Chapter 1

Legal Personality of Unborn/Foetus*

Introduction

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.¹

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? A part of this introduction deals with how has the Supreme Court of India has dealt with the issue of ‘legal personality’, over the many years of its existence.²

Legal Personality, a Maze

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.³

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¹ The term unborn and foetus, though technically different, have been used synonymously in this research.
The work of this thesis primarily is conceptual analysis of why some entities are treated as persons (simply put, he who can act in law) in the eyes of law and some others as non-persons (those who cannot act in law and are generally thought of as property). The focus of this study is whether an unborn (the expression foetus has been used interchangeably) is a legal person or not. 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.

To begin with, it is important to specify that the law of persons is not a discrete field of study, but is scattered throughout the different branches of law-Tort, Crime, Family, Property and the Law of Succession, to name a few. Hence, the nature of protection that is afforded to the foetus in these different branches has been studied as separate chapter heads in this thesis. Consequently, they would find just a brief mention in the nature of preface in this introduction.

**Unique Case of the Unborn**

In case of the unborn, generally not taken to be a legal person, the jurisprudential controversy largely arises out of this denial, rather than the conferral, of personality. As put pithily by Ngaire Naffine, ‘there is a perceived disjuncture between legal and moral conceptions of the person--one that continues to disturb many legal theorists.’

Meaning thereby that the moral notion of the unborn might credit it with personality without any doubts, but the legal scenario is not that unambiguous. More so because confusion is added due to the different connotations in which the term person or personality is used in legal literature.

Broadly speaking, types of legal persons can be categorised as

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P1, P2 and P3. The elaboration of each follows:

**Personality 1 (P1).** This refers to the abstract form of legal person where legal personality is nothing more than the formal capacity bear legal rights and discharge legal duties. Since it is an abstraction, anything and everything can be branded as a ‘person’. Needless to say that it is the most inclusive definition of person and can be regarded as ‘potentially all encompassing’. All that the legislature needs to do here is to decide what entity should be treated as a subject of rights or other legal relations. From this perspective, animals too can be legal persons, if Law decides so or the Judiciary so stipulates. Hence an idol is a legal person in India. As Lawson puts, we are dealing with pure abstractions, something which exists only in contemplation of law.  

Sometimes this personality is understood to exist in the entity (such as human beings) while at other times the term is used in the restricted sense, that is, only for those entities to which law *attributes* personality. This restricted definition was elaborated upon by the Supreme Court of India in the year 2000 in *Shriomani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass*.

[A] legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination. Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. However, this should not lead one to conclude that the

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5 The categorisation of persons (P1, P2 and P3) has roughly been adapted from Ngaire Naffine, ‘Who Are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (May 2003) 66(3) The Modern Law Review 348. However, the arguments put forth on behalf of the unborn are new and original.


7 *Shriomani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass* 2000 (2) SCR 705.
expression ‘legal person’ is reserved only for those non-human entities on which law attributes personality. It may at times mean to include human beings, in regard to whom, personality is understood to exist. Human beings are the prime claimants of personality and they cannot be denied the same.\(^8\)

Salmond said, ‘So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Legal personality may be granted to entities other than individual human beings, for example, a group of human beings, a fund, and an idol.’\(^9\)

It is through the application of ‘P1 definition’ of person that corporations (group of individuals) are attributed personality by law through fiction. A corporation acquires a distinct personality upon incorporation because without this fiction it would be impossible for law to deal with the multitude of its members all at one go; so upon incorporation, the corporation as such gets authority to act as a single distinct unit.

However, all rules that are applicable to natural persons, that is, human beings, cannot be extended or transposed on to corporations. For instance, while human beings are citizens, corporations cannot be.\(^10\) They may have a certain nationality though.

Ordinarily, when corporations are given recognition by law, they acquire a number of capacities that a natural person, that is human beings, have, such as capacity to sue or be sued, borrow or lend money, pay taxes, acquire property in own name and many more. Access to courts by getting a capacity to sue is perhaps the most

\(^8\) Hence it is important to investigate, in any given piece of legal literature that one comes across, the connotation in which the expression has been used-wider sense or restricted.


\(^10\) *The State Trading Corporation of India Ltd v The Commercial Tax Officer, Visakhapatnam* 1964 SCR (4) 89.
important as in this way the law invests an intangible body with a
distinct unity and individuality of its own. However, though
corporations, upon acquiring personality, gain access to courts, it is
not to be thought that corporations have an access to courts as a
matter of course. The courts are open as a matter of course to
natural persons and not to ‘intangible concepts’ like corporations.
For instance, these privileges which corporations share with natural
persons do not make them ‘citizens’ entitled to every other privilege
which the municipal law gives, to citizens. It is debatable whether
Chapter III of the Constitution of India guaranteeing various
fundamental rights to persons and some to citizens would be
applicable to Corporations. The underlined rule is that only those
rules of natural persons that law deems fit, are transposed on to
corporations. In-fact in general P1 personality granted by law to an
entity through fiction is not equivalent to the personality of natural
persons.

