Chapter 5
Criminal Law and Unborn:
Introduction and USA/UK Scenario

Introduction and Background

In order to analyse the status of the unborn in Criminal Law, generally\(^{388}\), the most basic question that needs to be answered is the following: If a baby is born alive only to die some time afterwards from a pre-natal injury, for what crime is the perpetrator liable? Coke\(^{389}\) considered that if the injury was caused after quickening\(^{390}\) by an attempted abortion or by a violent assault upon a PW, the answer to the question would be murder, even if the accused defendant did not intend or foresee death or serious injury to a fully born child.\(^{391}\) That the injury happened post quickening and there was live birth were the foremost requirements of the rule however. Intention was given a backseat in the event of these two being fulfilled.

It is relevant to explain at the outset that quickening was the standard, primitive to that of viability.\(^{392}\) In olden days, because of lack of modern day scientific techniques of determining pregnancy and ascertaining gestational development, it was only when the mother evidenced the activity of the child or when it was otherwise

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\(^{388}\) That is without confining oneself to any particular country.

\(^{389}\) Sir Edward Coke (1552-1634) was an English barrister, judge and politician considered to be one of the greatest jurist of his times. One of his best known works often referred to as ‘the foundations of our law’ is contained in ‘Institutes’. The same has been quoted in this thesis to reflect on the prevailing jurisprudence revolving around foetus and Criminal Law.

\(^{390}\) ‘Quickening is the name applied to peculiar sensations experienced by women in about fourth to fifth month of pregnancy’ (18-22 weeks): Ratanlal and Dhirajlal, *The Indian Penal Code* (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1795.


\(^{392}\) The IPC, 1860 does not use the term viability but quickening, though it is an outdated method of determining gestational age and is highly variable.
crudely visible from outside the womb that the unborn could be
treated as alive or capable of being born alive. It was only when it
was born alive or displayed such capacity that it could be a subject
of death/homicide or miscarriage\(^{393}\) respectively. Hence, quickening
performed an evidentiary function.

Bracton\(^{394}\) and Fleta\(^{395}\) were not fixated to live birth and
considered killing of the quickened foetus in the womb itself as
homicide.

Coke wrote: If a woman be quick with childe, and by a potion or
otherwise killeth it in her wombe; or if a man beat her, whereby the
childe dieth in her body, and she is delivered of a dead childe, this
is a great misprision, and no murder; but if the childe be born alive,
and dieth 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.\(^{396}\)

The above quote clearly elaborates that *in-utero* death of a
quickened foetus as a result of intentionally consuming some potion
or because of a violent third party assault on the PW was not

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\(^{393}\) Miscarriage is the premature expulsion of the foetus from the mothers
womb at any period of pregnancy before the term of gestation is complete.
Medically, three different terms viz abortion, miscarriage and premature
labour are used to denote this expulsion at different stages of gestation. The
term abortion is used only when the ovum is expelled within the first three
months, the term foetus when expulsion takes place between 4\(^{\text{th}}\) to 7\(^{\text{th}}\)
month (before viability) and premature labour is used thereafter (for delivery
of a viable child): Ratanlal and Dhirajlal, *The Indian Penal Code* (32\(^{\text{nd}}\)

\(^{394}\) Bracton, *Folio* 121. More properly famous as Henry of Bracton (ca.
1210–68), Bracton was an English jurist famous for his writings on Law,
particularly ‘On the Laws and Customs of England’. The Ames Foundation,
with the assistance of the Harvard Law School Library, has created an on-

\(^{395}\) *Fleta* Book I, c.23. Fleta is a treatise, written anonymously in Latin on
the Common Law of England. Blackstone branded it as one of the
authoritative statements of the law at the time at which they were written.
Sir Edward Coke also cites Fleta as an authority in his ‘Institutes’.

\(^{396}\) Coke, *Institutes* 3, 50.
homicide.\textsuperscript{397} Two aspects are notable: first is the fact that a foetus before quickening does not figure at all insofar as protection by Criminal Law is concerned and second, per Coke, it was murder only where the pre-natal injury sustained after quickening caused the death of a baby \textit{born alive}; and here the liability for murder ensued irrespective of any intention to kill the foetus. Both are objectionable.

First one because, it ignores the pre-quickened foetus altogether and second because it imputes upon the offender the crime of murder without satisfying one of its fundamental ingredients: ‘intention’. The first objection is a radical one and new in itself but not the latter.

Blackstone\textsuperscript{398} simply followed Coke and repeated Coke verbatim on the issue: ‘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 is murder...’\textsuperscript{399}

Thus a number of renowned scholars of their times, considered that: (1) murder of a foetus could ensue only after quickening, if other conditions were satisfied. Before quickening, a foetus could not be imagined to be protected by the laws of murder. (2) pre-natal injuries of the foetus were accounted for but live birth was a requirement and (3) if these two requirements were fulfilled (quickening and live birth), infliction of injuries resulting in foetal death was murder even in the absence of intention (mens rea). The last point effectively translated into the following: if abortion is being performed post quickening by a medical practitioner who, because

\textsuperscript{397} What it is; whether it is an offence at all is not important here. It is unequivocally not homicide per Coke. This is unlike Bracton and Fleta.
\textsuperscript{398} Sir William Blackstone (1723-1780) was an English jurist of the eighteenth century who is famous for for writing the Commentaries on the Laws of England.
he is not an expert, fails to perform it correctly and the foetus, instead of dying in the womb, takes live birth and then dies, the abortionist becomes liable for murder...

The rule suffers from various other drawbacks. If an abortion was attempted prior to quickening and it resulted in foetus being born alive and later death did not amount to any offence. The rule did not apply. Similarly, it did not apply to post quickening cases that resulted in still birth.

**Current Scenario**

Since, legal relations of rights, duty, power, liability etc, traditionally speaking, can arise only between persons, the legal position of the foetus in Criminal law raises difficult questions presently as well. This is because the foetus cannot be a victim because of lack of legal personality. In India and the UK, and rigidly so, this is the position. The law of homicide denies the unborn child any independent legal personality, and consequently fails to protect it at all, whatever its stage of gestational development. In the USA however, though conventional practice excludes a foetus as a legally relevant person but the scenario has been changing slowly. It is strange that while a full term foetus of 40 weeks gestation would be denied any protection of the law of homicide but a newly born child would receive the same protection as an adult, merely by virtue of being born alive and attaining independent existence. Giving such a step-motherly treatment to the foetus as against a newly born child merely adds to the anomalies and inconsistencies in the existing legal principles relating to the unborn child.

