Chapter 8

Conclusion and Suggestions

At the outset, I would like to clarify that although this research has reached its aims and conclusions, nonetheless it has had its share of limitations and shortcomings. One that deserves special mention is that the research was perforce spread over various laws as there are many that touch upon the unborn tacitly or patently. It was humanely impossible to comprehensively cover each in the comparative manner. Hence, Laws of Crime and Tort where there is immense scope of something radical being accomplished for the foetus and its rights are primarily the laws that form the core of the research.

For the sake of avoiding a hop scotch of ideas and suggestions (because a number of laws across three nations are being compared) suggestions for law reform required for India and corresponding conclusions have been discussed as a part of each chapter instead of being all at the end. What follows here is a summary of conclusions and suggestions.

A. Conceptual Understanding Faulty: The understanding of the concept of human personality—that it starts at birth and ends at death is imperfect in India. There are pre-birth and post death situations where the non-existent entity continues to display rights’ based behaviour. For instance, long after the human being is dead and gone, his will, in case of testamentary succession, continues to govern those alive. Such anomalous situations are either not highlighted as an exception to the rule or are not understood to be exceptions at all. They are necessary to be read as exceptions\textsuperscript{634}. There can be no other explanation to them.

\textsuperscript{634} To the general rule that legal personality of natural persons begins at birth and extinguishes at death.
**B. Rationale for Conferment of Personality**: Since, P1\(^{635}\) provides the most inclusive definition of legal person; the pre birth and post death scenarios can also be made to fit into it. As for the reason/s, the author concludes that in the conferment of legal personality onto any entity, powerful political and social and economic forces are at work. This is the reason why some beings are granted the legal status and others are denied the same. Eg, animals could never gain that stature where they could garner enough legal support so that they could be bestowed with personhood. Hence they continue to be property. Likewise, a foetus does not have support in the form of advocates /activists to be able to snatch ‘legal personality’ for itself from the system. However, nothing stops the legal or judicial fraternity to pronounce the foetus as a legal person under P1 in India.\(^{636}\)

**C. Born Alive Rule**: The Born Alive Rule (BA Rule) has been a major hurdle in the foetus being recognised as a separate legal entity, vis a vis being an extension of the PW. The author suggests that there is nothing everlastingly sacrosanct about any Rule and the same is true for the BA Rule as well.

Increasing degree of personality is assumed to exist in the human being as it grows, important stages being foetus<quickened foetus<viable foetus<newborn<minor<adult. A minor does not have full personality because it does not for instance have the capacity to contract. However, basic rights are not denied to the minor. In the same vein, it is suggested that the unborn should not be denied legal protection. Improved information about stages of foetal development, newly acquired knowledge of modern science to prevent, ameliorate, or cure foetal disabilities etc should be considered carefully in evaluating foetal interests. If the same is done honestly, it would demonstrate that some foetal interests

\(^{635}\) Text to n 6.

\(^{636}\) As has been accomplished by the USA through the Unborn Victims of Violence Act 2004. Text to n 414-417.
deserve at least some legal protection at all stages of development—one such being the right to life from the time life comes into being (that is, conception). Such a revision of age-old rules is necessary to keep pace with medical advances.

To put it differently, discriminating between pre-viable and viable foetuses to provide legal protection does not augur well at all with the current state of medical advancement.

**D. Duty of Pregnant Woman towards Foetus:** If foetal rights have to have any significant meaning in the real sense, then the PW should owe a duty of care to her unborn child and this duty should be legal. The author suggests that if (say) a PW ingests toxic substances, it should be viewed as a violation of the foetal right to wholesome life and a serious breach of duty on her part. It is high time that the courts should recognise, and overwhelmingly so, the tort of maternal malpractice (analogous to the existing tort of medical malpractice). 637

**E. Viability Removed as Benchmark:** The states interest in potential human life should be extant throughout pregnancy. Potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. Hence, to choose viability as the special point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.

In light of the advancement in medical technology, viability should not be treated as a milestone that is set in stone—a pre-viable foetus is no less a potential human being. Also, since advancement in medical technology has assured two things concerning the foetus: (1) that the foetus and the PW are genetically

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637 Refer to ch 3, ‘Forseeability of Foetal Rights in Abortion Era; Possibility of Prosecuting PW for Foetal Abuse’ for understanding the situations where maternal malpractice has been recognised as a Tort.
different beings since conception and that (2) the foetus has life since conception, law should in response assure two things—that the concerned life is protected from arbitrary behaviour on part of the PW or third party and that in order to afford such protection, it is not necessary to set a cut off limit of viability.