Sometimes P1 is applied for granting personality to certain
entities in order to resolve a financial scenario-to earn revenue. The
separate personality that results is subject to tax separately. One
additional advantage that this fictitious personality has over the
natural one is that law has the discretion to remove the façade of
personality in appropriate cases. For example, the Court has power
to disregard the corporate entity if it is used for tax evasion or to
circumvent tax obligations.

A classic case of P1 is provided in the 1980 case of Mathura
Ahir where the SC of India held that a religious institution such as

\[11\] Under English Law, a corporation is a juridical person, not a subject at
Common Law. This is because allegiance is regarded as a personal bond and
presumed limited in its application to individuals. Corporations have not
been recognised as statutory British subjects or as citizens of the United
Kingdom and colonies.

\[12\] The Commissioner of Income-Tax, Madras v Sri Meenakshi Mills Ltd 1967
SCR (1) 934.

\[13\] Sri Krishna Singh v Mathura Ahir 1980 SCR (2) 660.
a *Math*\(^{14}\) has a legal personality and is capable of holding and acquiring property. As to the ownership of the concerned property—the ownership is in the institution or the idol. From its very nature a *Math* or an idol can act and assert its rights only through human agency known as a *mahant* or *shebait* or *dharmakarta* or sometimes known as trustee.

This linkage of legal personality with natural personality is a legal necessity and hence the law recognises certain human agents as representatives of the *math* or idol.\(^{15}\)

> [W]hen an idol was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian.\(^{16}\)

As to the reason why an idol has been recognised as a legal person, the Supreme Court of India, in *Yogendra Nath Naskar v Commissioner of Income Tax, Calcutta*\(^{17}\), held that it is only the consecrated idol in a Hindu temple that is a juristic person. The

\(^{14}\) Jenkins CJ in *Babajirao v Laxmandas* (1904) 28 Bom 215 defines the true notion of a ‘*Math*’ in the following terms: ‘A *Math*, like an idol, is in Hindu Law a judicial person capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency.’ It follows that merely because the *mahant* for the time being dies and is succeeded by another *mahant*, the suit does not abate.

\(^{15}\) This is because the *math* or idol, being inanimate cannot carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract et al by itself.

\(^{16}\) *Shriomani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass* 2000 (2) SCR 705.

In this background, we find that this Court in *Sarangadeva Periya Matam v Ramaswami Goundar (dead) by legal representatives* (AIR 1966 SC 1603) held that a *Mutt* (sic) was the owner of the endowed property and that like an idol the *Mutt* was a juristic person and thus could own, acquire or possess any property. In *Masjid Shahid Ganj v Shiromani Gurudwara Parbandhak Committee, Amritsar* (AIR 1938 Lahore 369) a Full Bench of that High Court held that a mosque was a juristic person.

\(^{17}\) 1969 (1) SCC 555.
court, in stating thus, relied on the observation of West J. in the following passage made in *Manohar Ganesh v Lakshmiram*\(^{18}\).

[I]t is really the religious faith that leads to the installation of an idol in a temple. Once installed, it is recognised as a juristic person. The idol may be revered in homes but its juristic personality is only when it is installed in a public temple. Faith and belief cannot be judged through any judicial scrutiny. It is a fact accomplished and accepted by its followers. This faith necessitated the creation of a unit to be recognised as a Juristic Person.

All this shows that a Juristic Person is not roped in any defined circle. With the changing thoughts, changing needs of the society, fresh juristic personalities were created from time to time. An idol is a Juristic Person because it is adored after its consecration, in a temple. The offerings are made to an idol. The followers recognise an idol to be symbol for God. Without the idol, the temple is only a building of mortar, cement and bricks which has no sacredness or sanctity for adoration. Once recognised as a Juristic Person, the idol can hold property and gainfully enlarge its coffers to maintain itself and use it for the benefit of its followers. On the other hand in the case of mosque there can be no idol or any images of worship, yet the mosque itself is conferred with the same sacredness as temples with idol, based on faith and belief of its followers. Thus the case of a temple without idol may be only brick, mortar and cement but not the mosque. Similar is the case with the Church. As we have said, each religion has different nuclei, as per their faith and belief for treating any entity as a unit.

In this background, and on over-all considerations, the SC maintained that Guru Granth Sahib was a Juristic Person though it could not be equated with an idol as idol worship was contrary to

\(^{18}\) ILR 12 Bom 247.
Sikhism.19

**Denial of P1**: Though P1 provides the most fluid definition of person, there have been instances where certain entities have been denied legal personality, as the intention to incorporate (coming together and uniting as one under a statute) was found to be absent. In *The Board of Trustees, Ayurvedic Andunani Tibia College, Del v The State of Delhi*20, the question was whether the Board was a corporation and hence a legal person distinct from its members. The court concluded that it was not. It had a distinct name because statutory convenience mandated it as a requirement for registration under the Societies Registration Act, 1860; the property ‘belonging’ to the society was in-fact vested in the trustees or in the governing body for the time being and it did not give the society a corporate status in the matter of holding (for all times to come) or acquiring property. The object of this arrangement was to provide a method of enabling legal proceedings to be brought in respect of the property of a registered society. Since the legislature had no intention of clothing such entities with a corporate status with power to hold property and to sue and be sued in their registered names, it was necessary to provide for the vesting of their property in trustees and to permit them to bring or defend legal proceedings in respect of that property on behalf of the Board. Hence a registered society was not a juristic person distinguishable at any at any moment of time from the members of which it was composed.