It is not that the entire corpus of Criminal Law does not offer any

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400 This has been detailed later in the chapter.
401 See generally *D v Berkshire County* (1987) 1 All ER 20. Though it must be markedly pointed out that the USA is totally different in this regard.
402 Refer to ch 5 for Unborn Victims of Violence Act 2004, a radical law that transforms the status of the foetus to that of a legal person in the USA.
protection to the foetus. The desire of the Criminal Law to protect the unborn child manifests particularly in the less severe crime of procuring a miscarriage. However, the author maintains that acknowledging legal personality to the foetus requires that the Criminal law acknowledge full personality in respect of the same so that the provisions of not only homicide but also hurt, assault, injury, and other relevant offences against the human body apply to the body of the unborn as well.

The following text analyses the status of a foetus in the USA, UK and India in that order, in the context of Criminal Law.

**Legal Status in the US Criminal Law**

In the USA, because of the efforts of the Judiciary and also the Legislature, the tendency towards recognising foetal rights in the arena of Criminal Law has seen an upward trend. The federal ‘Unborn Victims of Violence Act 2004’ (UVVA, 2004) (more commonly known as ‘Laci and Conner’s Law’) recognise an unborn child as a separate victim of criminal violence and treat the killing of an unborn child as a form of homicide. This operates in 36 states. In addition, 22 states define non-fatal assaults (hurt etc) on unborn children as criminal offenses. Prior to enactment of the federal law, the foetus in utero who was killed as a result of an assault on the PW was, as a general rule, not recognised as a victim of homicide or any other Federal crime of violence.

In addition to UVVA, 2004, there are provisions in various laws

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403 The law of homicide however has been consistent in this denial.
404 For instance, section 312 of the IPC 1860 makes causing miscarriage a punishable offence. The following sections, that is, sections 313-316 make various offences revolving around the foetus punishable under law.
405 Text to n 418-439.
406 The Unborn Victims of Violence Act 2004 was enacted by the Legislature amending Title 18 of the United States Code by inserting a new Chapter--90A that entails section 1841 – protection to unborn children.
407 The unique name comes from the names of the victims—a pregnant Laci Peterson of California who was eight months pregnant with a son who was to be named Conner. She was murdered in 2002 by her husband, Scott Peterson, in that pregnant stage.
of different states in America that classify the foetus as a victim for the purposes of certain specific statutory offences, such as vehicular homicide, foeticide or child abuse. Therefore, there can be occasions where criminal liability can be imposed on an accused who can be a third party who kills the foetus, or a mother who substance-abuses so as to harm her foetus.\textsuperscript{408} Though such statutory provisions are limited in their scope to very specific circumstances, it can be categorically said that such imposition of liability for crimes against the foetus transforms its status in Criminal Law of the USA to that of a legal person. There are improvements required but the country has come a long way from the Born Alive (BA) Rule\textsuperscript{409} and is definitely eons ahead of any other country in matters of recognising foetal rights.

Earlier, almost the entire USA, like the rest of the world, relied on the obsolete ‘born-alive’ rule for foetus related offences. Also the only crime, besides illegal abortion, that was recognised against the unborn (for which the unborn was protected in Criminal Law) was homicide.\textsuperscript{410} However, prosecution was not easy because it mandated that the unborn could be a victim of such pre-natal assault only if it was born alive after the assault, and then died as a result of it.

It would be useful to recall, as has been explained in other chapters, that the BA Rule was the result of unsophisticated medical knowledge and a high degree of pre-natal mortality. Primitive medical technology made it impossible to establish that a foetus was alive until it was born. As put by Mamta Shah,

\textit{[T]he impossibility of determining whether and when a foetus was living and when and how it died led to the difficulty of ascertaining whether a defendant’s misconduct was the cause of a

\textsuperscript{408} Refer to ch 4, ‘Confinement of Pregnant Women for Protection of Unborn’ for detailed discussion.
\textsuperscript{409} Refer text to n 106-116 for discussion on BA Rule.
\textsuperscript{410} Presently also, there is no offence in the nature of hurt to the foetus.
foetus’ death. In homicide cases, the Born Alive Rule provided an evidentiary standard for proving the corpus delicti of the homicide of an unborn child. Adoption of the Born Alive Rule avoided the difficulty of establishing a speculation.\textsuperscript{411}

Presently the situation has changed drastically. Medical and forensic science have made it possible to determine with almost pointed accuracy as to when the deformity set in and why or what was the cause of death.

The author maintains that law should translate the above development into granting legal personality to the unborn since conception. This has been substantially achieved in the USA post 2004, after the passing of the UVVA, 2004. The UK and India are not even close followers.

The SC of the USA explained the Born Alive Rule and the reason for its almost universal and age old\textsuperscript{412} acceptance in cases involving Criminal law (particularly homicide) in \textit{Commonwealth v Booth}. It stated that the rule essentially includes two aspects that (a) only one who has been born alive can be the subject of homicide and (b) that stringent proof of live birth is required. The Supreme Court proposed two reasons for these two conditions:

[F]irst, owing to the high incidence of pre-natal mortality and stillbirths, it was exceedingly difficult to determine that a foetal death or stillbirth had resulted from a defendant’s act and not from natural causes. Second, because the foetus was considered to be dependent upon, and therefore essentially a part of its mother, a prosecution for homicide could not be maintained, unless it could be shown that the foetus has become a person separate from its

\textsuperscript{412} \textit{Commonwealth v McKee} 1 Add 1 (1791). The McKee decision appears to be the earliest reported decision to deal with the rule.
mother.\textsuperscript{413}

**Unborn Victims of Violence Act, 2004**

Ever since 2004 when the federal ‘Unborn Victims of Violence Act, 2004 was passed, death of an unborn child became a prosecutable offence. As stated, presently the ratio of states, in the USA, that carry such provisions in their criminal law is 38: 12.\textsuperscript{414} Importantly, half the states provide protection to unborn without making such protection contingent on viability/gestational age.

The section reads thus: (d) The term ‘unborn child’ under the act means a child *in utero*, and the term ‘child *in utero*’ or ‘child, who is *in utero*’ means a member of the species homo sapiens, at any stage of development, who is carried in the womb.\textsuperscript{415}

It may be relevant to note that the Unborn Victims of Violence Act, 2004 amends Title 18, United States Code by inserting a new Chapter 90A relating to Protection of Unborn Children. Title 18 of the United States Code is the criminal and penal code of the federal government of the United States. It deals with federal crimes and criminal procedure.

\textsuperscript{413} *Commonwealth v Booth* 729 A 2d 1187 (1999). In this case the Defendant was driving his vehicle when he allegedly failed to stop for a stop sign and struck the car driven by one Nancy Boehm. Mrs Boehm, who was approximately 33 weeks pregnant at the time of the accident, was riding in the car with her husband. Both were seriously injured, and Mrs Boehm’s unborn child died in her womb as a result of injuries sustained in the accident. The court upon appeal held that the term ‘person’ protected unborn but viable foetuses (at least) in cases of homicide by vehicle.

