardingerbroek. *Jeugdrecht en jeugdzorg*. 6th revised edition, Amsterdam: Elsevier Juridisch, 2009, pp. 35-36.

From the moment of nidation Article 1:2 CC can be invoked on behalf of the unborn child.[14]

Although the interest mentioned in the provision has long been considered to relate only to property law interests[15] — such as most inheritance law issues — it cannot be excluded that this interest can also be involved in cases where the unborn child's physical integrity[16] is at stake.[17]

2.2.2 *Abortion Act*

As of 1 November 1984 the Abortion Act[18] regulates the conditions under which an unwanted pregnancy can be terminated. The core of this Act is that termination of an unwanted pregnancy is legally permissible when the woman is convinced that the abortion is inevitable because of a situation of emergency and the decision to terminate the pregnancy as well as the medical performance meet specific requirements of careful practice. Which circumstances count as a situation of emergency is not indicated by the legislator. It is clear, however, that under Article 82a of the Penal Code — a provision introduced by the Abortion Act — the woman's free will to experience a situation of emergency is limited by the unborn child's viability. Under normal conditions this viability is considered to be present when the child is 24 weeks old or older.[19] This term constitutes an

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14) B. Sluyters, Civielrechtelijke aansprakelijkheid voor medische fouten voor de geboorte, in J.K.M. Gevers and J.H. Hubben (eds.), *Grenzen aan de zorg, zorgen aan de grens*, *Liber amicorum in honour of H.J.J. Leenen*, Tjeenk Willink: Alphen a/d Rijn, 1990, p. 134.

15) Remarkable in this regard is a decision by the District Court Maastricht 18 October 2006, LJN AZ0717. In this case the plaintiff's unborn child died during delivery, due to inadequate medical supervision during the process of birth. As a result the plaintiff claimed to suffer from PTSS. The plaintiff's claim for compensation was partly dismissed, as the Court — referring to Article 1:2 CC — distinguished between a child not being born alive and a child who is born alive, but dies due to medical neglect. Legally speaking, the plaintiff's damages for losing her child were not considered damages resulting from a person's death. In consequence, these damages were not accepted as subject of compensation. The Court, however, recognized the plaintiff's 'personal' damages as subject of compensation as far as they resulted from the woman's PTSS confirmed by an expert's opinion.

16) The District Court Assen 15 June 2006, LJN AY7247 refused to issue a declaration of law which confirms the close personal relationship between the requestor and his pregnant partner's unborn child. The requestor is the child's biological father, the pregnant mother the child's surrogate mother. In any way, the Court concluded that a close personal relationship in the sense of Article 1:204 (3) CC can only be established from the moment of birth.

17) See W. Hammerstein-Schoonderwoerd, 'De fetus, een toekomstige patiënt?', 62 *Nederlands Juristenblad* (1987) 38, 1221-1222.

18) Act of 1 May 1981, Bulletin of Acts and Decrees 1981, 257. Several provisions of the Abortion Act are executed by administrative measures, i.e. the Order of Termination of Pregnancy of 17 May 1984, Bulletin of Acts and Decrees 1984, 218.

19) The meaning of 'viability' has been subject of debate. According to the Dutch Supreme Court it is not relevant whether the medically expected viability of an unborn child actually occurs. Decisive for the legal fiction of a foetus' viability is the reasonable expectancy at the moment of abortion that the unborn child can survive outside the mother's body in case of a regular birth. In consequence, an infant who is born alive but survives no more than an hour is covered by Article 82a PC. See Supreme Court 29 May 1990, NJ 1991, 217.

absolute limit for permissible abortion under Dutch law. Aborting a viable unborn child in principle equals a criminal offence, that is to say a homicide (infanticide or murder).[20] The woman who commits a so-called "*abortus-criminalis*" is also liable for punishment. [21] Moreover, it must be noted that a viable unborn child's death is covered by the Act on the Burial of the Dead, as this death can be considered a non-natural death, which must be reported by the physician in charge to the local coroner.

Yet, there are circumstances under which abortion beyond 24 weeks of pregnancy can come up for discussion. These cases of so-called *late* termination of pregnancy can be divided in two categories of reasons: foetal indications and maternal indications. The legal admissibility of this *late* termination of pregnancy depends on the one hand on the reasonable expectancy of the child older than 24 weeks being capable to survive outside of the mother's body, on the other hand on the consequences of a continuation of a pregnancy for the woman's life or health.

With regard to foetal indications the Dutch medical profession makes a distinction between cases of categories 1 and 2. Category 1 includes some 80% of all cases of *late* termination of pregnancy and involves unborn children diagnosed with severe and untreatable medical conditions incompatible with life. It is reasonably expected that these children inevitably die[22] during or shortly after birth.[23] Nevertheless, as a result of the abortion the moment of the unborn child's inevitable death in these cases is advanced. Category 2, including some 20% of the cases of *late* termination of pregnancy, refers to conditions resulting in serious and incurable functional abnormalities. These abnormalities hold a chance of survival, yet a rather limited one. According to current medical understanding postnatal life-prolonging treatment in such cases is considered futile and usually leads to a continuation of the unborn child's suffering, which is often without prospect

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20) Under Art. 82a PC jo. Art. 296 section 5 PC.

21) In case of abortus criminalis the pregnant woman deliberately provokes (Article 47 PC) the physician to terminate her pregnancy by using recognized means of provocation, while the unborn child is viable. In case the woman's cooperation is limited to the sole request for and be subjeted to the abortion, the woman — as a complice — is not liable for punishment under Article 296 (1) PC.

22) Exceptions in which a child appears to live longer than expected — i.e. the child is born alive, but dies a few hours later — do happen, but are not numerous. Interesting in this regard is the federal Born-Alive Infants Protection Act (Act of 2 August 2001, Public Law No. 107-207, 116 Stat. 926 (2002), H.R. 2175) in the United States, valid as of 5 August 2001. This Act regulates the legal position of all children born alive, regardless of their stage of development or the circumstances of their birth and considers these children as persons who are entitled to full legal protection. See J.H.H.M. Dorscheidt, *Levensbeëindiging bij gehandicapte pasgeborenen, Strijdig met het non-discriminatiebeginsel?* (diss.) Sdu: Den Haag, 2006, pp. 499-501.