The legislature, though conferred upon registered societies some of the gifts and attributes of legal personality, it had no intention of doing more. The very resort to the machinery of trustees or the governing body for the time being acquiring and holding the property showed that there was no such intention to incorporate the society.

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19 See *Shriomani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass* 2000 (2) SCR 705.
20 1962 SCR Supl (1) 156.
The case of registered society reflects that though P1 is an open definition, law does follow certain unwritten and unspecified norms for conferring this personality on to someone.\textsuperscript{21} That is the reason why a foetus has been denied P1 personality.

Sometimes, this politics of convenience results in strange arrangements. In India, the case of a Hindu Undivided Family (HUF) presents an example. A joint Hindu family cannot enter into a partnership as in law it has no legal personality. Under the Partnership Act, 1932 only ‘persons’ can join as partners. An association of persons is not a person within the meaning of that expression in the Act and hence cannot be a partner. The status of a HUF is also the same. It is not a ‘person’, but an association of persons.\textsuperscript{22}

On the other hand, the definition of ‘person’ in the Income Tax Act, 1961 includes within its fold HUF’s as well. This is because the primary intention is levying income-tax. This meaning of ‘person’ cannot be imported into the Partnership Act, 1932. Hence, a Hindu undivided family cannot as such enter into a contact of partnership with another person or persons, but is liable to pay taxes as a person. Such is the convenience of law. This indicates that P1 legal personality is a tool of law, a gift that law bestows upon entities just to attain some specific purpose.

Upon perusing through the abovementioned paras detailing the reasons why a particular entity has been considered as a P1 legal personality, it becomes clear that there is no common linkage indicating the basis of that grant. Every case has been subjective. If this is the case, there is no reason why an unborn cannot be conferred with personality under P1 definition.

\textbf{Appreciation of P1:} As a general rule of legal personality for

\textsuperscript{21} The author insists that the reasons include convenience, political pressures and policies, legislative lethargy and also the quantum of turmoil that such a conferral might create in the existing style of governance.

\textsuperscript{22} See \textit{Agarwal and Co v Commissioner of Income-Tax, UP} 1970 SCC (2)48.
human beings—it begins at birth and extinguishes at death, with the consequence that pre-birth and post-death situations do not result in legal persons. However, there are grey areas to this general rule which remain unrecognised either for the reason of disturbing the sanctity of the general principle or because of sheer intellectual lethargy.

On one end of the spectrum (of this general rule) is the foetus, the unborn which is denied personality as such but anomalously granted the same, on contingent basis, in cases of transfer of property or creation of trust in the name of the unborn. For instance, in India Section 20 of the Hindu Succession Act, 1956 recognises the rights of a child in the womb by providing that it retains the right to inherit property of the intestate as if it was alive (already born) at the time of death of the intestate. Sections 13 and 20 of the Transfer of Property Act 1882 deal with situations in which on a transfer of property, an interest therein is created for the benefit of a person not in existence. As per Section 20, where on a transfer of property an interest therein is created for an unborn person, he acquires on his birth, a vested interest.

Thus, at least in case of inheritance of property, a fiction has developed in the law that places an unborn child who is

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24 Live birth being the condition imposed.
25 See Transfer of Property Act 1882, s 13 that provides for transfer of property for benefit of unborn person. Typically, the parties to a transfer of property must be living persons (including juristic persons), but Section 13 is an exception to the general rule of transfer providing a way through which property can be transferred to a child in the mother’s womb. This Section does not apply to Mohammedans meaning a gift to an unborn person is void.

Also, under the Hindu Law, in a joint family, when partition is being contemplated and any woman of the family is pregnant at the time, Hindu law recommends postponing the partition till the child is born. However, if it is not possible to reschedule the partition, a share must be kept aside and that share must be equal to the coparcener’s share. If, this also is not done, the after born son has the right to get the partition reopened. A son begotten as well as born after partition can demand a re-opening of partition, if his father, though entitled to a share, has not reserved a share for himself.
subsequently born alive in the same position as a child living at the time of the death of the benefactor. This fiction has existed since times immemorial and is so well entrenched in the legal systems that for a statute conferring property rights on children to be interpreted as excluding a child who was en ventre sa mère at the time of the death of the father would require specific words of exclusion.