\textsuperscript{414} As per the National Conference of State Legislatures (NCSL), ‘currently, at least 38 states have foetal homicide laws. The states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. At least 23 states have foetal homicide laws that apply to the earliest stages of pregnancy (any state of gestation, conception, fertilisation or post-fertilisation)’ <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx> accessed 09 September 2013 (last updated February 2013).

\textsuperscript{415} Title 18 USC ch 90A, s 1841(d)
Increasing attacks on PW leading to the deaths of their unborn children resulted in the US Legislature promulgating this law. It enables that the assailants who attacked or murdered PW would, in some States, which have adopted the legislation, be prosecuted on two separate counts- attack on, or the death of the woman plus the death of or injury to the unborn in certain circumstances. The legislation extends protection to the foetus in more than 60 federal crimes including murder, manslaughter, killings in the course of drug-related activities, death caused as a result of sexual abuse, injuries or killings in the course of interstate domestic violence and so on.\textsuperscript{416}

Perhaps the most radical part of the law is that it applies to the accused whether or not he knew of the existence of (the pregnancy), and whether or not the accused intended to cause the concerned harm to the foetus.\textsuperscript{417} It hence entrenches the Doctrine of Causation-that, one takes one’s victim as one finds him. The pregnant condition of the woman may be equated with and operates in the same way as a haemophilic patient for instance. It is a medical condition which is not necessarily apparent from outside,

\textsuperscript{416} Title 18 USC ch 90A, s 1841: Protection of unborn children.
\( \text{(a)(1)} \) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

\( \text{(2)(A)} \) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother.

\textsuperscript{417} Title 18 USC ch 90A, s 1841(a)2.
\( \text{(B)} \) An offense under this section does not require proof that—
\( \text{(i)} \) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or
\( \text{(ii)} \) the defendant intended to cause the death of, or bodily injury to, the unborn child.

\( \text{(C)} \) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

\( \text{(D)} \) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.
but which will render the consequences of an otherwise ‘normal’ assault so much the worse. To elaborate the analogy, the mere fact that the pregnancy of the woman who is assaulted is not visible would not entitle the accused to avoid liability by asserting that he was unaware of the condition. In other words, where the PW is still in the early stages of pregnancy, the Act presumes that the assailant has accepted the risk that she might be pregnant.

One not very obvious but positive outcome of this application of the Doctrine of Causation is that foetuses in the early stages of pregnancy also get protection of the Criminal Law. It is a marked shift from the traditional stand that afforded protection (if any) to the unborn only upon viability (that sets in only in the later stages) or upon live birth.

In short, the Unborn Victims of Violence Act 2004 represents a significant development in the recognition of foetal rights, and although it does not specifically state its intention to establish foetal personhood, it is nonetheless a remarkable achievement in that direction.

**Case law Preceding the Passing of UVVA, 2004:** As already stated, even before the passing of the UVVA, 2004 many radical states in the USA contained legislations treating a foetus as a victim of homicide. Enactment of the federal Unborn Victims of Violence Act did not supersede state unborn victims’ laws. Also it did not apply for state crimes in a state that did not have any such law. Since the UVVA, 2004 is a federal law, it applies only to unborn children injured or killed during the course of the federal crimes of violence that are listed in the law. They are more than 60 in number.

Nonetheless, ever since the passing of the Act, providing for unborn protection through legislations gathered a substantial thrust amongst states that did not have any unborn victims’ law. Presently, in most states of the USA the assailant of a PW can, in
addition to charges of assault on the woman, be convicted of another crime—foeticide, or some variety of homicide—if the woman’s unborn child dies. It is important to study how the current status came to be.

In this regard, *Keeler v Superior Court of Amador County*[^1^]{418} is an important case in relation to the status of the unborn child in Criminal Law. Facts of the case are as follows: Mr and Mrs Keeler had been divorced, and Mrs Keeler became pregnant by one Ernest Vogt and subsequently began to live with him. She concealed the pregnancy from Mr Keeler. When the latter learnt that Mrs Keeler was pregnant with another man’s child he accosted her and saying ‘I’m going to stomp it out of you’ and assaulted her. Upon examination of the foetus *in utero*, it came to light that it had suffered a fractured head and was stillborn. The foetal age was estimated between 34-36 weeks. Mr Keeler was charged with unlawfully killing a human being with malice aforethought under the relevant sections of the California Penal Code.

The SC was presented with the critical question whether the stillborn foetus was a human being within the meaning of the statute. In a split decision, 5-2, the SC decided to abide by the Born Alive rule and held that the term ‘human being’ did *not* to apply to a child, until it was born alive.

Mosk J, delivering the majority opinion noted that since the concerned penal law of California had taken immensely from the Common Law experience, it was but natural that the statutory provisions were intended to be interpreted along the lines of Common Law. The judge stated that, ‘when it [the Legislature] couches its enactment in Common Law language, [it is obvious] that its intent was to continue those rules in statutory form.’[^2^]{419}

It is submitted that advances in medical science that now give a

[^1^]: Keeler v Superior Court 2 Cal 3d 619.
premature foetus of 28 weeks or more an excellent chance of survival were ignored by the Judge. The court simply shut its eyes to the fact that the Common Law ‘born alive’ requirement was no longer in accord with scientific facts.

Mosk J also gave a constitutional colour to the justification behind retaining the Born Alive Rule. It is relevant to study that argument because of its logic and legal significance. He maintained that since due process required fair warning and since there was no reported decision of the California Courts which should have given the petitioner notice that the killing of an unborn but viable foetus was prohibited by the law, it would be unjust to prosecute him for an unstated crime.  

It is submitted that this technical lacuna would automatically disappear once personhood is legally recognised in the foetus, irrespective of gestational age. This way, the guarantees given by various legal systems of ‘protecting life’ would sound more meaningful and with substance.

The acting Chief Justice, Burke J (dissenting) accused the majority of ignoring ‘significant Common Law precedents, of [frustrating] the express intent of the Legislature; and of [defying] reason, logic and common sense.’  

