FROM ANCIENT ISRAEL TO MODERN ISRAEL: THE HISTORICAL DEVELOPMENT OF THE PROTECTION OF A FETUS IN CRIMINAL LAW

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On December 12, 2018, Amiad Yisrael Lev-Ran died. Three days earlier, while Amiad was still in his mother's womb, Palestinians in a passing car opened fire on a group of people waiting at a bus stop – among them, Amiad's mother and father. After Amiad's mother was critically wounded, doctors at Shaarei Tzedek hospital in Jerusalem delivered her baby in an emergency C-section, however the baby survived for only a few days.

This heart-breaking tragedy is but another example of a criminal act done to a fetus leading to loss of life. Already in the Book of Exodus, the Bible set out rules dealing with situations in which a fetus was the victim of a criminal act. As we shall see, the central Biblical verses involved were subsequently interpreted in various ways and became the basis for differing points of view in regard to the degrees of culpability and punishment for acts done to a fetus in different circumstances.

Our discussion will take us from ancient Israel through Hellenistic times to Catholic Canon Law, which laid the basis for the Common Law approach to this matter. We shall then mention some of the modern international developments, especially in regard to statutory amendments, and then return to modern Israel and discuss the recent case law in this area.

I. THE BIBLICAL RULE

The Biblical Rule as found in the Book of Exodus states as follows:[1]

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[1] Exodus 21, verses 22-23. This is a direct literal translation from the Hebrew, since the standard translations already include elements of interpretation, sometimes at odds with each other. *Compare, e.g.,* these verses according to the Douay-Rheims Catholic Bible: "If men quarrel, and one strike a woman with child and she miscarry indeed, but live herself: he shall be answerable for so much damage as the woman's husband shall require..." with the translation of these verses in the New King James Bible: "If men fight, and hurt a woman with child, so that she gives birth prematurely, yet no harm follows, he shall surely be punished accordingly as the woman's husband imposes on him..."

> If men are fighting, and they strike a pregnant woman and her children 'depart' [Hebrew: *yatz'u*] but there is no calamity [Hebrew: *ason*][2] the one responsible shall be punished as the woman's husband may exact from him accordingly, as the judges shall determine. But if there be a calamity, you shall give a life for a life.

While the Hebrew word '*yeladim*' – children – is used in the verse, it is clearly speaking of a pregnant woman and the 'children' in her womb, *i.e.* the fetus or fetuses. The accepted understanding of the verse within Jewish legal thought is that the term 'calamity' refers only to the death of the pregnant women herself - and in such a case, as seen from the end of the last verse - the penalty is 'a life for a life'. If, however, only "the children depart" – *i.e.* only the fetus is killed within the womb – the Biblical verse calls for only a pecuniary penalty to be paid to the husband – rather than the penalty of 'a life for a life', which would be assessed on the guilty party if such an act was considered a homicide. From here it is clear that in traditional Jewish law, a fetus which died in the womb was not considered a 'person' for the purposes of the criminal law concerning the causing of the death of another.[3]

It should be noted that the lower standard of protection for the life of a fetus – and the consequently more lenient punishment for feticide as opposed to homicide – was found in other ancient legal systems as well. For instance, the Code of Hammurabi provided:

> If a man strikes a free-born woman so that she loses her unborn child, he shall pay ten shekels for her loss. If the woman dies, his daughter shall be put to death.[4]

While other ancient codes and rules may have indeed dealt with the status of the fetus in criminal law, it was the Biblical verse cited above that was to have the most direct influence on the development of Western law in this matter. And the first step in this journey occurred when the Hebrew Bible was translated into Greek.

II. FROM SEPTUAGINT TO CANON LAW

2 The translation of the Hebrew word '*ason'* as 'calamity' follows the common usage and the approach of B. S. Jackson, *Essays in Jewish and Comparative Legal History* 76-78 (1975).

3 For further elaboration of the issue, as well as its ramifications for abortion under Jewish law, *see* D. Sinclair, "The Legal Basis for the Prohibition on Abortion in Jewish Law", 15 *Isr. L. Rev.* 109 (1980).

4 Code of Hammurabi, secs. 209-210.

After the conquests of Alexander the Great, much of the Near East came under Hellenistic rule or influence, and Greek became the lingua franca of the area. It is against this backdrop that the five books of the Hebrew Bible were translated into Greek. According to tradition, this translation was undertaken in Alexandria, Egypt during the reign of Ptolemy II Philadelphus in the third century BCE.