In 1964, in the Indian case of *Aswini Kumar Pan v Parimal Debi* 26, it was held by the Calcutta HC that:

[I]n law, a child in the PW’s womb is deemed to be in existence, at least for purposes of inheritance, which alone are relevant here, and has thus a right to challenge any transaction, which affects its interest at the time. If so, it has a right of action or a cause of action in respect of the said transaction and is entitled to institute a suit upon the same and, as such a child, as aforesaid, cannot, under the Indian Majority Act 1875, be held to be a major, it must be held to be a minor, that is, a person, suffering from disability, as contemplated under Section 6 of the Indian Limitation Act 1963.27

Likewise, on the other end of the spectrum are dead human beings in whom personality is deemed to have extinguished. But still in cases of testamentary succession, wishes of the dead are observed and respected.28 In cases of copyright, right subsists in

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26 AIR 1964 Cal 354.

27 Section 6 of the Limitation Act 1963: The Act provides that if a person is entitled to institute a suit or make an application for execution of a decree but, is minor or a foetus at the concerned time, he may institute the suit or make the application within the same period after the disability has ceased.

28 For instance, it is illegal to speak ill of the dead, and it may amount to defamation under section 491 of the Indian Penal Code 1860. Presence of such provisions do indicate a semblance of personality in the dead, for it is almost as if the deceased is displaying legal personality and asserting its ‘right’ not to be defamed; the reasons might be holistic and not hard core legal in nature (a moral virtue being elevated to the status of law positive) but they are real nonetheless.
works for 60 years after the death of the author.\(^29\)

If an income tax assessee dies before being assessed for the income earned during the previous year, he is liable to be assessed to income-tax. The assessee under the Income Tax Act 1961 has-ordinarily to be a living person and cannot be a dead person because his legal personality ceases on death. What would happen, if say ‘A’ dies in June, in the middle of the previous year 1\(^{st}\) April 2012-31\(^{st}\) March 2013?

In order to overcome the difficulty posed by cessation of personality, the law extends the legal personality of a deceased assessee for the duration of the entire previous year in the course of which he died and, therefore the income received by him before his death and that received by his heirs and legal representatives after his death but in that previous year becomes assessable to income-tax in the relevant assessment year.\(^30\)

However, personality of the deceased is deemed as extended only to bring within the tax net incomes received by him or his representatives while he was alive. Any income received in the year subsequent to the previous year cannot be called as income received by the person deceased and hence, the estate of the deceased is not liable for incomes received beyond the previous year in which that person dies.\(^31\)

Similarly, inheritance is, in some sort, a legal and fictitious continuation of the personality of the dead man. The rights which

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\(^29\) See The Copyright Act 1957, s 22 which explains the term of copyright and states that-Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until 60 [sixty] years from the beginning of the calendar year next following the year in which the author dies.


\(^31\) See Ellis C Reid v Commissioner of Income-tax, Bombay [1931] ILR 55 Bom 312.
the dead man can no longer own or exercise in \textit{propria persona} and the obligations which he can no longer in \textit{propria persona} fulfil, he owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fiction, it may be said that legal personality of a man survives his natural personality, until his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for.\textsuperscript{32}

So, long after the human being is dead, his rights continue to dictate and govern the actions of those who are alive. These anomalous situations are either not highlighted as an exception to the rule or are not understood to be exceptions at all. The author however emphasises that they are necessary to be read as exceptions\textsuperscript{33}. There can be no other explanation to them.

Since, P1 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 reiterates 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, it was realised very early in time that it would be in the interest of revenue and the economy as such that a corporation be taxed and for that it was declared to be a legal person. Conversely, slaves were denied that status and they continued to remain property till the time slavery as such was abolished. Similarly 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

\begin{footnotesize}
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\item\textsuperscript{32} Chiranjilal Shrilal Goenka (Deceased) Through LRs v Jasjit Singh 1993 SCC (2) 507.
\item\textsuperscript{33} To the general rule that legal personality of natural persons begins at birth and extinguishes at death.
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fraternity to pronounce the foetus as a legal person under P1. It would be interesting to note that it has not been done by most nations of the world, USA being an exception.\(^{34}\)

**Conclusion for P1:** Though in case of P1, there is no need to be burdened by the tradition followed by past generations, unborn remains a non-person by-and-large. Ostensibly, P1 being pure abstraction, is like an empty vessel that can be filled and refilled in any way. Richard Tur also avers that ‘the empty slot’ which is the legal person ‘can be filled with anything that can have rights and duties’.\(^{35}\) Foetus has strong chances of being designated as legal persons through the route of P1. However, the process does not seem that easy and unbiased or ‘open’ as has been projected under P1. For instance, if at all personality can be attributed in favour of animals; it could be easily achieved through P1. But the hard truth is that animals till date are not legal persons. So, is then there a pattern in which personification occurs? The projected ‘open slot’ or empty vessel of P1-is not that open after-all. The term person, as defined by P1, is vacant only for certain entities and not others. It is not in fact a slot that fits anyone or anything but rather a slot that can be filled per legal convenience or need.

It is worth noting that there does not exist any point of commonality between the non-human entities that have been granted personality by the Indian Legal System/Supreme Court for various purposes. Paton, in-fact, asserts that the quest to discover any common essence which unifies all the entities on which legal personality has been conferred itself is outside the scope of jurisprudence; perhaps because there is no common thread running

\(^{34}\) Text to n 414-417 for introduction on Unborn Victims of Violence Act, (UVVA) 2004.

through these entities.  