Questioning the majority with probing statements, dissenting Burke CJ perhaps presented the best argument in favour of abandoning the BA Rule by stating,

[W]as defendant’s brutal act of stomping her to death any less an act of homicide than the murder of a newly born baby? No one doubts that the term ‘human being’ would include the elderly or dying persons whose potential for life has nearly lapsed; their proximity to death is deemed immaterial. There is no sound reason for denying the viable foetus, with its unbounded potential for life,

420 Keeler v Superior Court 2 Cal 3d 619, 492.
421 Keeler v Superior Court 2 Cal 3d 619, 494.
the same status.\textsuperscript{422}

Citing the case of \textit{People v Chavez}\textsuperscript{423} Burke CJ tried to highlight that there was not much of a difference between a full term foetus and a newborn child:

\textit{[T]}here is not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and normally, while still dependent upon its mother, the child for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life... It would be a mere fiction to hold that a child is not a human being because the process of birth has not been fully completed, when it has reached that state of viability when the destruction of the life of its mother would not end its existence...\textsuperscript{424}

The battle for the foetus was lost in \textit{Keeler} but it is noteworthy that in the wake of the lacunae highlighted by the \textit{Keeler} case, the California legislature amended its Penal Law to define murder as the unlawful killing of a human being, \textit{or a foetus}, with malice aforethought.\textsuperscript{425}

Another major step was taken by the California SC almost 25 years later in 1994 through the majority judgement of \textit{People v Davis} in which it was declared that the statute was to apply to a foetus of 7 or more \textit{week’s} gestation. This was a clear leap in the development and recognition of foetus as a separate legal person in Criminal Laws. Viability as a criterion or parameter for recognition of the unborn in Criminal Law was completely done away with. The Court concluded that:

\textit{[V]}iability is not an element of foetal homicide under the

\textsuperscript{422} \textit{Keeler v Superior Court} 2 Cal 3d 619, 497.
\textsuperscript{423} 77 Cal App 2d 626 (1947).
\textsuperscript{424} \textit{Keeler v Superior Court} 2 Cal 3d 619, 498.
\textsuperscript{425} See the California Penal Code, s 187, subd. (a).
relevant law and that third party killing of a foetus with malice aforethought is murder as long as the state can show that the foetus has progressed beyond the embryonic stage of seven to eight weeks.\footnote{30 Cal Rptr 2d 50, 872 P 2d 591 (Calif 1994).}

Reverting to the chronology of the 1980’s, another significant achievement of the courts was marked by the 1984, judgement of \textit{Commonwealth v Cass}\footnote{Commonwealth v Cass 467 NE 2d 1324 (Mass 1984): In this case while driving a car, the defendant struck an almost full-term PW. An autopsy revealed that at the time of the incident the foetus was viable and that its death was caused by the defendant’s action. The court accepted that proving the link between actus reus and result could be difficult in cases involving the death of foetuses, the court nevertheless believed that the difficulty of proving causation was no sound reason for denying criminal liability.}, when the Massachusetts Supreme Judicial Court became the first court to abandon the Born Alive Rule. However, it was done only in case of a viable foetus. It was held that a viable foetus was a person for purposes of a state vehicular homicide statute so that it was homicide if injuries were inflicted on a viable foetus which resulted in its pre-natal death. During those times, it was a significant step, though limited by 2 obstacles: (1) it applied only when the foetus was viable and (2) it applied only in case of vehicular casualty.

Point 2 limitation was done away with in the same year (1984) by another court-the SC of South Carolina in \textit{State v Horne}\footnote{State v Horne 282 SC 444, 319 SE 2d 703 (1984).} and held that it would be inconsistent to allow for the recovery of damages for wrongful death in civil cases while refusing to recognise a corresponding crime. In this case, a man attacked his full term pregnant wife with a knife. She survived the attack but her unborn child did not. The autopsy revealed that the child was viable and that the trauma the mother suffered as a result of the assault was the cause of its death.

The case is of utmost importance because the court highlighted to the world that murder of foetuses could be criminalised under...
prevailing murder statutes and Common Law could be brought in sync with the changing social requirements.

It is as a result of the Cass judgement in 1984 that 10 years later, in 1994, when similar facts presented themselves before the Oklahoma Court of Criminal Appeal in *Hughes v State* 429 another driving case involving the death of a late term foetus, the court had no difficulty in maintaining that killing of a viable foetus could be murder or manslaughter depending on circumstances.430 Rendering a very prudent and logical judgement, the court observed:

[W]e now abandon the Common Law approach and hold that whether or not it is ultimately born alive, an unborn foetus that was viable at the time of injury is a ‘human being’ which may be the subject of a homicide.431

In a way, all these cases can be regarded as landmark judgements of various courts of different states in the USA. They were formidable steps towards achieving personhood for the foetus in Criminal Law (specifically of Homicide). However all suffered from one major drawback: dependence on ‘viability’ as a criterion for establishing whether killing of the foetus tantamounted to homicide. Though they (the cases) managed to overcome the hurdle put up by the Born Alive Rule, the former was proving to be a complete roadblock as only viable foetuses were being accorded (if at all) protection of the laws of homicide.

In 1997, through the case of *State v Holcomb*432, another case involving the killing of a foetus by a third party, it was for the first time that the court established that even a pre-viable foetus could be the object of first-degree murder. This was in the state of Missouri. This case highlighted that just because abortion was allowed as a right to the PW, did not lead to the necessary

430 See *Hughes v State* 868 P 2d 730, 734.
431 *Hughes v State* 868 P 2d 730, 731.
432 *State v Holcomb* 956 SW 2d 286 (1997).
conclusion that in proper cases, the unborn child could never be a victim of third party homicide, or the third party could evade prosecution for killing the foetus without the consent of the PW.

This line of cases also display that in order to circumvent legislative lethargy, many US states managed to extract protection for the foetus through creative interpretation of the statutes by courts. It is the Judiciary and not the Legislature that took the lead. To recapitulate, for instance, the Supreme Court of Massachusetts in Commonwealth v Cass, the Supreme Court of South Carolina in State v Horne, and Oklahoma’s Court of Criminal Appeals in Hughes v State all held that their existing homicide statutes applied to viable foetuses. In Cass, the court even tried to overcome the hurdle posed by the condition of viability by leaving open the possibility of subsuming non-viable foetuses in the definition of person under general homicide laws.

Currently, as stated earlier, various states of the USA, have comprehensive foeticide laws. The statutes recognise that the crimes of murder, voluntary manslaughter (Culpable Homicide) and, if the unborn child is injured, the crime of aggravated assault can all occur against a foetus and thus, it mandates protection from all these.

Cari Leventhal comments,

[Without ever seeing the light of day, or extracting a breath of fresh air, a foetus is gradually acquiring legal protection as a ‘person’ in the United States. By way of legislation or court decisions, half the fifty states prohibit the killing of a foetus outside

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433 Abortion in some literature is regarded and termed as 2nd party homicide, 2nd party being the mother.
437 For instance, Minnesota, Illinois and Pennsylvania are states with foeticide statutes.
the domain of legal abortion.\textsuperscript{438}

**Legal Status in the UK Criminal Law**\textsuperscript{439}

Criminal Law of the UK does bestow some protection to the foetus, but it does so only vaguely and coincidentally and not cogently and directly. Most of the times, its regard for the foetus is to protect it through the PW, as her adjunct. The focus is on the requirement of being born alive. Normally, the aspect of viability or quickening (crudely speaking) is also added to ascertain the offenders’ liability. Meaning, any pre-natal injury to the foetus would be a criminal offence only after it has attained viability and provided it is born alive. Once this happens, even if it dies after one miniscule second, the requirement of Criminal Law to inculpate the offender would be satisfied. Conversely, there would be no crime committed under Criminal Law if the injury happens before viability or if the injury happens after viability but the pregnancy does not result in live birth (it is stillborn).\textsuperscript{440}

**Contribution of Courts**

Since the late 90’s at-least, the accepted view of foetal status in Criminal Law in the UK has been expressed clearly by the English courts in *Attorney General’s Reference (No. 3 of 1994)* which enshrines the ‘Born Alive Rule’, stating that ‘violence towards a foetus which results in harm suffered after the baby has been born can give rise to criminal responsibility.’\textsuperscript{441}


\textsuperscript{439} With the exception of WD, the position in the UK is clear under civil law--the foetus is not a person until it has achieved live birth: see, for example, *Paton v British Pregnancy Advisory Service Trustees* (1979) QB 276. The situation is not so clear however in Criminal Law. Though the law is developing towards a concrete stand ever since *Attorney Generals Reference*. Text to n 389-397 for details on Coke’s Rule.