The Greek translation is ascribed to seventy-two Jewish elders who were tasked with simultaneously – but separately – translating all five books of Moses; the translation is known to this day as the 'Septuagint', based on the Latin word for 'seventy'. According to legend, each and every translator arrived at the exact same finalized text, an outcome which was considered 'miraculous'.[5]

Miraculous or not, the Septuagint translation of the Exodus verse cited above, included significant changes to the original understanding of the text.[6] The Septuagint took the Hebrew word '*ason*' – which, as has been stated, is usually understood as 'calamity'- and ascribed to it some kind of connection to the idea of '*form*'. According to the Septuagint, the verses in Exodus were to be rendered as follows:

> And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty, as the woman's husband may lay upon him… But if it be perfectly formed, he shall give life for life…[7]

Rather than the Bible differentiating between the fetus and its mother – limiting a potential death penalty to one who brings about the death of the mother – the Septuagint version now differentiated between two different fetuses: a fetus which is 'imperfectly formed' *versus* a fetus which is 'perfectly formed'. And according to the Septuagint, if a 'perfectly formed' fetus was killed, the penalty was 'life for life'. Just as in the case of a homicide of a person, living and breathing, outside of the womb.

5 For a discussion concerning the Septuagint and its authorship, *see* A. Wasserstein & D. Wasserstein, *The Legend of the Septuagint: From Classical Antiquity to Today* (2006).

6 This is not the only instance of the translative interpretation, and sometimes translative mistake, of the Septuagint having far-reaching consequences for the future understanding of Biblical rules. For another example, *see* B. Levinson, "The Birth of the Lemma: The Restrictive Reinterpretation of the Covenant Code's Manumission Law by the Holiness Code", 124(4) *Jour. Biblical Lit.* 617 (2005).

7 Based on the translation of the Septuagint into English by Sir Lancelot C. L. Brenton in 1851; *see* E. C. Marsh, "English Translation of the Greek Septuagint Bible", *ecmarsh.com*, 2010, available at http://ecmarsh.com/lxx/.

While the creation of the Septuagint was important at the time for the Jews of Egypt and the Near East, many of whom spoke mostly Greek, its more far-reaching effects were to be felt within the Christian religion which was to make its appearance on the scene within a few centuries. For many of the members of the early Christian community, especially those who were not originally Jewish, the Septuagint became the authoritative version of the Mosaic Bible or Old Testament. And the Septuagint's approach to feticide was to influence the Church's view of the matter for much of its subsequent history.

For example, in the fourth century, Augustine stated that the killing of an 'unformed' fetus could not be considered a homicide, basing his opinion on a Latin translation of the Septuagint interpretation of the Exodus verses; this distinction between a 'formed' fetus and an 'unformed' fetus subsequently found its way into the authoritative Canonical corpus of the twelfth century known as the Decretals of Gratian.[8]

Ultimately, Catholic doctrine was to adopt a position viewing the killing of any fetus ('procuring an effective abortion') as the equivalent of homicide, a position enshrined in both Codes of Canon Law enacted during the twentieth century[9]. However, during the period in which some of the most basic concepts of the English Common Law were being developed, the distinction between 'formed' and 'unformed' fetuses was part of Canon law – and consequently played an important role in the Common Law view of this issue. It is this period to which we shall now set our sights.

III. COMMON LAW AND THE 'BORN ALIVE' RULE

As noted above, the compilation of Canon Law in the twelfth century included a distinction between the killing of a 'formed' fetus *versus* the killing of an 'unformed' fetus. At that time, England was, of course, a Catholic country in good standing. It should come as no surprise, then, that the Canonical distinction found its way into the English Common Law of the period as well.

The twelfth century jurist, Henry de Bracton, in his work, *De Legibus et Consuetudinibus Angliae* ("The Laws and Customs of England"), stated the position of the Common Law of the time as follows:

8 Sinclair, *supra* note 3, at 128-129. As Sinclair explains, there were also Christian thinkers who viewed the killing of any fetus – formed or unformed – as homicide, a position that ultimately won out within the Catholic Church.

9 *Codex iuris canonici* (1917); *Codex iuris canonici* (1983).