Furthermore, the idea is never to shift focus from the well being of the PW; abortion, if it is permissible, in the restricted form suggested, should be allowed so long as the health of the PW permits the same. Contrary to the present position, where the shenanigan adopted reflects as if the state is interested in the life of both the mother and the foetus. On one hand, it conveniently refuses to grant any legal personality to the unborn and on the other hand displays concern for the ‘life’ of the foetus by denying the right of legal abortion by choosing the arbitrary standard/limit of viability because apparently at viability the foetus gains the capacity to exist independent of the host mother.638

**F. Social Recognition Translated into Legal Person:** Briefly speaking, when a woman recognises her foetus as part of the social community, the woman acknowledges that the foetus is a person and desires life for the foetus. The author suggests that in the light of such social recognition, if a certain claim is put forth by the foetus, it should not be viewed as untenable or unreasonable in the eyes of law. In-fact, in the wake of such social recognition, any brutal death of the foetus by a third party is not only a loss to the PW but also the foetus himself, who should have a right to recompense through punishing the perpetrator.

**G. Abortion Overrated:** Though abortion is an issue surrounding foetal personhood, it is not the only, in-fact not even the main issue. There are more pressing issues surrounding foetal personhood—some traditional like reliance on viability and live birth (as explained above and appropriately in various chapters), while

638 Text to n 155-163 for details on viability.
some are novel like foetal abuse by the PW, foetal homicide being not recognised by Criminal law in most jurisdictions, issues of wrongful birth due to medical malpractice, wrongful deaths and so on. It is a suggestion that India focuses on those matters than just abortion and its legality/morality.

**H. Abortion not for Birth Control:** Abortion should never be used as a medium of birth control. Abortion on demand is blatant murder. As a right, it should be circumscribed so that it is available only under the prescribed conditions of the MTPA, 1971. Instead of repeating, it is sufficient to begin and end the debate by restating one thought that is interspersed throughout the thesis—that it would amount to killing of a ‘person’ if it is not legal abortion to preserve the health/life of the PW.

Women in India till date do not have full control over their bodies. They are subjected to rape, marital rape, incest, forced to conceive to beget a son and forced to abort to lose the female foetus. In addition to this, widespread illiteracy, ignorance and social taboos prevent them from seeking methods to control procreation. The factors are endless. Hence, in the Indian scenario, it would be unreasonable to place the responsibility of conception only on the PW. It is also because of this that one has to suggest more liberal grounds of abortion in addition to the current MTPA, 1971. Nonetheless, the author advocates that abortion on demand should be denied in any case, because abortion should not be reduced to a method of birth control. It should definitely not be viewed as a ‘right’ on part of the woman, unless her case falls within the specified episodes mentioned in the MTPA, 1971.

The author is aware that this might be viewed as a hardliner stance and it might not find favour with the feminists. Also the

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639 Since India does not favour abortion on demand. The MTPA, 1971, regulates (or at least seeks to regulate) abortions in a systematic manner by giving specific grounds for abortions. The author also disfavours ‘on-demand’ abortions because it goes against the spirit of pursuing foetal personhood.
aspect of responsibility sharing by the putative father would also come into picture, but the author maintains that settlement of such issues is ancillary and does not or should not divert ones attention to the core aspect that needs to be acknowledged—that the woman is responsible for the pregnancy and the life that it creates.

In countries like the US (and wherever abortion is available on demand), although a PW does not have an obligation to allow a foetus to remain in her body and thus has a right to abort a foetus, the author suggests that once that woman forgoes the option of abortion, she assumes obligations and duties to the foetus that should translate into limiting her freedom and autonomy.

**I. Foetal Personality versus Legality of Abortion, not Contra:**
The author maintains that there is no contradiction in allowing abortion and demanding legal personality for the foetus as no jurisdiction protects all human life *absolutely*. There are killings in the nature of capital punishments for the prevention of further crime, and some others that are done in self defence which are justified. Lawful abortion can as easily be seen as further instances of the same.

**J. Negligent Behaviour towards Foetus and WD be Legalised:** The question of negligence in/as a tort was always a question of Common Law which could have been revised by the courts had it displayed the necessary will. However, when it came to compensating for pre-natal injuries suffered by the unborn before viability, complications of all sorts are read in.