\textsuperscript{440} Attorney General’s Reference (No 3 of 1994) (1998) AC 245, 254. In **Attorney-General’s Case**, the accused had stabbed a PW in the abdomen, causing her to go into premature labour. Two weeks later she gave birth to a live child who survived for 121 days.
So, the status in Criminal Law hinges on live birth. Till then, a foetus is not viewed as a ‘person’ for the purposes of obtaining protection. It is important to point out however that the foetus is afforded some protection through the criminal law in the form of the Abortion Act 1967, although only after 24 weeks.\textsuperscript{442}

In \textit{Attorney-General’s Reference (No. 3 of 1994)}\textsuperscript{443}, a case which, Stephen Gough says ‘has generated less comment than it may deserve’\textsuperscript{444}, the author maintains that, the foetus has been accorded a curious status. In this case, the defendant (D) had fathered the child of a woman (PW), who was pregnant with F, the foetus. F# is the child after birth. D stabbed the PW and pleaded guilty to a charge of wounding her with the intent to cause her grievous bodily harm. At this time it was not apparent that F had suffered any damage \textit{in utero}. However, shortly after wounding PW, and because of it, PW went into labour and gave birth to F# who was premature. It now was realised that D had wounded F in his attack though not seriously. F# died 121 days later from a condition resulting from her prematurity but unconnected otherwise with the knife wound. D was charged with the murder of F#. He pleaded not guilty. A submission was made that no criminal offence relating to F# had been established. The trial judge held that neither the \textit{actus reus} nor the \textit{mens rea} for murder of F# was present\textsuperscript{445}.

The Attorney-General referred the following questions to the Court of Appeal:

1. whether the crimes of murder or manslaughter can be committed where unlawful injury is deliberately inflicted to a child \textit{in utero},

\textsuperscript{442} Till the 24\textsuperscript{th} week, abortion is a legal possibility under section 1(1)(a) of the Abortion Act 1967 (UK) if conditions prescribed therein are fulfilled.
\textsuperscript{445} There was no \textit{actus reus} because, at the time of the assault, F# was not a live person and the attack was on the PW, not F#; no \textit{mens rea} because D had no intention to kill or do serious harm to anyone other than the PW.
2. whether the crimes of murder or manslaughter can be committed where unlawful injury is deliberately inflicted to a mother carrying a child in utero, where the child is subsequently born alive, enjoys an existence independent of the mother, thereafter dies and the injuries inflicted while in utero either caused or made a substantial contribution to the death.

3. whether the fact that the death of the child is caused solely as a consequence of injury to the mother rather than as a consequence of direct injury to the foetus can negative any liability for murder or manslaughter in the circumstances set out in question.

The judgment of the HOL was unanimous. Lord Mustill and Lord Hope of Craighead delivered the speeches, the gist of which has been produced in the succeeding paras.

The first question was smartly evaded by the court stating that question did not arise on the facts of the case. It was declined to be answered. For the second question, the court held that the crime of manslaughter but not murder could be committed where unlawful injury was deliberately inflicted to a mother carrying a child in utero and the child was subsequently born alive, enjoyed an existence independent of the mother, and thereafter died as a result of those injuries. For the third question, the court was of the opinion that the question of murder did not arise (as clarified through the 2nd question) where the death of the child was caused solely as a consequence of injury to the mother rather than as a consequence of

446 Though scholars like Jennifer Temkin argued way back in the mid 1980’s that causing the death of a foetus even intentionally would not amount to murder, even though the baby was born alive but died thereafter (since a foetus was not a person contemplated by the laws of murder). She opined that post-natal deaths would amount to homicide where the offender injured the foetus whilst intending to kill the mother or cause her really serious injury. This liability would accrue to him through the principle of transferred malice. See Jennifer Temkin, ‘Pre-Natal Injury, Homicide and the Draft Criminal Code’ (1986) 45 Cambridge Law Journal 414, 422.
of direct injury to the foetus. It could be manslaughter only and if it were indeed manslaughter, the liability remained constant whether the death of the child was caused solely as a consequence of injury to the mother or as a consequence of direct injury to the foetus. The offender would be guilty of manslaughter against the foetus. A mere fact that the attacker never intended any direct injury to the foetus would not mitigate his liability.

In coming to this conclusion the court delved into the details of the Five ‘Established Rules’ of Homicide. The purpose of this enquiry was ‘to see whether the existing rules were based on principles sound enough to justify their extension to a case where the defendant acted without an intent to injure either the foetus or the child which it would become.’ Lord Mustill was of the opinion that they were not. The five principles are as follows:

1. An act embodying an intention to kill or cause grievous bodily harm to another is sufficient to support a prima facie case of murder. This is sufficiently easy to understand and simply demonstrates that ‘intention’ has been regarded as an essential ingredient for murder. In the absence of the requisite intention (mens rea), there simply cannot be a charge of murder. In Attorney Generals Reference, the accused did not have any intention to kill the unborn, so inapplicable.

2. If D does A with the intention of causing harm of kind H to X and inadvertently does that kind of harm to Y, then that intent may be taken to be operative towards the harm actually done to Y. This rule embodies the Doctrine of Transferred Malice. Cases involving the doctrine are treated as if the actual victim had been the intended victim from the start. Lord Mustill straining to establish the inapplicability of the

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Doctrine of Transferred malice stated:

To make any sense of this process there must, as it seems to me, be some compatibility between the original intention and the actual occurrence, and this is, indeed, what one finds in the cases. There is no such compatibility here. The defendant intended to commit and did commit an immediate crime of violence to the mother. He committed no relevant violence to the foetus, which was not a person, either at the time or in the future, and intended no harm to the foetus or to the human person which it would become. If fictions are useful, as they can be, they are only damaged by straining them beyond their limits. I would not overstrain the idea of transferred malice by trying to make it fit the present case.

