An Abstract of Ph. D. Thesis titled

Legal Personality of Unborn: a Jurisprudential Analysis

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INTRODUCTION

The legal understanding of the concept of ‘person’ or ‘personality’ revolves around possession of rights and capacity to discharge legal duties. Hence, natural persons, that is, human beings are the prime claimants of legal personality.

Legal personality of natural persons begins at birth and extinguishes with death with the result that pre-birth, post death stages are devoid of any legal persona. Understanding absence of personality in the pre-birth stage (read foetal stage) poses problems as the unborn being understood as incapable of exercising any legal rights and not being duty bound towards anybody, gets a raw deal when it comes to tortious acts committed towards it. There are crimes committed against them that are not recognised as such and hence make punishment impossible.

For law, the problem is complicated by other disciplines like theology and medicine maintaining the unborn to be ‘living’ entity. The problem is whether unborn foetuses or a child in the mothers’ womb are legal persons or not? If personality begins only post birth, would it be an exaggeration to say that an unborn is worse off in his mother’s womb—susceptible and doomed to suffer all assaults without respite, till of course, it takes its place amongst the living! It is the submission in this research that the answer is ‘yes’. As a

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1 This is per general common understanding; though there is a strong difference of opinion here too which may be taken as exceptions.
2 For instance, threatening to kill a foetus is no crime. Similarly, simple or even grievous hurt (in-fact anything that falls short of ‘causing miscarriage’) is not an offence qua the unborn.
general rule of law they are not legal persons though there are exceptions, where the unborn is indeed given some modicum of legal personality. Various aspects of this topic have been discussed in this research modestly comparing the jurisprudence of USA, UK and India in the regard.

**PROBLEM, RELATED LITERATURE AND OBJECTIVE**

Dearth of original legal research on the topic of legal personality of unborn was the principle driving force behind writing on the aspect. Throughout the research it was difficult to obtain hard copy written material, which deals specifically with the proposed project. It is hoped that the proposed research will fill this gap. It is also a modest desire that the study proves useful to not only the academicians in providing intellectual fodder, but also to lawmakers in formulating laws pertaining to the rights of unborn.

In this regard, the present stand is vindicated by the observations of noted jurists, judges and academicians of eminence whose views have been quoted in this study.

A number of online materials were available revolving around the aspect of legal personality and the theories of personality and the same have also been relied upon in this research.

Another reason was the fallacies and misconceptions that are prevalent amongst people about the correct legal status of a foetus; most bizarre being the notion that a foetus is a ‘person’ with rights and duties—that it has the fundamental right to life and so on, while the fact is that in most of the countries, ‘a doctor can lawfully, by statute do to a foetus what he cannot lawfully do to a person who has been born’\(^3\). This research is an endeavour to remove some myths and highlight certain contradictions and/or misinterpretations which, over a period of time, have acquired the status

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\(^3\) Mackay v Essex Area Health Authority [1982] 2 AER 771 at 781. In India foetal death is legally permissible under the circumstances prescribed in the Medical Termination of Pregnancy Act, 1971.
of legally and morally correct view.

**HYPOTHESIS**

An unborn does not have any legal personality.

**METHODOLOGY**

The methodology adopted for this research was non-empirical/doctrinal comprising a systematic study and analyses of published research (journals, books and online sources). An attempt has been made to identify commonalities and differences in the treatment of an unborn under the legal systems of the USA, UK and India.

**LIMITATION OF STUDY**

Although this research has reached its aims and conclusions, nonetheless it has its share of limitations and shortcomings.

First of all, 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, the laws where the status of the unborn is almost settled, such as laws of property and succession have not been discussed in detail; they only find a peripheral mention. 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.

Secondly, it was difficult to find books related to the subject, let alone written on it. Most of the literature touched upon the issue of abortion, which is very different from the present study topic. Consequently, huge reliance had to be placed on medical/legal journals and reports (online or otherwise) to cull out and articulate arguments.

**ORGANISATION OF STUDY**

In order to provide a clear visualization and better understanding
of the topic of study, the entire work has been divided into seven (7) chapters. 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 my conclusion has been discussed as a part of each chapter instead of it being all at the end.

A brief introduction of each chapter follows:

**Chapter 1: Legal Personality of Unborn/Foetus**

On what basis are different entities ‘subjects’ of law? A bare perusal of the nature of some of them indicates that there is no common thread running through them; that they are not identical in nature or scope of their rights. In-fact, in India, an entity like a HUF may be a ‘person’ for taxation purposes, but is denied that legal personality when it comes to entering into a partnership.\(^4\)

Traditionally, per the Hohfeldian thesis, an entity is deemed to have legal/juristic personality if it is amenable to the right-duty correlation. A question that is relevant to answer in relation to personality is-‘is there any parameter followed in granting the same? The concept of legal personality has been puzzling and uncertain since inception. Hence, the case-law regarding the same has also been inconsistent. In 2001, the Harvard Law Review confirmed this diagnosis and concluded that ‘the law of the persons is fraught with deep ambiguity and significant tension; that the definitional problem of the person was likely to become more acute with ‘technological and economic progress; and further that the subject was so ‘grossly under-theorised that it merited more attention.\(^5\)

**Chapter 2: Tort Law and Unborn: USA, UK and Indian Scenario**

\(^*\) The term unborn and foetus, though technically different, have been used synonymously in this research.