23) Examples of category 1-conditions are: serious lunghypoplasia, serious and inoperable coronary malformations, severe skeleton dysplasy, kidney agenesia, trisomy 13, trisomy 18, anencephalia as well as triploidy and osteogenesis imperfecta type 2. See *Late Zwangerschapsafbreking; zorgvuldigheid & toetsing*, Rapport van de Overleggroep 'Late zwangerschapsafbreking', Rijswijk, 1998, p. 8.

of recovery. In view of an unborn child's poor prognosis life-prolonging treatment in such cases can sometimes even be harmful.[24]

As of 15 March 2007 *late* termination of pregnancy in category 2-cases must be reported to a national multidisciplinary expert committee — often called the "Hubben Committee", after its chairperson, Professor Hubben. This Committee serves as an advisory board to the Public Prosecutor, with regard to whether or not the aborting physician has acted in accordance with special requirements of due care.[25] Cases of *late* termination of pregnancy in category 1 must be reported directly to the judicial authorities.[26] Afterwards, these cases are discussed by a special Committee of the Dutch Obstetric and Gynaecology Association.

Usually, an unborn child's viability is determined by the duration of the pregnancy, the severity of malformations and disorders as well as the prognosis. In case it is unclear whether an unborn child is viable, abortion should not be performed.[27] To abort a viable unborn child who suffers from a disorder compatible with life, principally amounts to liable homicide.

In case of maternal indications harmful medical conditions of the pregnant woman urge to terminate the pregnancy. Such a condition can coincide with serious pregnancy hypertension and risk for organ failure (particularly pre-eclampsia, eclampsia and HELLP-Syndrome), severe exacerbation of auto-immune diseases, serious deterioration of cardiac function in case of heart diseases, severe placenta bleedings or maligne abnormalities of the woman.[28] In these circumstances abortion can be the only possible way to treat the woman. Often, maternal conditions hold negative consequences for the unborn child's viability. In some cases, however, this is not the case. In rare cases a healthy unborn viable child needs to be aborted to save the pregnant woman's life. Although abortion in such a case is not covered by the Abortion Act and legally qualifies as a case of non-natural death of a human person, which needs to be reported to the local coroner, it can be assumed that such a performance equals no criminal offence.

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24) Examples of category 2-conditions are servere manifestations of spina bifida and hydrocephaly. See *Late zwangerschapsafbreking; zorgvuldigheid & toetsing, op. cit*., p. 8.

25) See Parliamentary Papers II 2005-2006, 30300 XVI, nr. 90; Regeling centrale deskundigencommissie late zwangerschapsafbreking in een categorie 2-geval en levensbeëindiging bij pasgeborenen, *Government Gazette* 13 March 2007, nr. 51, p. 8 (Article 3, page 1). In 2008 3 cases of late termination of pregnancy in category 2 were reported to the Hubben Committee. See the Committee's Annual Report 2008, The Hague, November, 2009, pp. 9-11.

26) Aanwijzing vervolgingsbeslissing levensbeëindiging niet op verzoek en late zwangerschapsafbreking, *Government Gazette* 6 March 2007, nr. 46, p. 10, at page 6.

27) L.A.P Arends, 'Abortus provocatus', in J. Legemaate (red.), *Regelgeving beroepsuitoefening gezondheidszorg*, Houten: Bohn Stafleu Van Loghum, 1994, looseleaf edition, C 1050, p. 4/5.

28) Nederlandse Vereniging voor Obstetrie en Gynaecologie, *Modelprotocol Medisch handelen late zwangerschapsafbreking*, Utrecht, 2007, p. 2. See also www.nvog-documenten.nl.

2.2.3 *Other Regulations*

As of 1 September 2002 the Embryo Act[29] entered into force[30] and codifies limitations to the use of reproductive cells and embryo's for other purposes than creating pregnancy. Its aim is to ensure that embryos are handled with respect, to provide special protection at the beginning of life and to safeguard the interests of an embryo. The Embryo Act states who has authority over the availability and the limited use of reproductive cells and embryos, and allows embryos genuinely left unused following fertility treatment to be made available for donation or research. Apart from special procedural conditions, the Embryo Act contains several specific permanent prohibitions, such as creating embryo's for the sole purpose of scientific research, reproductive cloning, creating human-animal hybrids or applying techniques to determine the sex of the unborn child.

The Foetal Tissue Act[31] — also valid as of 1 September 2002[32] — specifies the purposes and conditions under which the availability and use of foetal tissue — and cultures of cells and tissue created from foetal tissue — is permissible. Their use is permitted only for medical purposes and purposes within the context of medical and biological-scientific education, provided that appropriate informed consent requirements are met and the intended use of this tissue does not influence any decision to terminate a pregnancy. In order to prevent conception for the purpose of using foetal tissue, women may not designate the persons who are to benefit from the tissue. The Foetal Tissue Act also prohibits commercial practices with regard to making foetal tissue available.

As the Embryo Act and the Foetal Tissue Act generally do not apply to issues directly related to the problems addressed in this article, both regulations will be left aside.

3. Legal Status of the Unborn Child

The aim of all these national regulations is to specify the legal protection of the unborn child in a particular context. A recurring question in these contexts is related to the unborn child's legal status, in particular whether the unborn child derives personality rights from these regulations.

Under Dutch law this is generally not the case. According to prevailing[33] Dutch legal understanding the unborn child enjoys a progressive legal protection from the moment of nidation. This legal protection (*'status nascendi'*) includes the

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29) Act of 20 June 2002, *Bulletin of Acts and Decrees* 2002, 338.

30) *Bulletin of Acts and Decrees* 2002, 359.

31) Act of 8 November 2001, *Bulletin of Acts and Decrees* 2001, 573.