On this transferred malice point, Jennifer Temkin also argues along the same lines but by presenting a completely different logic. She maintains that, if the defendant injures the PW with the intention that she should die but as a result her baby dies after birth; if this is taken as murder because of transfer of intention from the woman to the baby, then too the application of the doctrine appears to be flawed. To quote Temkin,

If it is accepted that there is no relevant mental element where the injury to the foetus alone is intended (on the ground that a foetus is not a human being for homicide purposes), then there is no ‘person’ to whom to transfer the mental element when the woman is the object of the attack.

Hence, the problem remains exactly the same whether the intention is to kill the mother or to kill the foetus—and that is absence of personality in it (the foetus). It is relevant to note that the problem dissolves the moment personality is accepted in favour of the unborn. That an unborn has life, is sentient etc is a medically relevant and long established proven fact. It would be a legally sound principle to accept the same and acknowledge that it can be
killed (be a victim of homicide).\textsuperscript{448}

3. Leaving aside statutory provisions, the embryo or foetus cannot be the victim of a violent crime. In particular, it cannot be the victim of murder. This was taken to an unassailable rule and hence not elaborated upon. Meaning, it was simply accepted as the Gospel truth in case of Attorney Generals Reference.

4. If D does act A with requisite intent I and victim V dies after a period of time [consequence C], then A + I + C = murder provided there is unbroken causal connection between A and C. This rule is an exception to the generally accepted principle that \textit{actus reus} and \textit{mens rea} must coincide. A continuous act or a continuous chain of causes leading to death is treated by the law as one consolidated act. This was considered inapplicable because the act A of D done with the intent I was not directed towards the foetus (victim V) in the instant case.

5. Violence towards a foetus or embryo \textit{in utero} which results in harm to the child subsequently born alive can ground criminal responsibility, even where, as per rule 3, the harm wouldn’t have been criminal if it had been suffered \textit{in utero} alone.

Lord Hope of Craighead elaborated upon the difference between murder and manslaughter.

\textit{Criminal homicide is divided by the Common Law into the two separate crimes of murder and manslaughter.}\textsuperscript{449} Manslaughter itself can be divided into various categories, depending on the context for the exercise. In regard to \textit{mens rea} it is usually convenient to distinguish between (1) cases where the accused intended to injure the deceased and (2) cases where the accused had no such

\textsuperscript{448} The third rule of homicide however maintains otherwise.

\textsuperscript{449} Manslaughter is roughly the same offence as Culpable Homicide not amounting to murder under section 304 of Indian Penal Code, 1860.
intention. Within the first category there are the cases (a) where he intended to cause grievous bodily harm to his victim but his criminal responsibility is reduced on the ground of provocation at the time of the act, and (b) where he intended to cause only minor harm to the victim but death ensues as a result of his act unexpectedly.

The question, once all the other elements are satisfied, is simply one of causation. The defendant must accept all the consequences of his act, so long as the jury are satisfied that he did what he did intentionally, that what he did was unlawful and that, applying the correct test, it was also dangerous.

Since the defendants act in the present case demonstrated all these requirements, the charge of manslaughter as per Craighead was proper.

Lord Mustills discomfort on the charge of manslaughter was due to the fact that the charge could be sustained so long as the act of the accused was to cause harm, irrespective of the prospective victim (or whether the accused knew of the existence of the prospective victim) and thus entailed a doctrine of general malice. Lord Mustill, elaborating upon his discomfiture about the charge of manslaughter to such cases commented:

[All that it is needed, once causation is established in case of manslaughter, is an act creating a risk to anyone; on a broader canvas, the proposition involves that manslaughter can be established against someone who does any wrongful act leading to death, in circumstances where it was foreseeable that it might hurt anyone at all; and that this is so even if the victim does not fall into any category of persons whom a reasonable person in the position of the defendant might have envisaged as being within the area of potential risk. This is strong doctrine, the more so since it might be said with some force that it recognises a concept of general malice (that those who do wrong must suffer
the consequences of a resulting death, whether or not the death was intended or could have been foreseen).

Despite his personal dilemma, Lord Mustill conceded that since it was the (then) current state of English law and produced a result which did substantial justice, it was acceptable. It almost appears that the judgement was delivered in favour of the charge of manslaughter (and not murder) for lack of choice. Thus, the judgement leaves much unanswered. The stands taken are also not compatible with sound logic and medical developments. The act of D in the case has to be murder through the proper application of the doctrine of transferred malice. A foetus is a living entity which may be taken as having a sui generis status of being present inside the PW’s womb. In such a scenario, if a fatal attack on the PW ends up only injuring her but kills her unborn child instead, there is a clear case of intentional killing of the latter. Just because the actual victim is not the intended victim does not absolve the accused of the guilt of snuffing off a life. It is suggested that instead of shrouding such cases under the pretext of legal technicalities or, more specifically, lack of personality in the foetus, it would serve the legal system better if the demands of logic, justice, good conscience and medical advancement are met.

Reverting to the judgement of Attorney General, Lord Mustills famous dissent from the proposition that the foetus is part of the mother (as maintained by the Court of Appeal) was in the following words,

\[\text{An embryo is in reality a separate organism from the mother from the moment of its conception.}\]

This individuality is retained by it throughout its development until it achieves an independent existence on being born. So the foetus cannot be regarded as an integral part of the mother in the sense indicated by the Court of Appeal, notwithstanding its dependence upon the mother for its survival until birth.
Hinting at overhauling of the existing laws to cover foeticide as homicide, he continued:

[I] would, therefore, reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a ‘person’ it must be an adjunct of the mother’ and adds ‘Eschewing all religious and political debate, I would say that the foetus is neither [a person, nor an adjunct of the mother]. It is a unique organism. To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead.

On the face of it, the statement does appear logical as reason is the soul of the law; when the reason fails, so must the law.\textsuperscript{450} It is true that laws are generally formulated taking into consideration the social and cultural situations and circumstances present during the time of formulation and those reasonably foreseeable. If it is bombarded with a totally novel situation which the Legislature did not foresee at all, during conceptualisation, the law cannot be applied to the same. However, this should not stop legal reform or development. The law of homicide as it originated may not have had the foetus within its purview but this does not mean that we cannot now remedy it. In-fact, if weakness is known, wisdom lies in removing it. Given our contemporary knowledge of embryology and human development, such knowledge not having been previously available to the law, it would be prudent and advisable to encompass this new development and provide legal rules governing the same.\textsuperscript{451}

On one hand, and strangely so, Lord Mustill denied the ‘mothers adjunct status’ to the foetus and on the other hand did not find the case fit for the application of the Doctrine of TM (Transferred

\textsuperscript{450} Taken from the Latin maxim ‘Ratio est legis anima, mutata legis ratione mutatur et lex’.