> If there be anyone who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the foetus be already formed or quickened, and especially if it be quickened, he commits homicide.[10]

On the surface, Bracton's statement seems nothing more than a restatement of the Canonical distinction extant at the time. However, according to Bracton, an additional element of 'quickening' seems to have been adopted by the Common Law. From the wording of Bracton's statement – *'and especially if it be quickened'* – it is unclear what the relationship is between the fetus being 'formed' and it being 'quickened'. Is the quickening ('especially', in Bracton's words) the central condition in order to convict for homicide of a fetus? Or would it in fact be enough if the fetus was 'already formed', as indicated in Canon Law?

In the thirteenth century Latin compendium of English Common Law known as *Fleta*, the possibility of viewing the killing of a fetus as homicide rested on the fetus being both "already formed and quickened".[11]

The word 'quickening' – referring to the ability of the mother to feel the activity of the fetus in her womb[12] – was to become a staple of the Common Law view of the status of the fetus in regard to the possibility of a homicide being committed upon it.[13] But was the element of 'quickening' intended as a substantive condition separate from and in addition to that of 'formation', or was it intended only as an element of an evidentiary nature? In other words, was the requisite 'quickening' meant only to be regarded as evidence for the fulfillment of the substantive condition that the fetus in the womb was indeed 'already formed'?[14] This conundrum – substantive or evidentiary – was to

10 Henry of Bracton, *The Laws and Customs of England* (G. Woodbine ed. 1968).

11 *Fleta: seu Commentarius juris Anglicani* 23 (1955).

12 J. Pedone, "Filling the Void: Model Legislation for Fetal Homicide Crimes", 43 *Col. J. L & Soc. Prob.* 77, 81 (2009) ("Quickening precedes viability and tends to occur around the fourth or fifth month, at the time when the mother first feels fetal movement, while viability generally occurs near the sixth or seventh month.").

13 Regarding the long history of 'quickening' in this regard, *see* M. S. Scott, "Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use", 1 *Mich. L & Pol. Rev.* 199 (1996).

14 According to Clarke Forsythe, this was an evidentiary issue since before quickening it was virtually impossible for either the woman, a midwife, or a physician to confidently know that the woman was pregnant, or, it follows, that the child in utero was alive." *See* C. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms", 21 *Val. U. L. Rev.* 563, 573 (1987). Ultimately, the element of 'quickening' became recognized as an evidentiary element, which was sufficient to prove the existence of a viable fetus when the fetus died in the womb, and to convict the person of the crime of 'child destruction' – a crime for which the punishment was less than the crime of homicide. *See* E. Coke, *Institute of the Laws of England* vol. 3 at 58 (1648).

repeat itself in regard to what became the central principle of the Common Law concerning the status of the fetus, i.e., the 'born alive' rule.

The 'born alive' rule (hereinafter – the "BAR") stated simply that if someone acted in a criminal manner in relation to a 'quickened' fetus in its mother's womb and that fetus subsequently died, the person could be found guilty of homicide – but only if the fetus was 'born alive' and died thereafter. Under this rule, no homicide was involved if the fetus died in its mother's womb.

The writer Andrew Horn is considered the earliest to detail the BAR in his work of the thirteenth century, in which he wrote:

> As to the infant who is slain, we must distinguish whether he is slain *en ventre sa mere* [in its mother's womb] or after birth, for in the former case there is no homicide, for no one can be adjudged an infant until he has been seen in the world so that it may be known if he is a monster or no…[15]

The statement often considered authoritative in regard to the BAR is that of the great Common Law jurist, Lord Edward Coke, in his seventeenth century treatise, Institute of the Laws of England:

> If a woman be quick with a childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision [misdemeanor] and no murder, but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder, for in law it is accounted a reasonable creature, in *rerum natura*, when it is born alive.[16]

Was the BAR itself an evidentiary rule or a substantive rule? From Horn's writings, the former seems to have been at the root of its original adoption. However, from Coke's wording – and especially from the final phrase 'for in law it is accounted a reasonable creature…when it is born alive' – one could argue that the rule was meant to be substantive. According to such a reading, the Common Law of the time declared that '<u>when</u> it is born alive' – and only from that point forward – was the child considered substantively to be a reasonable creature, who could be subject to murder (even if the act leading to the death predated the birth). On the other hand, it could be argued that

15 A. Horn, *The Mirror of Justices*, 139 as quoted in J. Shannon, "A Fetus is not a 'Person' as the Term is Used in the Manslaughter Statute", 10 *U. Ark. Little Rock L. Jour.* 403, 405 (1987).