32) *Bulletin of Acts and Decrees* 2001, 573.

33) H.J.J. Leenen, J.K.M. Gevers and J. Legemaate, *Handboek Gezondheidsrecht, deel 1: Rechten van mensen in de gezondheidszorg*, fifth revised edition, Houten: Bohn Stafleu Van Loghum, 2007, pp. 140-141. Van der Burg has criticized the statutory basis for this current opinion. See W. Van der Burg, 'De

period from nidation until viability and the period from viability until birth. The nidated embryo's protection proportionally increases with its growth and development. The pre-embryo — being: a not-yet-nidated embryo — enjoys less protection than the nidated embryo, due to its mere potential (*'status potentialis')* of becoming a human being. However, this does not mean the pre-embryo is outlawed. An aim of the Embryo Act and the Foetal Tissue Act is actually to prevent such outlawing. Viability is the furthest point of the progressive legal protection of the unborn child. From the moment the foetus is born alive, it is recognised as a person having full legal personality and holding legal rights (and duties).

To abort a viable unborn child constitutes — as I already mentioned — a crime under Dutch criminal law, as Article 82a of the Penal Code links Articles 287-291 of the Penal Code to deliberately causing the death of a viable unborn child. Important to notice, however, is that this statutory link only relates to causing viable unborn life to die within the context of abortion. Even though causations of prenatal death other than abortion can constitute a crime against the pregnant mother, it follows that such acts do not qualify as a criminal offence against the unborn child. For instance, the act of a layman who deliberately kills a pregnant woman's viable unborn child by kicking or punching her in her stomach is not covered by this link. The same goes for a drunk driver who crashes into a woman with an advanced pregnancy and causes her to lose her viable unborn child. As I see it, this legal constellation constitutes an important omission in the Dutch legal protection of the viable unborn child, because it shows that in situations in which a viable unborn child's life is at stake beyond the matter of abortion this unborn life is not protected by penal law.

4. Developments in Jurisprudence

Developments within juvenile case law, particularly in relation to cases of advanced pregnant psychiatric patients and situations where pregnancy is terminated beyond the 24-weeks time limit, put new light on the legal position of the unborn child. In my view, these developments provide good cause for serious reconsideration, if not expansion, of the legal protection of the (viable) unborn child's life. Arguably, this protection should involve this unborn child's mental and physical integrity as well.

4.1 Vo v. France

The ECHR's decision in the case of *Vo v. France* has clarified that abortion is not the only issue to raise questions regarding an appropriate legal protection of the

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juridische status van het embryo: een op drift geraakte fictie', *Tijdschrift voor Gezondheidsrecht* (1994) 386-401 and: 'Symboolwerking van embryowetgeving,' *Nederlands Juristenblad* (1995) 1236-1241.

unborn child.[34] Situations resulting in an unborn child's death are not necessarily characterized by a collision of the pregnant mother's interests and those of the unborn child. It is quite possible that these interests coincide — as in *Vo v. France* — but that a third person's conduct is the cause of an infringement on both interests.

In *Vo. v. France* the unborn child's death was caused by an attending gynaecologist, who carelessly omitted to perform an adequate physical examination, thus failing to verify the identity of the pregnant Ms. Vo. In consequence, this gynaecologist mistook Ms. Vo for a namesake who was due to have her coil removed. The omission resulted in an erroneous performance by the gynaecologist, causing the involuntary termination of Ms. Vo's pregnancy. This case raised the question of whether or not an unborn child is entitled to protection against culpable causation of its death under national criminal law. The European Court of Human Rights ruled that France did not violate Article 2 ECHR by failing to penalize the causation of culpable prenatal death, and that France was not obliged to do so, due to a lack of (moral) consensus[35] on this matter among the States Parties to ECHR.

4.2 *Developments in Dutch Case-Law*

In the last decade there is an increased willingness among Dutch magistrates to recognize an unborn child's legal interest in protective measures against a pregnant woman's behaviour that constitutes a serious threat to this child's life or health. Such measures have particularly been issued in case of an advanced pregnancy. This willingness especially[36] occurred within the area of mental health care law and juvenile protection law. An overview of relevant cases may illustrate this.

4.2.1 *Mental Health Care Case-Law*

In the year 2000 the District Court Amsterdam[37] issued a court order resulting in compulsory admission into a psychiatric hospital of a woman who was 30 weeks

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34) ECHR 8 July 2004 (Appl.No. 53924/00) *Gezondheidszorg Jurisprudentie* 2004/36, annotated by J.H.H.M. Dorscheidt.

35) Remarkably, Italy, Spain and Turkey have separate regulations which penalize the negligent causation of prenatal death, damage to the foetus and premature birth. See the European Court of Human Rights in the *Vo v France*-decision, par. 41.

36) Beyond the scope of this article but an illustration of the limited prenatal effect of Dutch law is District Court Amsterdam 14 October 2009, LJN BK1841 concerning a request to issue a declaration of prenatal adoption, with reference to Article 1:230 (2) CC. According to the District Court this provision's wording leaves no room for granting this request. Moreover, the Court considered it to be unsound to proclaim an adoption concerning a child who, at the moment of such a proclamation, is not yet born. In a similar case the District Court Groningen 16 February 2010, LJN BL4565 found that prenatal adoption must be dismissed, as the identity of the child who is to be adopted cannot be established before birth.

37) District Court Amsterdam 25 April 2000, *Bopz-Jurisprudence* (kBJ) 2000/47 annotated by H.J.J. Leenen.

pregnant, as she suffered from an anti-social personality disorder and a severe addiction to cocaine. The woman also appeared to be involved in prostitution. The woman's addiction to cocaine was believed to cause limitations to her ability to make rational decisions. Moreover, there was a risk of the placenta coming loose and a troublesome delivery. As a result, the Court found that the unborn child was at risk for brain damage. The Court concluded that the woman's behaviour caused danger to herself and her unborn child, and therefore ordered the woman's compulsory admission under the Compulsory Admissions in Psychiatric Hospitals Act.[38]

The District Court's decision has been criticized. According to Leenen[39] it was still unclear whether the woman's personality disorder and drugs addiction constitute a mental disorder. To establish such a disorder is necessary in order to assume that the woman's behaviour can cause danger to her unborn child in the relevant legal sense. Furthermore, Leenen disputed that an unborn child is a person who can be subjected to legally relevant danger. After all, at least under Dutch law, an unborn child is not regarded to have legal personality, nor is this child considered to fall under 'everyone' in Article 2 ECHR.