\textsuperscript{451} See Gerard Casey, Born Alive: The Legal Status Of The Unborn Child In England And The USA (Barry Rose Law Pub Ltd 2005).
Oliver Wendell Holmes once wrote,

"It is revolting to have no better reason for a rule of law [to prevail] than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.\textsuperscript{452}

This is the case with consistent and strangely obstinate denial of legal personality to the foetus in Criminal Law in the UK (as also in India, as would be seen later in the chapter).\textsuperscript{453} It would not be wrong to maintain that denial of legal personality to the unborn is substantially\textsuperscript{454} because of the Born Alive Rule (a foetus is considered to have attained personality only upon being born alive)—a rule that has long outlived its usefulness.

It would be pertinent to draw the readers’ attention to the dissenting judgement in \textit{Winnipeg Child and Family Services (Northwest Area) v DFG} in this regard\textsuperscript{455}:

\textit{[H]istorically, it was thought that damage suffered by a foetus could only be assigned if the child was born alive. It was reasoned that it was only at that time that damages to the live child could be identified. The logic for that rule has disappeared with modern medical progress. Today by the use of ultrasound and other advanced techniques, the sex and health of a foetus can be determined and monitored from a short time after conception. The sophisticated surgical procedures performed on the foetus before birth further belies the need for the ‘Born Alive’

\textsuperscript{452} Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, 469.
\textsuperscript{453} The USA, as already seen is leaps ahead in this regard though not quite there: see text to n 414-417 for details.
\textsuperscript{454} Not wholly because the limitation of viability is also there.
\textsuperscript{455} Despite the fact that the case belongs to Civil Law of Torts and not Criminal Law, the evocation of the court regarding the Born Alive Rule is impressive and cogent.
The whole basis of Common Law or judge-made-law was to afford justice on sensitivity of case basis and then suddenly the Doctrine of Stare Decisis was read into the legal system which stifled creative judgement. Outdated conventions prevailed in the name of consistency and are prevalent till date in many jurisdictions like the UK. As Gerard Casey notes,

"The conservatism of the Common Law is notorious. There are only two ways to escape its reach. The first way is by means of the sharp sword of statute. For those of a conservative bent this is a remedy not without danger but it has its uses in allowing us to cut through the Gordian knot of dead or decaying traditions. The second way to escape the reach of an established rule is by circumventing it."

The reader may note that the idea of the author is not to declare that the Born Alive Rule or ‘quickening’ were illogical parameters that resulted in warped decisions. The protest of the author is just at the continuation of those criterions despite advancement in medical and related technology. The author concedes with Forsythe that

"In its adoption of the Born Alive Rule and the quickening doctrine, the Common Law closely followed the medical evidence of the day. Those were the times when it could not be proved that the child in utero before quickening was alive so the law adopted the presumption that the child was first alive at quickening and made the production of a miscarriage thereafter a grave offense. Likewise, the law could not prove the corpus delicti of homicide, until the unborn child was observed alive outside the womb, so the law adopted the presumption that children are stillborn, unless there

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457  Gerard Casey, Born Alive: The Legal Status Of The Unborn Child In England And The USA (Barry Rose Law Pub Ltd 2005) 98.
was evidence of a live birth. It was not until a live birth occurred at any time of gestation that the law could prove life, death and causation, and with such evidence, the Common Law punished the resulting death as a homicide.\textsuperscript{458}

Presently, the world science does not suffer from any such handicap. In Criminal Law, several technological advancements have brought in changes in the law, viz. Video recordings, photographs, finger-printing, DNA analysis, polygraph test, ossification test and so on. In the modern times, evaluation of evidence depends heavily on these. There is no reason why medical progress in the area of technology, and specifically in obstetrics and foetology should not influence the law in relation to the unborn.

For instance, the specific evidence necessary to prove the \textit{corpus delicti} of homicide of an unborn child \textit{in utero} consists of three elements: (1) proof of pregnancy or the existence of a live foetus, (2) the death of the foetus, and (3) that the defendants act was the proximate cause of the homicide.\textsuperscript{459} All these have been made possible by medical technology today. This presents perhaps the strongest case for burying the Born Alive Rule forever and to acknowledge full legal personality in the foetus.

\textbf{Legislatures Contribution to Foetal Status in UK}

As for the legislative provisions, in the UK, the criminal law provisions relating to the unborn child are contained in three different statutes, namely the Offences against the Person Act 1861, the Infant Life (Preservation) Act 1929 and the Abortion Act 1967.

\textbf{Offences against the Persons Act, 1861}

Under section 58 of the Offences against the Persons Act, 1861,

\begin{itemize}
\end{itemize}
it is an offence to attempt to ‘procure a miscarriage’. Section 59 prohibits anyone from supplying the means by which a miscarriage might be carried out. It must be pointed out that under sections 58 and 59 of the 1861 Act; it is an offence to procure an abortion in respect of ‘every woman, being with child.’ So, theoretically the provision protects any unborn whatever the gestational stage. Scholars believe and argue that the aim of the two sections was to protect women from the consequences of inexpertly performed abortions rather than to protect foetuses.

**Abortion Act, 1967**

The 1967 Act gives grounds for legal abortion. In 1991, through section 37(4) of the Human Fertilisation and Embryology Act, 1990, some changes were made to the Abortion Act, 1967. Under section 1(1) of the Abortion Act, 1967, which gave the grounds for medical termination of pregnancy, the gestational age, till which abortion was a legal possibility, was made till 24th week. If it exceeded 24th week, abortion could not be carried out legally at all. It also amended section 5 of the Abortion Act, 1967 (for the smooth

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460 Offences Against the Person Act 1861, s 58: Administering drugs or using instruments to procure abortion-

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

461 Offences Against the Person Act 1861, s 59: Procuring drugs, &c. to cause abortion-

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude.


463 Because advancement in medical technology made it possible to save a foetus of 24 weeks gestation in case of pre-mature birth.
operation of the Infant Life Preservation Act, 1929) and stated that if pregnancy was terminated by a medical practitioner and in consonance with the provisions of the Abortion Act, 1967, it would NOT be an offence under the Infant Life Preservation Act, 1929. This ensured that if a medical practitioner under the Abortion Act terminated a pregnancy, it would not amount to the offence of child destruction under the Infant Life Preservation Act, 1929.

**Infant Life Preservation Act, 1929**

The Infant Life Preservation Act 1929 was introduced solely to deal with a lacuna that made it no offence at all to kill a child in the process of being born, which now is an offence of child destruction. Child Destruction is the name of a statutory offence in England and Wales primarily.\(^{464}\) It refers to the crime of killing an unborn but viable foetus, that is, a child capable of being born alive, which has been fixed at 24 weeks gestation.\(^{465}\) Meaning, if the unborn is killed beyond the 24th week and it is not done in consonance with the Abortion Act, 1967, it would be an offence of child destruction under the Infant Life Preservation Act, 1929. The purpose of the offence is to criminalise the killing of the child *during* birth because it is neither legal abortion\(^ {466}\) nor homicide\(^ {467}\) as per the UK Laws.