Another rather amusing fact is that none of the legal theories concerning personality, manage to explain why certain entities are treated ‘as if’ they are persons—why only those entities and not others; for instance, why idols, corporations and funds and not animals, foetuses?

Idols, corporations and funds do not bear any direct resemblance to human beings, yet they are legal persons on one pretext or the other; while certain others have been consistently denied the status—why? If we apply some logic to reality, ‘convenience’ or some would say ‘additional revenue’ seems to be the only/main criteria that have been followed by the Indian Supreme Court in accepting granting legal personhood in favour of certain non-human entities.

**Personality 2 (P2).** Under this, personality can be attributed to any reasonable creature in being. Human beings, being natural persons and having (generally speaking) a sense of reason, fit into this category as well; inanimate entities like corporations do not. P2 hence is not an abstraction or a fiction of law; it is real. A human being acquires personality (P2) at birth and the same extinguishes upon death.

Legal writings that depict the human being as the fount of legal personality, in-fact employs P2 definition of the person. If human being is a P2 legal person *ab initio* and by default, a pertinent question that arises is: when does this personality begin? It is this query that prompts judges to turn their minds to the discipline of science. In most of the relevant cases, the answer to this query has

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37 Though it is beyond the purview of this paper, it can be argued that since theories fail to explain ‘why’ and the jurists also suggest that the query is beyond jurisprudence, it would be safe to assume that as of date, animals and foetuses, to be treated as legal persons, do not have to fulfill any particular/common criteria.

38 Kindly note that human adults fit into all three definitions of person-P1, P2 and P3.
been that personality begins at birth, so the chances of a foetus being a legal person are ruled out at the outset.

It would be relevant to recall that because of certain negative motivations on part of the system, the unborn has been consistently kept away from P1. And P2 definition does not find favour with the foetus because of its requirement of ‘reasonable creature in existence’. Hence, both P1 and P2 are denied to the unborn.

**Personality 3 (P3).** This definition of person refers to only the rational and so the legally competent human beings. It is, in that sense a very narrow subset of P2, as not all human beings qualify for the status of person. 39 [T]he human agent should be able to initiate actions in a court of law and be held personally accountable for his civil and criminal actions. This is the individual who possesses the plenitude of legal rights and responsibilities, the ideal legal actor. 40

Locke and Kant emphasised on ‘rational capacity’ as a defining characteristic of legal person. In fact, ‘Cognitive capacities such as rationality have remained important features of most accounts of personhood.’ 41 For Locke, ‘A person is an intelligent being that has reason and reflection, and can consider itself the same thinking being in different times and places.’ 42. Kant also places emphasis on intelligence, but that intelligence has a limited/specific role to play—that of enabling one to act morally. At the heart of moral action, for Kant, was the ability to distinguish between persons and things and treat them accordingly. While the former may be valued for their

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39 Only normal human beings of sound mind do. Demented, idiots and retard are excluded.
utility, persons have an intrinsic value, in Kant’s terms a ‘dignity.’

Rationality is also one of the six conditions of personhood suggested by author, Daniel Dennett.

Legal scholar Ronald Dworkin also laid emphasis on mental capabilities for personhood. Dworkin argued that a foetus could not have interests of its own from the moment of conception because of lack of any mental capacity. An immature foetus without any brain functioning could not have an interest in survival. Hence according to him, a foetus was not a legal person.

If lack of rationality of the foetus is argued to deny personality to it, it would be worth its point to counter that in reality, a human does not develop the capacity for rational decision making until well into infancy and childhood. Should then personhood of young children be called into question as well? Further, agreed that the foetus is not a rational agent, but neither are Alzheimer’s patients or the comatose, and yet law would treat the very idea of stripping them of personhood as obnoxious.

There are a few points regarding the three definitions of person, P1, P2 and P3 mentioned above that mandate elaboration:

(1) different legal writings employ different definitions of the person to explain whether foetus comes within the ambit of the

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44 Daniel Dennett, ‘Conditions of Personhood’ in Amelie Oksenberg Rorty (ed), The Identities of Persons (University of California Press 1976) 177-179. The conditions of personhood per Dennett are as follows:

  1) Persons are rational beings. 2) Persons are beings to which states of consciousness are attributed, or to which psychological or mental or intentional predicates are ascribed. 3) Whether something counts as a person depends in some way on an attitude taken toward it, a stance adopted with respect to it. 4) The object of this personal stance is capable of reciprocating and having second order volitions. 5) Capable of verbal communication. 6) They are self-conscious.

expression. And this is why the choice of definition of legal person is of such consequence.

(2) while P1 is the widest, P3 is the narrowest definition of the person.

(3) foetus either does not fit or has been deliberately excluded from the purview of all three for various reasons.

(4) if depicted on a pie chart, the outermost representing P1, the circles would diminish as there is a progressive exclusion of beings.

Diagram 1: Stacked Venn depicting P1, P2 and P3 definition of ‘legal person’.