16 Coke, *supra* note 14, at 58.

when Coke stated "for in law it is accounted a reasonable creature…when it is born alive", he was referring to the evidentiary rules that are part and parcel of the law and which dictate when a legal conclusion can be drawn; on this reading, Coke was clarifying that the legal conclusion that the fetus was a 'reasonable creature' could only be finally arrived at once the child was born alive, and no earlier.

The position that the Common Law BAR was evidentiary in nature would seem to be borne out by the 1601 decision in the matter of *Sims* – a proceeding in which Coke served as the prosecutor. The judgment included the following clarification in regard to the BAR:

> [T]he difference is where the child is born dead, and where it is born living, for if it be dead born it is not murder, for *non constat*, whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the batter or shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.[17]

So, while there is still academic disagreement as to the exact nature of the BAR[18], there would seem to be more support, both in the sources and among jurists and academics, for the view that the BAR was regarded as a rule of an evidentiary nature. For example, Clarke Forsythe states that the BAR was "an evidentiary principle that was required by the state of medical science of the day".[19] John Shannon clarifies:

> Unless the child was born alive, proving that the quickened fetus was alive at the time of the trauma to the mother was virtually impossible because of the limited understanding of fetal development, periods of fetal life, and causes of fetal death.[20]

The view according to which the BAR was a product of its time period, with its limited scientific and medical ability to assess the viability of a fetus or even whether it was alive, before its birth, opened the door in recent times to

17 *R. v. Sims*, [1601] 75 Eng. Rep. 1075, 1076 (K.B. 1601).

18 Sinclair, for instance, seems to view it as a substantive, rather than an evidentiary, issue. *See* D. Sinclair, "The Intersection of law and morality in Jewish, Canon, Common and Israel Abortion Law", 13 *Hamishpat* 239, 254 (2008) [Hebrew].

19 Forsythe, *supra* note 14, at 586.

20 Shannon, *supra* note 15, at 405.

changes in the rule in various Common Law jurisdictions, especially *via* statutory amendment. But, for hundreds of years, and even to this very day, the influence of the BAR was felt not only in England, but in myriad countries throughout the world, especially those that were at one time or another part of the British Empire.

IV. THE BAR ON THE WORLD STAGE

As we have seen, in England, by the thirteenth century the BAR was mentioned as a principle of the Common Law, subsequently attested to by the great jurist Sir Edward Coke. Not all jurists agreed with the BAR at the time, but by the eighteenth century, it was definitively viewed as part of English Common Law[21], with the great jurist of that period, William Blackstone, restating the BAR thus:

> [T]he person killed must be 'a reasonable creature in being, and under the king's peace', at the time of the killing… To kill a child in its mother's womb is now no murder, but a great misprision; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.[22]

A century later, in 1877 when James Stephen published his volumes on Criminal Law, he, of course, included the BAR. Stephen was subsequently appointed to a Commission tasked with codifying the Criminal Law, and Stephen's formulation of the BAR in his book consequently became the basis for section 162 of the draft Criminal Code of England of 1880 tabled in Parliament by Prime Minister Benjamin Disraeli's Attorney General. As can be seen, the wording of the two are almost exactly the same:

Stephen's BAR formulation:	S. 162 of the Draft Criminal Code, 1880:
A child becomes a human being within the meaning of this definition, when it has completely	A child becomes a human being within the meaning of this Act, when it has completely

21 According to the historical description of the matter in Attorney General's Reference (No. 3 of 1994), [1997] 3 All E.R. 936.