This chapter explores the treatment meted out to the unborn in the Tort Law of the three countries. It also discusses the impact of the Born Alive Rule, which 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.

“The 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 foetus’ death.”

This is the main reason why pre-natal tortious injuries suffered by an unborn were not recognised as a civil wrong.

Presently the medical and forensic science situation has changed drastically by making it possible to determine with almost pointed accuracy as to what caused the injury, when the deformity, if any, 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 from conception itself.

The chapter also elaborates upon the emerging areas of Tort law that touch upon the unborn. Cases of wrongful death, wrongful life and wrongful birth are new areas where new tort laws are emerging. Courts have been grappling with a number of issues that were hitherto unheard of for instance, right of action by the unborn against the mother for failure to provide a healthy womb (say when PW is a drug addict, an alcoholic etc); the right of action against the mother for a botched self-abortion attempt resulting in temporary or permanent disability of the child; or the right of action against the attending physician for negligence.

Towards the end 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.

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and even for in-utero wrongful deaths.\textsuperscript{7} 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.

\textbf{Chapter 3: Feasibility of Foetal Rights in Abortion Era; Possibility of Prosecuting PW for foetal abuse}

This chapter, amongst other things, elaborates on how it is not hypocritical to advocate for foetal rights and personhood from the time of conception on one hand and supporting abortion on the other. For instance (and many such instances have been mentioned) if the mother herself, being the host, is unwilling to carry on with the pregnancy, there is absolutely no reason why the State should thrust it upon her to carry it till full term. Such extreme detachment of the mother from the unborn merits that foetal right to life be treated on a lower footing than life of the expecting mother. Though foetus should have a right to life, it must be life with dignity, a meaningful, wholesome life which would not be possible if the mother herself has not been able to form any emotional bonding with the foetus/would be child. Here it is suggested that attempts must be made to provide therapy and consultation to the PW to persuade her to keep the baby.

The second half of the chapter probes into the possibility of prosecuting PW for foetal abuse leading to wrongful deaths (WDs). Though pregnant women have been conventionally kept immune from WD claims, there is no reason why, in proper cases, the mother

\textsuperscript{7} This would effectively do away with viability and also the requirement of live birth for WD claims.
should be excluded from being liable for the said death.⁸ In fact in repeated cases of substance abuse⁹ that results in death of the foetus, it should be employed to set an example. Also, if the State can do as much as to enter a very private domain of depriving the mother a choice of whether she should keep the child or not, for several reasons¹⁰, the State can very well regulate the pregnancy further, in order to protect potential life and its rights.

Chapter 4: Confinement of Pregnant Women for Protection of Unborn

As per Rosamund Scott, ‘maternal foetal conflict concerns two main senses in which a PW may cause pre-natal harm. First, she may refuse medical treatment, caesarean or other surgery...Second, aspect of her daily life may be detrimental to the well-being of her unborn child such as smoking, consumption of alcohol or drug taking or for that matter failure to take care in crossing a road.’¹¹

The conflict between the rights of women and unborn take an ugly turn when one speaks of confinement of women for protection of their foetuses. The very thought seems perverse because we delve into the negative aspect of the rights discourse—rights are in modern times used as weapon to correct moral depravity. The relationship between the mother and her foetus, particularly the aspect of maternal care towards the unborn is more a matter of course than

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⁸ Though, in such cases extra care would have to be taken to differentiate accidental deaths from grossly negligent deaths.

⁹ The World Health Organisation (WHO) defines Substance Abuse as: the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.

¹⁰ For instance in India, apart from numerous holistic and religious reasons, prevention of sex selective abortions is one of the major concerns why abortion has not been given a free way. Despite protests and demands from pro-choice feminist circles, abortion remains heavily regulated and circumscribed through the Medical Termination of Pregnancy Act, 1971. Hence, India is by and large a pro life country more by compulsion of societal and religious dogmas and practices than by choice. In the USA and the UK, though abortion laws are lenient than that of India, there are regulations pertaining the same; it is not a lawless issue.

‘rights’. Thus, in case of PW-foetal relationship, what essentially was a part of maternal responsibility and innate to motherhood\textsuperscript{12} gets reduced to rights and becomes a matter of legal duty rather than a moral responsibility.

From the moral-philosophical perspective, it may be viewed as a debasement of the relationship from both sides--the mother refuses to alter her lifestyle of addiction for the sake of the unborn upon which the latter is up in arms against the former with the charge of abuse.

This chapter maintains that the rights discourse is ill equipped to understand the problem, as law cannot be perceived as the panacea of all ills.