The author suggests that India should not only come up with an unequivocal civil law policy regarding such injuries but also have a strong and cogent Wrongful Death (WD) statute. If legal personality is to be acknowledged in favour of the unborn, it is but logical that it should have an equal right to be free from death caused by the defendant’s negligence. It has been medically recognised long ago that the child has a separate existence before birth. It has become
the demand of the day that the same be accepted whole-heartedly by law as well so that any breach of duty toward that foetus be actionable, either by him (in and ex utero), or, if he is born dead, by his administrator under the wrongful death statutes.

It is suggested that India should have a specific ‘Unborn Wrongful Death Act’ to permit wrongful death claims for the death of an unborn child at any stage of development or gestation and even for in-utero wrongful deaths. This would place India not only at par with the most advanced countries of the world, but also introduce a change in one of the basic tenets of Tort law-survival of cause of action post the victim’s death. The tortfeasor (wrongdoer) would not be able to escape liability merely because he inflicted injuries so severe that they resulted in the death of his victim in utero. It would also mark as a watershed development for it would mean acknowledgement of foetus as a legal person.

*Tweaking of MTPA required:* The author in-fact maintains that with the suggested modifications to the MTPA, 1971 in place, the Indian model would perhaps be the best one available taking care of all conflicts especially the ones between right to self determination of the mother and foetal right to life.

It is apt to reiterate here that the author supports extreme regulation of abortion as is the case of India and not the liberal stand as is the case in the USA and the UK. The Indian policy behind almost banning abortion has one rationale (amongst many others) rooted in societal ideology and (mal)practices. Even for countries where sex selective abortions are not prevalent, this ideology behind the Indian model is not only morally and demographically healthy; it is also more conducive towards acknowledging the legal personality of foetus. After going through the literature and comparing the status of the USA and UK with

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640 This would effectively do away with viability and also the requirement of live birth for WD claims.
India, it can be safely concluded that there is no need to dilute the stringent abortion laws even when the Indian society evolves to pull itself out of sex preferences.641

**Criminal Law can do more to Protect Foetus:** It is not that the entire corpus of Criminal Law does not offer any protection to the foetus.642 However, the desire of the Criminal Law to protect the unborn child manifests particularly in the less severe crime of procuring a miscarriage.643 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.

It is suggested that *any* homicide of an unborn, beyond the purview of the MTPA, 1971644 should be treated as murder that is, killing of a ‘person’. A foetus in all stages of gestation should be taken as a ‘person’ irrespective of quickening or viability. It does not make sense to maintain that a viable foetus is a potential life while a pre-viable is not, one cannot be a soothsayer and decide the future of any unborn just on gestational age.

**Morality versus Practicality:** It is submitted that if parents don’t want to have a child, medically diagnosed to suffer a fair chance of being born with disabilities, they have already lost the emotional bonding and law should not coerce the mother into continuing with and delivering the child. It is not a question of modelling the baby to suit the particular requirements of parents; but is a decision of not having a baby with deformities.

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641 The obsession for the male child results in female foeticide-sex detection and selective abortion of female foetuses.
642 The law of homicide however has been consistent in this denial.
643 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.
644 Which provides for grounds of legal abortion.
The author maintains that there is nothing morally degraded about such a choice. The government in India and throughout the world is in support of eradicating polio as a disease because it would improve the chances of having healthy babies vis a vis deformed ones. The idea behind polio vaccination is that if a certain problem can be nipped in the bud, then there is no reason why the same should not be resorted to.

Though the thrust of this thesis is to garner support for foetal personality and more realistic protection of the same through law, the author has consistently maintained that abortion should be available in proper cases. The notion does not run contrary to the theme of this research but rather is in sync with it. This is because the idea is not only to derive and extract legal personality for the unborn, so that it can enjoy right to life, but rather the idea is also to ensure that the new entrant to the world has a meaningful life replete with ample resources, nurturing mechanism and support system to grow into a mentally and physically healthy adult. If the unborn is unwanted to the extent that the host PW herself is unwilling or unable, under compelling circumstances, to carry the pregnancy to term, there is no logic in forcing the latter to deliver. The author here is simply suggesting legalisation of the manner via which the PW can bail herself out of the situation and in general, to keep those ways (of obtaining legal abortions) minimal so that the activity remains circumscribed/regulated.

As an afterword, the author would like to mention that the work of this thesis primarily was conceptual analysis of whether an unborn is a legal person or not. A part of the conclusion derived is that there is an aura of strange vagueness and discomfiture (in the Legislature and Judiciary of India and the UK, if not the USA) surrounding the question making it difficult to arrive at a logical conclusion. Nonetheless, the author maintains that a conclusive decision regarding the same is not only necessary but of immense
practical importance because it would decide the ways in which and the degree to which, law would interact and protect the unborn, if at all.