22 W. Blackstone, *Commentaries on the Laws of England* 198 (1765).

proceeded in a living state from the body of its mother, whether it has or has not breathed, and whether the navel string has or has not been divided, and the killing of such child is homicide, whether it is killed by injuries inflicted before, during, or after birth.[23]	proceeded in a living state from the body of its mother, whether it has breathed or not, **whether it has an independent circulation or not**, and whether the navel string is severed or not. The killing of such child is homicide, **when it dies in consequence of** injuries inflicted before, during, or after birth.[Emphasis added]

It should be noted that, in addition to section 162, which enshrined the BAR rule possibility of conviction for homicide in the killing of a fetus – provided it was born alive before it died – the Draft Criminal Code of 1880 included a crime called 'killing unborn child' (section 205):

> Everyone is guilty of a crime and liable to penal servitude for life, who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born…

Ironically, while the Draft Criminal Code of 1880 was never adopted in England itself,[24] the Draft, in whole or in part, did end up becoming law in other jurisdictions: the colonies that were part of the British Empire. As one twentieth century book noted, "[the Codes that] the English denied to themselves, they gave with largess to their colonies and dependencies".[25]

Canada was the first to turn the Draft into law, using it as the basis for the Criminal Code it adopted in 1892. Second to adopt the framework of the Draft

23 J. F. Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* 138 (1st ed. 1877).

24 Stephen himself chronicled the numerous attempts made to get the Criminal Code passed by Parliament; *see* J. F. Stephen, *A History of the Criminal Law of England* vol. 3 at 349 (1883).

25 J. Michael & H. Wechsler, *Criminal Law and Its Administration* 1284 (1940).

Criminal Code was New Zealand in 1893, while the next few years saw more legal enactments of the Criminal Law rules set out in the Draft Code, including in the various colonies of Australia.

In this way, the BAR became statutory law in numerous Common Law jurisdictions down to the present day. For example, section 159 of the criminal statute in force today in New Zealand[26] entitled 'killing of a child' includes the exact wording of section 162 of the Draft Code. The BAR is also law in eight different jurisdictions of the United States: Oregon, Hawaii, Vermont, Montana, Missouri, New Jersey, New York and the District of Columbia.[27]

As noted, Canada was the first jurisdiction to adopt the Draft Code. Section 223(1) of Canada's modern Criminal Code[28] is the exact equivalent of the first sentence of section 162, while section 223(2) of Canada's Code includes only minor changes from the second part of the Draft's section 162. Canada's BAR was subject to judicial deliberation in the 1991 case of *R. v. Sullivan*[29]. The accused in this case were two midwives who were hired by a pregnant woman to help with the home birth of her baby. While the midwives succeeded in having the head of the baby emerge from the birth canal, the contractions soon stopped and by the time emergency medical personnel were called in, the baby was dead and could not be resuscitated. The midwives were charged with criminal negligence causing death to another 'person' under the relevant section of the Criminal Code. All sides were in agreement that if a homicide had been involved, the accused could not have been found guilty due to the BAR section which set that a child became a 'human being' – and subject to homicide – only if it had "completely proceeded, in a living state, from the body of its mother". It was argued, however, that the criminal negligence section, which employed the term 'person' rather than 'human being' could be read as pertaining to a full-term fetus which died while in the process of exiting the birth canal[30]. The Supreme Court of Canada, though, found no basis for differentiating between the terms 'person' and 'human being', leading to its finding the midwives not guilty of criminal negligence causing death –

26 New Zealand Crimes Act, 1961.

27 Pedone, *supra* note 12, at 83, 87.

28 Canada Criminal Code, R.S.C. 1985, c. C-46.

29 *R. v. Sullivan* [1991], 1 S.C.R. 489.

30 Conceptually and logically, it would seem difficult to argue that a criminally negligent person - whose level of culpability would certainly be considered lower than that of a person who intentionally caused death – could be found guilty and subject to life in prison if the death was of a fetus only 'partially born', when if that same person had intentionally caused the death of that same fetus, they would not be quilty of causing the death at all (due to the BAR). And, from the perspective of protecting the life of the fetus, it would seem absurd to protect the life only in the face of criminal negligence, but not from a person who intentionally ended such a 'life'.

since the fetus had not, in this view, become a 'person' for the purposes of the offence.

In our day and age, there are still many jurisdictions where the killing of a fetus in its mother's womb can only be considered homicide if it had first been 'born alive'. Some jurisdictions, including some which accept the BAR, have constituted a separate crime of killing a fetus in its mother's womb – similar to section 205 of the Draft Code. For instance, England itself legislated such a crime, calling it 'child destruction'.[31] Other jurisdictions such as Hong Kong[32] and various states of Australia[33] have enacted similar legislation, though with varying levels of punishment. In this way, different jurisdictions have extended the protection afforded by legal precedent and statute to the life of a fetus.