**Debate Surrounding Personhood of Unborn**

To some scholars, within the religious and philosophical community, foetal personhood begins at conception. Medical science has nothing to do with foetal ‘personhood’ as such but one thing is certain-the beginning of human life is acknowledged from conception. The third discipline where personality of an unborn comes of relevance is law-where legal personality is a subject of intense debate.

Over the years, the law has taken cues from both the moral and
medical paradigms but has managed to fashion its own unique conception of the legal meaning of personhood for the unborn. As a human being, the foetus has a potential claim to personhood which is a subject of controversy because of the age old legal tradition of considering ‘birth’ as the criterion of possessing legal capacities and of demanding legal protection. Inception of personhood for the foetus is not the only point of debate. The debate deepens when this claim comes in contention with Pregnant Woman’s (PWs) right to control her body which is a component of her rights as a person. The conflict situation has been discussed in detail in a separate chapter—chapter 3 titled ‘Pregnant Woman and Unborn as Adversaries’ and hence would not be elaborated upon here.\textsuperscript{46}

The basic problems concerning the notion of foetal rights can be enumerated as follows\textsuperscript{47}:

1. **Contingency of Birth**

   Since times immemorial, Indian, English and American laws have recognised the right of an unborn to inherit property. John Salmond says,

   \begin{quote}
   [T]here is nothing in law to prevent a man from owning property before he is born. His ownership is contingent, for he may never be born at all; but it is nonetheless real and present ownership. A man may settle property on his wife and the children to be born of her. Or he may die intestate and his unborn child will inherit his estate.\textsuperscript{48}
   \end{quote}

   The catch is that though a right is created in favour of the foetus, giving the ostensible impression of legal personality being almost acknowledged in favour of the same, but its accrual is made contingent on live birth. If the foetus does not take its place

\textsuperscript{46} Refer ch 3, ‘Forseeability of Foetal Rights in Abortion Era; Possibility of Prosecuting PW for Foetal Abuse’ for elaboration on the conflict situation.

\textsuperscript{47} It need not be taken as an exhaustive list but only as a list of important points raised over the years for denying personality to the unborn.

amongst the living, the limited personality attributed to it disappears *ab initio*. In short, if the child perishes in the womb, the inheritance will revert to someone else.

One of the most famous (read popularised) right of the foetus involves the right not to be wrongfully injured before birth, which has been recognised in tort law of India, UK and the USA. In the present legal situation, if the child is born alive, it is permitted to maintain an action for the consequences of pre-natal injury, and if he dies of such injuries after birth an action will lie for his wrongful death.

To elaborate, the law of pre-natal torts, which is full of anomalies for the foetus, may be categorised as follows:

Situation where the unborn is injured *en ventre sa mere*, is born, and then brings suit for his injuries through a guardian. Presently the UK and every jurisdiction in the US allow recovery on these facts.

Situation where the child is born but subsequently dies from the effects of the pre-natal injury. This is the classic WD situation.

Situation where the child is stillborn as a result of defendant’s tortious act, that is, the death occurs before birth. It is this third scenario that poses problems, although now many jurisdictions allow recovery.

Here is what creates a paradox—the legal right of the unborn as explained above, is conditional on live birth. How can they be projected as rights of the unborn if they are conditioned on birth? If they have been designed not to vest until the child is born, then they cannot be rights of the unborn child.

Furthermore, if these rights vest before birth, why is it that the unborn child has no power to sue for a remedy until after birth?

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49 The fact that these rights of the unborn are conditional on birth is referred to as the ‘Born Alive Rule’. Text to n 106-116.
When the convention was framed, the status of medical technology might have been different, but presently there is no such technological handicap, and so there is no reason why the cause of action cannot accrue to the foetus right on the occurrence of injury causing damages, like in case of any adult. It goes in favour of the basic principle of tort law as well.\(^{50}\)

Regarding the Born Alive Rule (BA Rule), the author insists that there is nothing everlastingly sacrosanct about any Rule and the same is true for the BA Rule as well. As Carl Wellman argues,

[T]here is no logical or legal impossibility in abandoning the rule. The law could, if legislatures or courts so choose confer unconditional rights upon the unborn child... To be sure, this would require giving the foetus the legal power to institute legal proceedings before birth. Similarly, the law could enable parents or other guardians to take legal action in the name of the unborn child.\(^{51}\)

Apart from the fear that the legal system might not be able to cope with the consequences of disturbing an age old tradition, two main reasons why the courts have refused to recognise any right of the foetus while \textit{in utero} are (1) that it would enable the parent or some other guardian to take legal action before the child is born and even when it perishes before birth. Any such suit would require an unequivocal evidentiary proof that the act of the defendant was the proximate cause of the injury to the foetus; and (2) it would also require an assessment, by the court, of damages that are commensurate with the injury suffered by the foetus.

In earlier times when technology provided limited support, both these matters became manageable only after childbirth. However,

\(^{50}\) The basic tenet of Tort law on cause of action states that only the aggrieved has the \textit{locus standi} to initiate/maintain a suit against the tortfeasor.

present technology enables one to determine almost with precision, the time of the injury, the reason behind the same and also the possibility of correction of through in utero therapy or surgery.\textsuperscript{52} Hence it is no longer impossible to compensate the foetus while in utero.