It is under the Infant Life Preservation Act 1929 that the original focus was on protecting the foetus/newborn (even from the mother). Once born alive, any killing would be covered by the law of homicide.\(^ {468}\) The miscarriage offences cease once delivery begins.\(^ {469}\) As Wells and Morgan point out,

\(^{464}\) The 1929 Act does not apply to Scotland.
\(^{465}\) See *C v S* (1987) 1 All ER 1230.
\(^{466}\) The offence of child destruction is not abortion, legal or illegal (which is referred to as unlawful procurement of miscarriage in section 58 of the Offences Against the Person Act 1861).
\(^{467}\) Child Destruction is also not murder, manslaughter or infanticide either.
\(^{468}\) The definition of homicide requires the victim to be in *rerum natura* or ‘in being’, which means that he must be ‘completely born alive.’
[T]here was a lacuna which the 1929 Act sought to fill; as historians of the legislation have shown, it was passed to cover the twilight period between pregnancy and birth - that is, a killing in the course of birth, except where done to save the life of the woman. The Act sought to do this by making it an offence to cause the death of a foetus ‘capable of being born alive’ but which had not yet achieved an existence ‘independent of its mother’.

Thus, the 1929 Act reflected a concern that the criminal law was unable to deal for example with women who strangled their babies at birth.

The language of the section is wider and prohibits the killing of any ‘child capable of being born alive’. The meaning of the undefined phrase ‘capable of being born alive’ in the 1929 Act was settled through case law. In C. v S., both the Queen’s Bench Division and the Court of Appeal refused to interpret the phrase very narrowly. Consequently, the fact that a foetus of approximately 18 weeks gestation displaying some signs of life was taken as insufficient to render it ‘capable of being born alive’ for the purposes of the 1929 Act. C. v S is a decision that consolidated that the meaning of the concerned phrase, though the Act does not explicitly

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472 Infant Life Preservation Act 1929, s 1 Punishment for child destruction:
   (1) Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:
   Provided that no person shall be found guilty of an offence under this section, unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.
   (2) For the purposes of this Act evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be primâ facie proof that she was at that time pregnant of a child capable of being born alive.
473 (1987) 1 All ER 1230.
say that to be protected by the 1929 Act, the foetus must be capable of surviving if born alive.\textsuperscript{474}

Pearl and Grubb aptly discussed why the meaning of ‘capable of being born alive’ used in the 1929 Act to explain the offence of Child Destruction is ambiguous. They maintain that

[T]he words are by no means clear. If it is accepted that not every product of a conception is ‘capable of being born alive’ however early on in the pregnancy it may be, there seem to be three possible interpretations. First, that the foetus could be said to demonstrate real and discernible signs of life (but not necessarily possessing any capacity to survive) as, for example, where its cardiac muscle is contracting and a primitive circulation developing. Secondly, that the foetus must have the capacity to survive either naturally or with the aid of reasonable medical intervention if only for a short period. Thirdly, that the foetus has the capacity to survive naturally or with the aid of reasonable medical intervention for a realistic period.\textsuperscript{475}

It seems that the expression capable of being born alive covers the second as well as the third scenarios but not the first one where the chance to survive cannot be ascertained. Glanville Williams however maintains that

[I]t would be contrary to reason if the fact that the infant would

\textsuperscript{474} A foetus of 24 weeks’ gestation is presumed to have the capacity of being born alive. If such a foetus is aborted or an attempt is made to destroy the same, then it is for the defence to prove that the abortion was lawful and that despite the gestational age, the foetus was incapable of being born alive. The prosecution need not establish anything under the 1929 Act.

It is pertinent to mention that though the modest aim of the Act was to prevent viable foetuses from being destroyed while in the process of being born, the gestational age mentioned as a cut off was mis-interpreted as (1) the time when viability sets in and (2) the time till which abortions can be permitted-this legal significance attached to the viability factor was misplaced; See generally Special Report of the Select Committee of the House of Lords on the Infant Life (Preservation) Bill presented to the House of Lords by the Bishop of Birmingham, the Right Reverend Hugh Montefiore. Further, the argument of the author is that viability should be done away with: see text to n 168-171.

be able to live for a few seconds or minutes after birth but would then be doomed to die makes it ‘capable of being born alive.’ The phrase must surely mean capable of being born with a reasonable chance of survival.\footnote{476}{Dennis J Baker, Glanville Williams, \textit{Textbook of Criminal Law} (3rd edn (revised), Sweet & Maxwell 2012).}

It is submitted that when the question as to whether a child is ‘capable of being born alive’ comes before a court of law, it becomes a legal question and not a medical question; though medical science evidence can aid us in coming to a conclusion that is most congenial to the legal rules and norms of justice. For instance, in any given case it might be able to inform us the chances whether a foetus would be able survive if born alive and, possibly, for how long. However, medical science would not be able to tell \textit{with accuracy} that the child would die say within minutes for being born or would live for a reasonable time—this would always remain an unresolved question and there would always be a margin of luck or error. This being the case, the author suggests that if there is inconsistency, disagreement and general uncertainty, it is better to rely on theoretical and theological rather than medical and safely presume that every foetus indeed is capable of being born alive—there is no harm after-all in maintaining the same. The 1929 Act may be amended in the light of the original purpose, that is, to criminalise foetal deaths in the process of birth, to limit its application.\footnote{477}{It may be noted that section 299, Expl III of the IPC, 1860 also deals with the offence of child destruction but has been so aptly worded that there is no possibility of any interpretational ambiguity.}

From 1967 to 1990, there existed a possibility of an offence being committed under the 1929 Act despite compliance with the 1967 Act.\footnote{478}{See, on this point, \textit{C v S} (1987) 1 All ER 1230 and \textit{Rance v Mid Downs Health Authority} (1991) 1 All ER 801.} This happened when doctors performed abortions in say the 22\textsuperscript{nd} or 23\textsuperscript{rd} week when the foetus was very much ‘capable of being
born alive’ as termed by the 1929 Act. The Human Fertilization and Embryology Act 1990 smartly decoupled the two overlapping legislations and ensured that the abortion law used a twenty-four week limit for most abortions, thus sparing only post 24 week period for the offence of child destruction. After the passing of the Human Fertilization and Embryology Act 1990, doctors can no longer be hauled up under the 1929 Act for performing late abortions (in the stated limited circumstances) so long as they comply with the Abortion Act, 1967.479

It must be noted that though both the Offences Against the Persons Act 1861 and the Infant Life Preservation Act 1929 do sometimes provide routes whereby the interest of the foetus can be protected, they are perforce limited.

**Preface to the next chapter**

The next one is an adjunct to the present chapter and elaborates upon the Indian position of foetus in Criminal laws.