V. FROM ANCIENT ISRAEL TO MODERN ISRAEL

As we have seen, the Exodus rule of Ancient Israel regarding fetuses underwent a metamorphosis during the Hellenistic period, emerging in a different form in the Septuagint, which formed the basis for subsequent Canon Law and, ultimately, the Common Law 'born alive' rule. And it was the BAR thus constituted, which spread throughout the Common Law world, often *via* Stephen's Draft Criminal Code which was exported to many of England's colonies over the years.

One of the colonies in which Stephen's Code was adopted, with certain changes, was Queensland, which did so in 1899, two years before the new federated state of Australia came into existence. The Queensland Criminal Code divided Stephen's version of the BAR (s. 205 of the English Draft Criminal Code) into two separate sections, one dealing with the issue of when a fetus becomes a person and another clarifying that when such a fetus dies as a result of a criminal act that is considered homicide even if the act preceded the birth:

> s. 292. A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not…
>
> s. 294. When a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child.

31 Infant Life (Preservation) Act, 1929.
32 Section 47B of the Offenses Against the Person Ordinance.
33 *See, e.g.,* sec. 290 of the Criminal Code Act Compilation Act, 1913 of Western Australia.

It was Queensland's Criminal Code which was adopted by the British Colonial Office in London to become a model for Criminal Codes in many of the colonies under British rule at the time. Thus, for example, it was enacted in the Protectorate of Northern Nigeria in 1904, becoming the Criminal Code of all of Nigeria in 1916 after its unification[34].

For our purposes, the adoption in Cypress in 1928 of a Criminal Code based on that of Queensland is of supreme importance. The Cypriot Code became the model for the Criminal Law Ordinance adopted in British Mandatory Palestine in 1936.[35] As far as the BAR, though, the Cypriot Code included only the first of the two Queensland sections dealing with the rule – Section 292 of the Queensland Code which became Section 202 of the Cypriot Code – but not the second (s. 294) which explicitly stated that an act which preceded the live birth of a fetus could also be considered homicide.[36] Thus, when the Criminal Law Ordinance was adopted in Palestine in 1936, it included a section parallel to the Cypriot section 202 – which became section 220 of the Ordinance – with no section corresponding to the historical section 294 of the Queensland Code. In other words, in the Cypriot Code there was no section explicitly deeming a person guilty of homicide if he or she caused the death of a child born alive through an action undertaken against that child before its live birth.

This state of affairs did not have any actual ramifications for the first decades after the adoption of the Ordinance as the Criminal Code of Mandatory Palestine and then of the State of Israel itself. Only in the 2005 *Huri* case would Israel's courts be called upon to deal with the issue of an action taking place before the birth of a fetus, which caused its death after its live birth.

The *Huri* case dealt with a situation of a car accident, in which Huri drove recklessly, crossed into oncoming traffic and crashed into the car driven by Ms. Sarel, who was thirty-two weeks pregnant at the time. As a result of the crash, an emergency C-section was performed in which Sarel's baby was delivered. The baby was dead upon delivery, but as a result of medical life-saving techniques, his heart began to beat; unfortunately, after 14 hours, the baby died.

The Court of first instance found Huri guilty of criminal negligence causing death. This verdict was based upon the present section 308 of Israel's Penal

34 Y. Shachar, "Sources of the Criminal Law Ordinance, 1936" 7 *Tel Aviv U. L. Rev.* 75 (1979) [Hebrew].

35 *Ibid.*

36 Our attempts to uncover, through research, what led to the second part of the BAR being left out of the Cypriot Code were unsuccessful.

Law, 1977 (formerly, section 220 of the Criminal Law Ordinance), which reads:

> From the moment when a fetus has completely proceeded in a living state from the womb of its mother, it is considered a person for the purposes of this chapter [concerning the crime of causing the death of another], whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not.

Under section 18 of the Penal Law, a crime may consist of three types of elements: an act (or omission), circumstance and outcome; according to the accepted understanding, in the crime of causing the death of a person, the element of 'personhood' is considered a circumstance. The question in *Huri*, then, was – given that the existence of a 'person' was a circumstance of the crime, rather than part of the act or the outcome – should its existence be necessary at the time of the act itself or at the time of the outcome of the act, in order to convict. The Court decided that since the crime is one based upon outcome it is at the point of outcome – rather than when the act was done – that the existence of the relevant circumstance (*i.e.*, the existence of a 'person') was to be determined.[37] Therefore, since at the time of outcome the fetus had already been born alive – and hence become a 'person' under section 308 – the circumstance necessary for finding the accused guilty was fulfilled. Huri was thus found guilty of criminal negligence causing the death of the child.