2. \textit{Controversy about when Foetus Becomes Separate}

This controversy arose primarily because of the age old understanding that foetus is just an extension of the PW and also inadequacy of medical science to provide evidence with certainty, of any separate foetal injury. Given this roadblock, it was very difficult to ascertain when there would deemed to be a separate injury to the unborn; if at all this was a possibility. It must be reminded that there was never a shadow of doubt about the PWs claim to compensation for the injuries suffered by her because of, say, the attendant doctors' negligence, under a medical malpractice suit. But for anyone to claim compensation for and on behalf of the foetus, the plaintiff had to establish four things:

1. That the defendant had a duty of care towards the plaintiff foetus
2. That he breached that duty
3. That there was injury suffered by plaintiff foetus in consequence and
4. That the defendants’ act was the proximate cause of that injury

Until the 1946 case of \textit{Dietrich v Inhabitants of Northampton}\textsuperscript{53} courts, almost all over the world held that there was no separate injury to the child, until the child was born. A child \textit{en ventre sa mere} was considered a part of its mother. All this changed through \textit{Bonbrest v Kotz}\textsuperscript{54} which held that there was a separate injury to the child as soon as it was viable. It rejected, ‘... the assumption that a child \textit{en ventre sa mere} has no juridical existence, and is so intimately united with its mother as to be a ‘part’ of her and as a

\textsuperscript{52} The latter may be helpful in determining damages.
\textsuperscript{53} 138 Mass 14 (1884).
\textsuperscript{54} 65 F Supp 138 (1946).
consequence is not to be regarded as a separate distinct and individual entity.\textsuperscript{55}

Justice McGuire of \textit{Bonbrest} fame opined:

[A]s to a viable child being ‘part’ of its mother - this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life - and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a ‘part’ of the mother in the sense of a constituent element - as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers.\textsuperscript{56}

These cases and much more have been discussed in detail under Chapter 2, Unborn and Law of Torts. Suffice to say here that presently an unborn, whether viable or not, should have no difficulty in being acknowledged as a separate entity. It has been ascertained that the genetic code of the unborn is different since conception from that of its mother, it is a distinct individual and can suffer a separate injury. And because it is a human life, it should possess all the rights that law confers upon human beings. The reasoning of the previously mentioned cases seems to fly in the face of contemporary medical knowledge which has grown by leaps and bounds.

If the medical fact of a foetus being a separate life from conception is recognised legally, it would mark a movement backwards from birth, viz, birth\textless quickening\textless viability\textless conception as being the milestones in the process of such recognition.

Extending the example of medical malpractice or negligence, regarding defendant’s (physician in this case) duty of care to the unborn, the unborn (through its representative) must also demonstrate that by causing the injury, the doctor breached his

\textsuperscript{55} See \textit{Bonbrest v Kotz} 65 F Supp 139 (1946).

\textsuperscript{56} See \textit{Bonbrest v Kotz} 65 F Supp 140 (1946).
duty of care towards it. It has historically been very difficult to establish. The unique relationship between the doctor and his pregnant patient is, in most situations, contractual. Since the foetus is not capable of entering into any legally binding contract with the doctor treating the host PW, it would seem to be impossible for the physician to owe any contractual duty of care to the unborn child. However, the situation can be resolved by treating the foetus to be a third party beneficiary to whom the doctor owes at least an indirect duty of care. Two reasons can be advocated in this regard: (1) the attending doctor, upon accepting the PW as his patient, agrees not only to look after the well being of the PW but also of the unborn; the latter being the reason why the PW is under his care in the first place. (2) Whatever treatment is administered to the PW, directly affects the unborn and in that sense the unborn also becomes his patient in its own right.

3. **PW v Unborn**

A complete chapter is devoted to the topic and hence elaboration has been restricted to brief. In substance, another reason why foetus has not been accorded with personhood is that the aspect of duty of care may give rise to wrongful life claims against the host PW which is viewed as a serious moral and legal conflict.

If foetal rights have to have any significant meaning in the real sense, then, as many jurists argue, the PW should owe a duty of care to her unborn child. The author is in full support of the argument and insists that if a PW ingests toxic substances such as heroin other narcotics (as an example), 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

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57 For Wrongful Life Claims (WL), refer to ch 2, ‘Tort Law and Unborn: USA, UK and Indian Scenario’.
to the existing tort of medical malpractice). 58

For instance, if in a given case, despite the due care being displayed by the attending doctor in transmitting the necessary warnings, the PW made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice should be taken as sufficient to exonerate the doctor and inculpate the PW for the WL of the child so born. It is the PW (both parents in case of a joint decision to retain the pregnancy) who is responsible for the pain, suffering and misery wrought upon the child; hence it is only logical for law to inculpate her for the tortious act.

Thus, we can see that the concept of foetal rights is much more complex than one might imagine.