A few months later the District Court 's-Hertogenbosch ordered the provisional authorization of a pregnant woman' admission to a psychiatric hospital. At certain moments this woman denied her pregnancy of 30 weeks.[40] The District Court considered that the woman's mental disorder could cause danger, especially in view of her delivery, and that manifestation of this danger could only be prevented by the woman's willingness to cooperate. As this willingness appeared to be insufficient, the District Court ordered the provisional authorization. Yet, this authorization would only be effectuated if the physician in charge considered this to be necessary.

The question was raised whether or not the District Court's authorization in this case was used incorrectly, as its aim apparently was to force regular health care. Treatment of a somatic condition against a patient's will is not covered by the Compulsory Admissions in Psychiatric Hospitals Act, but falls within the scope of the Medical Treatment Agreement Act,[41] incorporated in Book 7 CC. It was considered to remain unclear whether the District Court exclusively points at perinatal and therefore somatic care, or possibly at psychiatric care as well. In this case the 's-Hertogenbosch Court, unlike the District Court Amsterdam in the previous case, did not refer explicitly to danger to the child. It is conceivable that

38) Act of 29 October 1992, *Bulletin of Acts and Decrees* 1992, 669.
39) See Leenen, *supra* note 37.
40) District Court 's-Hertogenbosch 11 September 2000, *Bopz-Jurisprudence* 2001/29 annotated by R. de Roode.
41) Act of 17 November 1994, *Bulletin of Acts and Decrees* 1994, 837.

the District Court 's-Hertogenbosch only considered endangerment in relation to the future mother.[42]

In 2005 the District Court Amsterdam refused to authorize the continuation of a pregnant woman's (40 weeks) provisional admission, because her use of cocaine and heroin was not considered a mental disorder under the Compulsory Admissions in Psychiatric Hospitals Act. The District Court found that the woman was not entirely absorbed by her addiction and was still capable of avoiding dangerous conduct. After all, to be possessed by an addiction is a crucial element in order to conclude that the addiction is a mental disorder under the law. Obviously, the judges took notice of the pregnant woman's testimony in court that she would not use drugs until her child was born and that she was willing to await her delivery in the hospital.[43]

In 2006 the District Court Amsterdam ordered the compulsory admission of a severely drug addicted pregnant woman in a psychiatric institution.[44] The woman suffered from a personality disorder, causing her mental capacities to dysfunction. Because of this disorder, she was also regarded to be at risk for severe self-neglect and loss within society. The District Court concluded that, due to the advanced pregnancy (27 weeks) in this case, the unborn child had to be regarded as 'another person' under the Compulsory Admissions in Psychiatric Hospitals Act. In result, it was acknowledged — and that is quite a break-through — that the unborn child was capable to experience danger within the meaning of the law, which was believed to justify the authorization of a compulsory measure in this case.

This decision by the District Court Amsterdam was welcomed in literature. According to Gevers the District Court's decision did justice to the unborn child's entitlement to legal protection under CRC and would not be contrary to Article 2 ECHR. Furthermore, Gevers implied to use the term of 24 weeks of pregnancy as the moment that marks the beginning of the legal protectibility of the unborn child.[45]

Indeed, I sympathize with the latter observation. Yet, I am cautious as to the assumption of an unborn child's entitlement to legal protection under the CRC based on the ninth preambular paragraph.[46] It follows from Article 32(2) of the Vienna Convention on the Law of Treaties (VCLT), that the preamble is not part of a treaty's text, even though a preamble is often referred to as a source of guidance on the object and purpose of a treaty. A preambular paragraph therefore

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42) See De Roode, *supra* note 40.

43) District Court Amsterdam 6 April 2005, *Bopz-Jurisprudence* 2005/19, annotated by W. Dijkers.

44) District Court Amsterdam 21 February 2006, *Bopz-Jurisprudence* 2007/6, annotated by J.K.M. Gevers.

45) *Ibid.*

46) This assumption is also expressed by M.W. Bijlsma c.s. (see note 50) and A.C Enkelaar/A.M.I. van der Does (see note 1).

hardly provides a legally sound basis for an authoritative interpretation of a treaty provision such as Article 1 CRC.[47]

In a subsequent case the District Court Amsterdam authorized the provisional admission in a psychiatric hospital of an addicted woman who was pregnant beyond 24 weeks.[48] In this case the unborn child was recognized as 'another person' under the Compulsory Admissions in Psychiatric Hospitals Act and considered to be endangered by its addicted pregnant mother's behaviour.

4.2.2 *Juvenile Protection Case-Law*

In juvenile protection case-law Dutch courts have also shown an increased willingness to recognize an unborn child's interest in legal protection before birth. A break-through in that matter was a decision by the District Court Utrecht in 2004.[49]

In this case the District Court ruled on a request by the Child Protection Board to issue a temporary family supervision order against a mother who was pregnant of her fifth child. The other four children were all subjected to custodial placement as a result of the mother's mental incapacity to raise and take care of her children. In response to the Child Protection Board's request the District Court invoked Article 1:2 CC and stated that the mother's life style and the interest of the unborn child require that the temporary family supervision order is issued *before* the child is born. In addition, the Court ruled that immediately after birth the child would be consigned to the same foster family which already took care of the other four children.[50]

In another case the Child Protection Board requested temporary custody of an unborn child in case of a 34 weeks pregnancy. The Board argued that the pregnant woman was not under the regular care of an obstetrician, used hard drugs and was known to prostitute herself. Due to these circumstances the unborn child was believed to be at risk of being born addicted. As the mother was unwilling to undergo preventive care and intended to continue the use of hard drugs and her activities in prostitution the District Court Rotterdam ruled that the child — with reference to Article 1:2 CC — had an interest in being regarded as already born. In result the Court ordered the implementation of appropriate measures for a controlled pregnancy and care during and after delivery.[51]

In 2008 the District Court 's-Gravenhage has dealt with a request by the Child Protection Board to issue a temporary family supervision order against a mentally

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47) R.K. Gardiner, *Treaty Interpretation*, New York: Oxford University Press, 2008, p. 192.