An appeal to the District Court was limited to the legal question whether a person could be convicted of criminal negligence causing death when the action or omission took place when the victim was a fetus in its mother's womb. In a decision delivered in March 2011, one judge accepted the lower court's reasoning, while the other two reversed the judgment.[38] According to the majority, the factual element of the victim being a 'person' must exist at the time the criminal act was committed; in this case, at the time of the criminal negligence, the victim was not a 'person' according to section 308 – and therefore the majority decided to acquit the accused of the crime. Leave to appeal to the Supreme Court was granted.

Three months after the District Court published its decision in *Huri*, another judicial decision involving the death of a fetus 'born alive' came down. In this case[39], a woman named Chinchulker was accused of stabbing a woman named Atar to death. Atar had been eight months pregnant. As part of the

37 *State of Israel v. Huri*, Crim. Case (Tsfat) 1188/05 (2009).
38 *Huri v. State of Israel*, Crim. App. (Nazareth) 43/10 (2011).
39 *State of Israel v. Chinchulker*, Crim. Case (Be'er Sheva) 1620-07-10 (2011).

emergency medical treatment she received, the medical team performed an emergency C-section and delivered the baby alive. Unfortunately, the baby died four days later.

As part of a plea bargain with the prosecution, Chinchulker pled guilty to murder in regard to Atar herself and manslaughter in regard to her baby. In order to decide whether to convict Chinchulker on the basis of the plea bargain, one of the three District Court Judges[40] - Justice Azoulay – delved into the issue which had been raised by the accused in a preliminary proceeding: the question of the possibility of conviction for causing the death of a baby, when the criminal action took place before the fetus became a 'person' according to s. 308 of the Penal Law. It should be noted that, at the time of J. Azoulay's deliberation, the majority opinion in *Huri*, which opposed the possibility of such a conviction, had already been published, and the judge related to it.

Justice Azoulay wrote that in his opinion, when the fetus is born alive and subsequently dies – and when the accused was aware that her actions could bring about the death of the fetus/child – then legally the accused could be convicted of the relevant crime in relation to causing the death of the child. Justice Azoulay wrote that where a crime of outcome was involved, there was no statutory condition that the relevant circumstance – the victim being a 'person' – had to be in existence at the time of the criminal act; if the circumstance existed during the time of the outcome, *i.e.*, the death, that was enough in order to convict. He arrived at this conclusion after bringing sources from Jewish Law (with conflicting conclusions in the matter) and then referring to the English Common Law 'born alive rule'. In the event, all three judges in *Chinchulker* agreed to convict the accused in accordance with the plea bargain.

Six months after the decision came down in *Chinchulker*, Israel's Supreme Court gave leave for a second appeal in the matter of *Huri*.[41] The final judgment of the Supreme Court[42] was given in 2014 by Justice Jubran, with Justices Shoham and Barak-Erez[43] concurring.

40 The other two judges wrote that they saw no reason to give their opinion regarding this issue after the sides had agreed to a plea bargain and specifically asked the court not to look into this legal question.

41 *State of Israel v. Huri*, Leave for Criminal Appeal 7036/11 (Supreme Court).

42 *State of Israel v. Huri*, Criminal Leave to Appeal 7036/11 (Supreme Court), 24.4.2014 ("Huri Appeal").

43 Justice Barak-Erez agreed both with the result and with the reasoning, but added an opinion of her own, in which she expressed concerned for the potential fallout of the decision and the legal situation as long as the Legislature did not deal statutorily with the topic – both in regard to crimes in which the fetus dies in the womb and in regard to the question of potential responsibility of the mother herself for injury to her fetus.

After first opining that the District Court's majority erred in its understanding of the position of a leading Israeli jurist on the matter,[44] Justice Jubran found that there was no general requirement that a circumstance necessary for the conviction of a crime must always be in existence at the time of the criminal behavior itself. He then set forth a framework within which to ascertain whether, in regard to a particular crime, there needed to be a 'temporal connection' (simultaneity) between a requisite circumstance and the relevant (criminal) behaviour. This framework included three considerations, which Justice Jubran declared should not be viewed as a 'closed list'.[45]

Firstly, one must focus on the social interest meant to be protected through declaring the relevant activity as criminal. The second consideration was whether the relevant crime was a crime related to the behavior itself or a crime related to outcome. The third consideration was what role the requisite circumstance was meant to play within the context of the particular crime.