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

This chapter analyses the status of the unborn in Criminal Law and seeks to answer certain basic questions such as whether a baby who is born alive but dies some time afterwards from a pre-natal injury, has any respite under Criminal Law (more specifically whether it can be a victim of homicide). If yes, whether viability plays a role in inculpating the perpetrator or whether injuries inflicted in the pre-viable stage also merit retribution.

In the USA, because of the efforts of the Judiciary and also the Legislature\textsuperscript{13}, 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’\textsuperscript{14}) recognize an unborn child as a

\textsuperscript{12} As automatic care for the entity in the womb.

\textsuperscript{13} 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.

\textsuperscript{14} 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.
separate victim of criminal violence and treat the killing of an unborn child as a form of homicide.

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 as a criterion 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).

Chapter 6: Criminal Law and Unborn: Indian Scenario

The chapter attempts to appreciate the legal position of the unborn in three Indian legislations viz. the Medical Termination of Pregnancy Act, 1971 (MTPA, 1971), Indian Penal Code 1860 and the Pre-Conception and Pre-Natal Diagnostic Techniques Act 1994 (PCPNDT 1994) in that order. The last legislation has been briefly mentioned. The chapter has been divided into three parts accordingly.

This thesis seeks to establish that in order to acknowledge foetal personality in Criminal Laws, it is necessary to criminalize that conduct which injures or causes death of an unborn child so that the unborn gets protection from conception until birth. In the Indian

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15 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] Q.B. 276. The situation is not so clear however in Criminal Law. Though the law is developing towards a concrete stand ever since *Attorney Generals Reference*. 
context, it translates into amending the IPC, 1860\textsuperscript{16} to include culpable homicide, murder, all kinds of hurt etc and attempts thereof as applicable to the unborn. This may be effectuated by specifically mentioning that the term ‘person’ in the Code includes an unborn child at every stage of gestation from conception until birth.

After going through the various provisions of law revolving around the foetus in India, four stems that can be easily identified where the Criminal Law, whether it is a general Criminal Code\textsuperscript{17} or a specific criminal law\textsuperscript{18} does not come to the rescue (though it does so for an adult). They are:

(1) it is definitely not an offence to threaten to kill a foetus,
(2) it is not necessarily an offence to injure a foetus\textsuperscript{19},
(3) it is not necessarily an offence to kill a foetus\textsuperscript{20} This is subject to the qualification of legal abortions\textsuperscript{21}
(4) it remains arguable whether it is a criminal offence to cause the foetus injuries from which it dies after being born alive\textsuperscript{22}

\textsuperscript{16} Particularly Chapter 16 dealing with offences against the human body.
\textsuperscript{17} That is the IPC, 1860.
\textsuperscript{18} Like the MTPA, 1971 in India or the Abortion Act, 1967 of the UK.
\textsuperscript{19} Unless the injury is done with intent to procure a miscarriage...see details later...At this point, it must be mentioned and underscored that in this segment the author is not dealing with civil liabilities/tort action that may arise in case of pre-natal injury to the foetus. The probe here is whether the Criminal Law declares it to be an offence or not.
\textsuperscript{20} Sections 312 (causing miscarriage), 313 (causing miscarriage without woman’s consent)-315 (preventing the child from being born alive or causing it to die after birth), and 316 (causing death of quick unborn child) do provide some instances which offer some protection to the unborn by providing for some punishment to the perpetrator in some instances. In the UK some protection is offered by the Offences Against the Person Act 1861, ss 58 and 59 (unlawfully procuring a miscarriage) and Infant Life Preservation Act 1929, s 1 (child destruction). The USA is on a different footing especially ever since the passing of the UVVA, 2004.
\textsuperscript{21} This is not the same as ‘on demand’ but is meant to cover limited abortion rights of the type recognized in the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), the precondition for which is that the woman requests/agrees. The thought that a foetus might be aborted contrary to the woman’s wishes (for example, on eugenic grounds) would probably be regarded as repugnant by most women and men.
\textsuperscript{22} Glanville Williams, 
Chapter 7: International Law (IL) and Unborn

The chapter investigates briefly whether International Law protects the unborn child, meaning whether it has been treated as an independent entity, whether live birth, viability etc are also a requirement in the international scenario or whether in utero stage is protected from assaults and death.

CONCLUSION

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.

In case of India specifically, it may be noted that hoards of policies and schemes for the welfare of PW and unborn/newborn are conceptualised and implemented by the government. The intention behind such schemes is to ensure protection to the PW so that she is able to carry her child to term in a safe and healthy environment. As a natural culmination of this effort, it is only logical that not only the PW but also the unborn be legally protected, and perpetrators of crimes/torts against unborn children be held accountable for their acts in law.

23 For instance the ‘Janani-Shishu Suraksha Karyakram’ (JSSK), Mamata, in Orissa for the welfare of PW and newborns.
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**INTERNATIONAL LAW**