48) District Court Amsterdam 28 November 2006 nr. 13561. See *Journal Ggz en recht* (December 2008) 8, 156.

49) District Court Utrecht 3 June 2004, *Tijdschrift voor Familie- en Jeugdrecht* 2005/98, 10, at. 262.

50) See M.W. Bijlsma, J.M.B. Wennink, A.C. Enkelaar, M.H.B. Heres, A. Honing, 'De mogelijkheid van ondertoezichtstelling van het nog ongeboren kind bij twijfels over de veiligheid van de thuissituatie', 152 *Nederlands Tijdschrift voor Geneeskunde* (2008) 15, 895-898.

51) District Court Rotterdam 9 May 2006, LJN AX2185.

disabled pregnant mother due to a crisis situation. Two other children of this woman were subjected to custodial placement for a period of six weeks. The Child Protection Board referred to Article 1:2 CC and argued that it was in the interest of the unborn child to be regarded as already born. The District Court granted the Board's request, which offered the family guardian the possibility to supervise this child's interests before as well as after birth. Anyway, the pregnant woman did not oppose to the Court order.[52]

The District Court Groningen was presented a case regarding an immediate custodial placement of an unborn child after birth. The child's pregnant mother suffered from several behavioural dysfunctions, mental retardation and was known to hide from necessary medical care. As the child's natural father had withdrawn from all basic support, care institutions had no real idea about the parent's situation. In consequence, the child was at risk of being kept away by its parents from necessary medical care. Since further delay in taking appropriate measures could cause serious and immediate danger to the unborn child and further investigations were expected, the Court concluded it was urgent and necessary to issue a temporary family supervision order for three months, as well as a four weeks custodial placement of the child from the moment of birth.[53] In a similar case the District Court Roermond — with reference to Article 1:2 CC — ordered the immediate temporary (twelve weeks) custody of an unborn child, whose parents were mentally retarded. The pregnant mother was previously placed under legal restraint; the natural father was unable to take care of a child. The District Court considered a further delay in taking such a measure as well as awaiting the results of a parental hearing to be inappropriate and likely to cause immediate danger to the unborn child.[54]

The District Court Arnhem was requested by the Child Protection Board to order protective measures against a pregnant mother who was considered unable to provide the necessary care and safety to her future child. On the basis of the Child Protection Board's report the District Court ruled that 'factors related to the mother' could cause serious harm to this child, as the child would be ultimately dependant of its mother after birth. According to the Court such 'factors' included domestic violence against the mother's two other children, sexual abuse and physical assault, the possible traumatisation of the mother, her inability to protect her children from such extreme circumstances, her pedagogical incapacities as well as a lacking power of autonomous decision making. Due to these 'factors' the District Court concluded that professional maternity assistance to the mother and her unborn child was in this child's best interest in order to safeguard

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52) District Court 's-Gravenhage 7 November 2008, LJN BG0849.

53) District Court Groningen 10 October 2008, LJN BG4372. Similar decisions were issued by the District Court Rotterdam 23 July 2008, LJN BD8661 and the District Court Utrecht 10 April 2008, LJN BC9962.

54) District Court Roermond 26 June 2009, LJN BJ0644.

the child's basic need for care and safety. Moreover, in view of the circumstances the Court found it was necessary to effectuate a family protection order before delivery, as this would offer all possibilities of supportive care in view of the child's birth. The pregnant mother's appeal to Article 8 ECHR (the right to family life) while arguing that parents deserve a reasonable chance to raise a child themselves, was rejected by the Court.[55]

5. Developments in Medical Practice

This tendency to recognize an unborn child's interest in legal protection before birth seems to be in contrast to developments signalized in the last Dutch Healthcare Inspectorate's Annual Reports on the Abortion Act.[56]

In 2008 32.938 abortions took place — 165 less than in the previous year — which illustrates that the Dutch rate of abortions, in relation to a total population of 16 million, is among the lowest in the world. Up to 57.8% of these abortions were performed in the first seven weeks of pregnancy. Since 2000, however, the amount of second trimester abortions (after 13th week of pregnancy) has tripled. Significant as well is that the number of abortions between 20 and 24 weeks of pregnancy has increased from 140 in 2005 up to 276 in 2008.

There are strong indications that this increase of abortions in the period 20-24 weeks of pregnancy is related to the introduction[57] of an echographic screening program at 20 weeks, offered to all pregnant women. In case this screening shows that the unborn child suffers from malformations — for instance spina bifida or hydrocephalus — a prenatal diagnostic investigation can be performed. Depending on this investigation's results parents may decide to terminate the pregnancy. Although thorough study on this relation is lacking, it is assumed that the increased amount of abortions in the period 20-24 weeks of pregnancy relates to this prenatal diagnostic investigation, particularly as medical practice shows that many of these abortions take place in academic hospitals, on reference by an obstetrician or another hospital or in consequence of genetic counselling or paediatric consultation. Moreover, a recent inventory of congenital anomalies based on the National Obstetric and Neonatal Registration of Congenital Anomalies has confirmed that the introduction of the echographic screening program resulted in an increased number of abortions, especially in case of spina bifida and

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55) District Court Arnhem 19 October 2009, LJN BK9430.

56) Inspectie voor de Gezondheidszorg, *Jaarrapportage Wet afbreking zwangerschap 2007*, The Hague, 2008, pp. 19-20; Inspectie voor de Gezondheidszorg, *Jaarrapportage Wet afbreking zwangerschap 2008*, The Hague, 2009, pp. 20-22.