When analyzing the crime at issue – criminal negligence causing death – Justice Jubran showed that all three of these considerations pointed to the conclusion that in regard to this particular crime there was no need for contemporaneity between the negligence and the victim being a 'person'. Firstly, the social interest meant to be protected was human life – the protection of which would be curtailed if the death of a live baby were not protected only because the negligence which caused it took place before it was born. Also, according to the second consideration, this was a crime focused on outcome – and so from this perspective as well, it was more logical to check for the existence of a 'person' at the moment of the outcome, *i.e.*, when said 'person' died as a result of the negligence. Finally, the role of the circumstance of 'person' within the context of criminal negligence causing death, was not a role connected to the behavior at all or to the causation involved, but rather to characterize the final outcome itself – *i.e.*, the death of a person or not.

Both Justices Jubran and Barak-Erez referred in a detailed manner to the Common Law 'born alive rule' and to the comparative law protection of the life of the fetus in various jurisdictions. And both wrote of the need for the Legislature to attempt to formulate a more coherent policy in this area and give it expression within the provisions of the Penal Law.

44 The majority had concluded that the jurist Feller insisted that the 'person' who could be subject to a homicide must be in existence at the moment of the criminal behavior, just like any requisite circumstance must be in existence at such time. However, J. Jubran opined that Feller would have viewed the element 'person' not as a 'circumstance' (as is the common view of the matter) but rather as part and parcel of the 'outcome'; therefore, according to this view, Feller himself would not have required that the 'person' exist at the time of the behavior. *See* Huri Appeal, *supra* note 42 at par. 19-24 of Jubran's judgment.

45 *See* Huri Appeal, supra note 42 at para. 33 of J. Jubran's judgment.

A petition by Huri for an additional trial before an expanded tribunal of the Supreme Court was denied.[46] In her decision in the matter, Chief Justice Naor emphasized that the decision was consistent with both the express language of the statute and with the societal interest involved – the protection of human life.[47] It should be noted, in this regard, that the protection which the BAR (and section 308 of Israel's Penal Law) provides to the life of a fetus is obviously limited. To the extent that Israeli society – and the Israeli legislature – are of the view that it is important to expand the protection of life, it behooves the Knesset to undertake the legislative changes necessary to provide for criminal prosecution in cases where death was caused and the child was not 'born alive'.

At any rate, the result of the Huri decision was that in the twenty first century of the Common Era, the 'born alive rule' became recognized law[48] within the modern State of Israel[49] – the culmination of a journey which over the years reached various cultures and numerous corners of the globe, and which began over two millennia ago with a somewhat enigmatic verse contained in the Bible of Ancient Israel.

46 Petition for Additional Trial No. 3080/14.

47 *Ibid,* at para. 30 of C. J. Naor's decision.

48 Justice Jubran emphasized that he viewed the Supreme Court's decision as one based directly on the interpretation of existing Israeli statute law (s. 308 of the Penal Law), rather than adoption of the BAR as Common Law precedent or judicially created law. *See* Huri Appeal, supra note 42 at para. 58 of his decision.

49 Since the decision in *Huri*, another case involving the BAR (within the interpretation of s. 308) has been adjudicated in Israel. The case of *State of Israel v. Habusha* (Criminal Neg. Causing Death file 7588-05-16) (Shalom Court. – Tel Aviv) involved a car accident during a heavy fog when the accused crashed into a car, in which Lee Shalom Hirschberg, a woman in her fortieth week of pregnancy, was a passenger. Ms. Hirschberg's baby was delivered by C-section, but died 38 minutes later. The accused's defense focused on claims regarding the issue of negligence, rather than the 'personhood' of the victim. However, after he was convicted by the lower court and received a longer sentence than he expected, Habusha put in an appeal to the District Court raising the claim that the baby had only been undergoing attempts at resuscitation during the relevant 38 minutes, and had not, in fact, been 'alive' at any point (*Habusha v. State of Israel*, Criminal Appeal 64710-02-18 (Tel Aviv)); Then he withdraw the appeal following the court's recommendation.