57) The echographic screening program was officially introduced on January 1st 2007. In the course of 2006, however, some screenings were already carried out.

hydrocephalus.[58] The increase of abortions in the period 20-24 weeks of pregnancy might even be related to the significant drop of reported cases of medical neonaticide in the last years,[59] as the official number of such cases contradicts earlier estimations by Dutch neonatologists.

Because of the echographic screening program's particular moment in pregnancy and the period between prenatal diagnostics and a possible abortion resulting from it, it is clear that an actual abortion under these circumstances occurs close to the moment of an unborn child's viability (24 weeks). The key question is whether performing such an abortion is at all times compatible with the viable unborn child's legal protection under Dutch abortion law. To be more specific: how to safeguard that a foetus with malformations but nevertheless viable isn't still aborted as a result of this echographic screening program? Under regular circumstances pregnancies are not to be terminated beyond 22 weeks; the maximum licence term for Dutch abortion clinics. An abortion beyond this term must be performed in a hospital and requires a medical-professional justification. The Dutch Healthcare Inspectorate's Annual Report on 2008, however, does not provide any information as to how the justifications for the 276 abortions in the period 20-24 weeks of pregnancy related to the foetus' possible viability. In view of the viable unborn child's interest in (maintenance of) the legal protection of its life more insight in this relation is necessary.

6. Reflection

How are we to understand this increased number of abortions in the period between 20-24 weeks — and the apparent legal space to do so — while at the same time civil court law increasingly recognizes a viable unborn child's legal interest in child protection measures when a pregnant mother's behaviour seriously endangers this unborn child's life or health? If we are to outline a better tailored legal protection of the unborn child it is important to clarify the clues behind these developments.

Important in this regard is to put matters in perspective, since the developments in Dutch prenatal case-law are not unique. Similar developments in case-

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58) A.D. Mohangoo and S.E. Buitendijk, *Aangeboren afwijkingen in Nederland 1997-2007*, based on the National Obstetric and Neonatal Registries. TNO Quality of Life, Prevention and Care, Leiden 2009, Report Nr. KvL/P&Z 2009.112, 2009, pp. 71-74.

59) In 2008 no cases of medical neonaticide were reported to the Hubben Committee. See the Committee's Annual Report 2008, The Hague, 2009, p. 3 and 6. Yet, it is believed that such cases occur in current medical practice. In 2009 a single case was reported. In this case a neonate suffered from severe epidermolysis bullosa. The Hubben Committee found that the decision to end this neonate's life was in accordance with all requirements of due care. The Board of Procuror-Generals concluded that criminal prosecution was not at issue in this case.

law in the United States of America,[60] Canada, England, Wales, Scotland and New Zealand have preceded the Dutch ones for years — even decades — and have addressed specific items in relation to what constitutes an adequate prenatal legal protection in a particular situation. This case-law is often related to mother-foetus conflicts[61] manifest, for instance, in decisions whether or not a competent but uncooperative pregnant woman can be forced to undergo intra-uterine treatment[62] — even open foetal surgery — if this is expected to save the unborn child's life. An extension of this issue is whether or not a pregnant woman can be forced to undergo a caesarean section[63] or to accept medicinal therapy (zidovudine) to avoid vertical transmission of HIV.[64] The need to respect prenatal interests in such matters is growing parallel to increasing scientific developments in foetal medicine. Such developments begin to dominate the outcome of legal decision making. For instance, isn't it imperative to adopt prenatal protection laws since it is clear that Foetal Alcohol Syndrome (often characterised by facial deformities and mental retardation) is caused by heavy — sometimes even moderate — drinking during pregnancy?[65] A plea for such legislative measures is reinforced by the fact that a drug addiction (heroin, cocaine) during pregnancy poses severe risks to the unborn child's health, in fact even results in neurological damage to the foetus and in retarded prenatal growth.[66] Yet, the suggestion to codify prenatal interests is not generally supported. Cave, for instance, has argued against an extended criminalisation of maternal acts against the unborn child, as criminal justice and human rights considerations are believed to operate against such a policy.

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60) See for that matter B. Steinbock, *Life before birth. The moral and legal status of embryos and fetuses*, New York: Oxford University Press, 1992, pp. 133-163.

61) A general overview of such conflicts is presented by M.A. Warren, 'Women's rights versus the protection of the fetus', in F.K. Beller and R.F. Weir (eds.), *The beginning of human life*, Dordrecht: Kluwer Academic Publishers, 1994, pp. 287-299.

62) An overview of available effective fetal treatments as well as possible (experimental) fetal surgery is presented in Nuffic Council on Bioethics, *Critical care decisions in fetal and neonatal medicine: ethical issues*, London, 2006, pp. 54-55.

63) N.K. Rhoden, 'The Judge in the Delivery Room. The Emergence of Court-Ordered Cesareans', 74 *California Law Review* (1986) 6, 1951-2030, here 1959. A much disputed case in this matter is *Supreme Court of Georgia Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga 86 274 S.E. 2nd 457 (1981), in which the Court ordered a 39-weeks pregnant woman to endure a caesarean section, as omitting to do so was believed to cause fetal death. See also V.E Kolder, J. Gallagher and M.T. Parsons, 'Court-ordered obstetrical interventions', 316 *New England Journal of Medicine* (1987)19, 1192-1196.

64) R.S. Sperling, D.E. Shapiro, R.W. Coombs, et al., 'Maternal viral load, zidovudine treatment and the risk of transmission of human immunodeficiency virus type 1 from mother to infant', 335 *New England Journal of Medicine* (1996), 1621-1629.

65) K. Norrie, 'Protecting the unborn child from its drug or alcohol abusing mother', in M. Freeman, and A.D. Lewis (eds.), *Law and Medicine*. Current Legal Issues Vol. 3, New York, Oxford University Press, 2000, pp. 223-243.

66) B. Steinbock,'Pregnant drug addicts', in F.K. Beller, R.F. Weir (eds.), *op cit.*, pp. 273-285.

Moreover, an extended criminalisation might outbalance maternal and foetal rights and interests.[67]

However, legal practice has produced clear examples of prenatal issues which are not related to mother-foetus conflicts. The case of *Vo v. France*, for instance, has confirmed that to bring about a better tailored recognition of prenatal interests under positive law means to attach importance to these non-abortion cases too. At the same time, the heterogeneous character of prenatal issues complicates the search for an adequate content of prenatally applicable statutory regulations, apart from already existing provisions under civil or penal law.

A central issue in relation to recognizing prenatal interests under positive law is whether or not such interests should be valid only from the moment of (reasonably assumed) viability.[68] In addition to this it must be noticed that the legal significance of this viability standard in civil law is different from that in criminal law. Whereas in criminal law this standard clearly relates to the limits of allowable abortion, in civil case-law the basis for the use of this standard is rather vague as there is no substantial reason why ordering protective measures in the interest of the unborn child would only be indicated in advanced pregnancies.

Apart from the implications of this standard, one may even question the rationale behind the idea that viability marks the point at which the pregnant woman's bodily autonomy is limited by increasing protective interests of the unborn child. In this regard Rhoden has stressed the need to distinguish between viability as technological survivability and viability as a normative concept.[69] It follows from this distinction that viability points at the physical capacity of a foetus to live independent of the maternal body and counts as a justification for (some degree of) legal protectibility. The question, however, is why this protectibility is linked to this particular phase of the foetus' bodily development. Why, for instance, isn't this protectibility linked to the seriousness of human behaviour and its impact on the unborn child? Be this as it may, countries where abortion is conditionally allowed generally accept viability as the moment at which a pregnant woman's freedom to have an abortion ends;[70] whereas the unborn child's legal protectibility is inextricably bound up with a particular moment in the foetus' physical development. A close look at Dutch abortion legislation, however, may illustrate the problematic nature of this starting point.

Under Article 82a PC unjustified late termination of pregnancy is linked to the PC's provisions concerning homicide and murder. This could indicate that under Dutch law the viable unborn child enjoys a restricted right to life. But even if we

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67) E. Cave: *The mother of all crimes. Human Rights, Criminalisation and the child born alive*, Ashgate: Dartmouth, 2004, p. 84.

68) See also Steinbock (1992), *op. cit.*, pp. 82-84.

69) N.K. Rhoden:, 'Trimesters and Technology: Revamping Roe v. Wade', 95 *Yale Law Jounal* (1986) 4, 639-697.

70) See note 83.

would accept this indication for a fact, it would still be doubtful why a foetus should enjoy such a right only from the moment of viability, as certain harmful behaviour by the mother in the early phases of pregnancy (i.e. heavily smoking) can prevent the foetus to become viable at all. A part of the justification for the limited legal protection of the foetus in the first trimester relates to the legal space necessary to perform prenatal diagnostics, prenatal screenings, embryo research etc. Yet, because prenatal deformations are often caused in the early phases of pregnancy it seems that providing legal protection from the moment of viability might come (too) late in the day. The question is therefore: is too much reluctance in providing legal protection in the early phases of pregnancy proportionate? Although this reluctance is generally based on anxiousness to disproportionately restrict the pregnant woman's personality rights, at issue is whether this anxiousness constitutes an absolute justification to forgo prenatal legal protection, particularly since there is also truth to the view that accepting an unborn child's legal protectibility does not necessarily mean to recognize its legal personality.[71]

Of course, it is debatable which content of prenatal protection under positive law must be considered proportionate, even sufficient. There are pro's and con's to almost every option. Full recognition of prenatal interests under civil law, for instance from the moment of viability, could cause the unborn child — when born alive — to sue his mother for prenatal damages at viability resulting from irresponsible maternal behaviour during pregnancy. It is questionable, however, whether such effects of prenatal legal protection must be pursued. Yet, this does not mean that other effects must be ruled out as well. In order to increase the protectibility of the unborn child in the area of criminal law one could argue in favour of extending child-neglect laws to (particular areas of) the prenatal period, thus creating the legal concept of "foetal abuse". I sympathize with such an extended protection of the unborn child under criminal law, particularly if such protection would not be limited to particular irresponsible maternal behaviour, but also includes seriously harmful conduct against a foetus by a third person.[72] An important instrument to enforce such a legal protectibility I believe is to establish a special legal representative for the unborn child.[73]

At present, however, recognition of tailored interests of the (viable) unborn child in legal protection of its life and personal integrity under penal law is lacking. This also means to maintain unsatisfying responses to cases in which an

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71) See Norrie, *op. cit.*, p. 227.

72) On the basis of legal practice, Steinbock has suggested to allow criminal proceedings against a drug addicted pregnant woman (who, by using drugs, endangers her unborn child's life or health) on the same charge prosecutors use against drug dealers: delivering drugs. This is a felony in most jurisdictions. Yet, for the most part, criminal courts in the USA have dismissed such a charge. See Steinbock, in Beller and Weir (eds.), *op. cit.*, p. 279.

73) Dorscheidt, 1999, *op. cit.*, pp. 334-337.

unborn child legal interest in protection of its life or health is obviously violated, but an adequate legal response is not possible as applicable penal law does not state this violation to be a criminal offence. Such a case occurred in Canada in the mid-nineties. In this case a 28 years old woman with an advanced pregnancy shot herself in her womb with a pistol and mutilated her viable unborn child, but did not kill it. As a bullet hit the child's head, the child suffered from severe brain damage. As a consequence the child remained gravely mentally disabled for the rest of its life. The legal authorities in Canada were shocked by this case, especially when they learned that it was not possible to prosecute the woman for severe assault of her unborn child, as assault of an unborn child by its pregnant mother was not a criminal offence under Canadian penal law. Remmelink, an eminent Dutch criminal law specialist, had difficulties to accept that this woman could also not be prosecuted under Dutch criminal law, as Article 82a[74] PC is not linked to the provisions on assault.[75] The Canadian case therefore showed that severe assault of a viable unborn child is not liable to punishment under Dutch criminal law. It follows that, according to Dutch law, a viable unborn child bears no right to respect for its personal integrity.[76]

A similar problem was presented to a Dutch District Court. In 1995 a gynaecologist was held responsible for the death of a twin boy shortly before birth. Yet, this physician was acquitted, as his negligent omission to provide proper treatment could not be classified as culpable homicide under Article 307 PC. The District Court 's-Hertogenbosch was compelled to conclude that this provision does not apply to the viable unborn child. In result, the gynaecologist was acquitted.[77]

Curiously, the Netherlands have also witnessed a criminal case in which quite the opposite happened, and the protection of an unborn child's legal interests has clearly been stretched. In 2007 the District Court Rotterdam sentenced a man to 11 years imprisonment for attempted murder of his pregnant ex-girlfriend and the murder of her 37-38 week-old unborn child.[78] While referring to Article 82a PC and the provision concerning murder, the District Court held that by stabbing his ex-girlfriend (eleven times) and consequently killing her unborn child, the man violated the child's most fundamental right: the right to life. In 2008 the Court of Appeals of 's-Gravenhage confirmed that the unborn child had suffered from severe injuries and died a day after birth as a result of the man's stabbing. The Court affirmed the District Court's view that the unborn child's right to life

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74) Article 82a PC reads: To kill another person or a child at or shortly after birth, includes the killing of a fetus who is reasonably expected to survive outside the mother's body.

75) J. Remmelink, 'Een schot op de (eigen) foetus', 46 *Ars Aequi* (1997) 9, 646-649.

76) See also J. Remmelink,'Artikel 82a Sr.', in A.A. Franken and A.M. van Woensel (eds.): *Een rariteitenkabinet*. Opvallende bepalingen in de strafwetgeving, Nijmegen: Ars Aequi Libri, 1993, pp. 75-78.

77) District Court 's-Hertogenbosch 20 December 1995, *Tijdschrift voor Gezondheidsrecht* 1996/45.

78) District Court Rotterdam 27 February 2007, LJN AZ9374.

was violated and concluded under the circumstances of the case that the man's act against the unborn child qualified as murder.[79] Even though one may consider justice having being served by this verdict, legally I believe that the verdict is unsound, as it is common Dutch legal understanding that the unborn child is not covered by Article 2 ECHR and — apart from that — currently derives no protection of the right to life from positive Dutch criminal law.

As basic international human rights conventions do not define the words 'everyone' and 'human being' States Parties to such treaties are at liberty to hold whatever view on the unborn child's legal position they consider appropriate. Generally, States Parties give substance to this liberty by holding the view that the unborn child derives no legal protection from these human rights instruments. It is my impression, however, that this prevailing view has emerged from the fact that during the drafting of many human rights treaties the legal position of the unborn child was exclusively considered in relation to abortion. Other prenatal matters were hardly discussed, probably because they were not identified yet, or simply not familiar to the States' delegates. Meanwhile, there is much evidence to the fact that the legal position of the unborn child is not a one-item issue and needs further elaboration in many other contexts as well. My impression seems endorsed by the fact that to this day the issue of prenatal legal protection is hardly ever addressed in States Parties' reports to the Children's Rights Committee in Geneva, or in the Committee's Concluding Observations.[80]

Therefore, it is fair to suggest that more attention to the unborn child's legal position is required. In my view we definitely need to articulate more what constitutes a proportionate legal protection of the unborn child, apart from the regulations on the termination of pregnancy.[81] As a start, we should decide which conduct against an unborn child requires recognition as a violation of the child's prenatal legal interests. Crucial in this regard is whether those violations should be limited to acts resulting in an unborn child's death or should also cover actions such as assault and other acts causing (a considerable risk for) substantial damage to the unborn child's health.

7. Final Remarks

The developments I have discussed provide a proper argument to reconsider the limited legal protection of the unborn child, at least the one provided by current Dutch law. Countries with a legal framework regarding the unborn child similar

79) Court of Appeals 's-Gravenhage 10 July 2008, LJN BD6973.

80) See C. Price Cohen: *Jurisprudence on the Rights of the Child*, Ardsley New York: Transnational Publishers, 2004, Vol. I-IV. Particularly Vol. 1, under Article 1 CRC.

81) Whether it is feasible to bring about a separate Convention on the Rights of the Unborn Child, as Ibegbu suggests, remains to be seen. See J. Ibegbu, *Rights of the unborn child in international law*, Lewiston-Queenston-Lampeter: Edwin Mellen Press, 2000, p. xxxiv.

to the one in the Netherlands might consider these developments as suitable grounds for a similar response.

In the Netherlands the timing for an in-depth debate on this issue seems quite right, as the Dutch government is preparing new legislation on patient rights in general and compulsory care in mental health care in particular. It is to be expected that, due to new developments in medical science, special attention will be paid to areas of health care in which existential interests of the prenatal patient are at stake, i.e. matters regarding the unborn patient's interest in curative treatment or a pregnant woman's responsibility to endure intra-uterine therapy.[82] Whether the Dutch legislator will penalize infringements of a viable unborn child's personal integrity or offences against prenatal life other than abortion remains to be seen. Whatever the outcome will be, an international analysis of statutory regulations on the unborn child beyond the matter of abortion[83] may offer more insights on what constitutes a proportionate as well as sufficient recognition of prenatal interests under the law.

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82) See on this issue a report by the Gezondheidsraad: *Zorg voor het ongeboren kind*. Ethische en juridische aspecten van foetale therapie, Signalering ethiek en gezondheid 2009/01. The Hague: Center for ethics and health, 2009.

83) A comparison of abortion legislation in 64 countries is offered by A. Eser, H-G. Koch: *Abortion and the law*. *From international comparison to legal policy*, T.M.C. Asser Press: The Hague, 2005.