**The Legendary Case of Roe**

Any substantial discussion on foetal personhood has to begin with the American case of *Roe v Wade*. 59 In the case, one Jane Roe, unmarried and pregnant, wanted an abortion. Because her life was not threatened by continuing pregnancy, she could not get an abortion legally in her home state of Texas. Moreover, she could not afford to travel to another jurisdiction for a legal abortion. 60 She

58 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.
60 Till this point, the case was similar to the one that arose recently in December 2012 in Ireland when an Indian woman was refused abortion allegedly because of Catholic sentiments. Insofar as the law goes, at independence from the UK in 1922, the Offences against the Person Act 1861 remained in force in Ireland, maintaining all abortions to be illegal and subject to punishment. In 1983 the Constitution of Ireland was amended to add that the unborn had an explicit right to life from the time of conception.

In 1992, a controversy arose whether denial of abortion in Ireland should be absolute and whether abortion should not be made available if the PW goes suicidal in an attempt to terminate a rape induced pregnancy. The case which became famous as *Attorney General v X* [(1992) 1 IR 1], paved a way for abortion being constitutionally available in the Republic of Ireland where a woman’s life, as distinct from her health, was at risk from the continued pregnancy.
therefore sued on behalf of herself and all similarly situated women. Roe contended that she had a constitutionally guaranteed right of privacy that included the right to terminate her pregnancy. In defence of its statutes, Texas contended that it could protect foetal life constitutionally from the time of conception, and that Roe therefore had no right to an abortion. In a decision that has come to be celebrated as landmark, a three-judge district court panel held that the Texas criminal abortion statutes were void.

**The Problem with Roe:** In *Roe v Wade*, the Supreme Court of the US denied any personality to the foetus stating that if the foetus was designated as a person with a corresponding right to life, abortion would necessarily be first degree murder and illegal. However, towards the end, the Court’s ruling, perhaps morally burdened, confused issues instead of resolving them. Paradoxically, the Court also found that the state had a legitimate interest in protecting the ‘potential’ life of the unborn and that this interest grew as the woman approached full term. Then the notion of ‘viability’ was introduced which was to complicate things in the years to come. Briefly put, viability marks that stage of foetal gestation whereupon the unborn acquires the capacity to thrive independently (sometimes with artificial medical support) outside the mothers womb. The court decided that once the ‘compelling’ point of viability was reached, the state’s interest in protecting

However, ever since, no legislation was introduced to give doctors a legal certainty as to when an abortion could be carried out. In the background of these facts, Savita Halappanavar, a PW of Indian origin, suffering from a miscarriage at 17 weeks gestation sought an abortion. The hospital told her that though the foetus was not viable, they could not perform an abortion under Irish Law as the foetus’s heart was still beating. The legislative vacuum took the woman’s life.

While the research was in its culminating phases, one development that took place in the matter was that Irish government was compelled to introduce the ‘Protection of Life during Pregnancy Bill 2013 which was signed into law on 30th July 2013 by Michael D. Higgins, the President of Ireland.

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61 For a detailed discussion on the concept of viability, refer to ch 2, ‘Tort Law and Unborn: USA, UK and Indian Scenario’.
potential life could even override the woman’s right of bodily integrity. Why a need was felt to choose a specific point in foetal development as compelling was not explained. Nonetheless its use by the later judgements is almost viral.

It seems that a morally upset jury was compelled to accept limited personality in favour of the unborn after it had reached viability, for after all, a third trimester foetus is extremely similar to a newborn in terms of its physical attributes. But then, it cannot be denied that a foetus is growing and developing from the moment of conception until birth. How is it possible that the foetus be a nonperson at the beginning of its time in the womb and ‘person’ post viability? What miraculous change is brought about by viability that, once the foetus reaches that stage, it merits state protection and the PW loses her right of bodily integrity? The American Supreme Court’s decision in *Roe* did not resolve the issue because it did not completely decide the status of the foetus.

The argument of the author is that 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.

Coming back to *Roe*, it is needless to mention that the decision outraged those who supported the concept that life begins at conception and who felt that personhood should be granted to the foetus immediately upon conception. The decision was equally offensive to those who argued in favour of the woman’s rights over her body. Hence, by giving to the world a twisted verdict that foetus was not a person, but a ‘potential life’ in which the state developed a legitimate interest once viability was reached, the Court, in *Roe v*
Wade succumbed to moral sentiments and set a precedent that remains a pitfall for advocates of foetal personality even today.\textsuperscript{62}

The only point perhaps that the case did manage to resolve is that unborn were not recognised in the law as persons in the whole sense but just because foetuses were not ‘persons in the whole sense’ did not mean that their existence could be ended through abortion. In Roe the US Supreme Court needed to come to a decision as to when the state could intervene in the PW’s decision to abort in order to protect the foetus. The Court chose viability and since then, viability has come to be recognised as a critical stage in gestation. The author has argued elsewhere that 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.\textsuperscript{63}

\textbf{Before Roe versus Wade}

Cases prior to Roe were indicative of a healthier debate focusing on personhood--in 1973, the debate got monopolised around abortion. It is notable that cases concerning the status of the foetus from the late 1800s to the 1960s did not concern abortion. Instead, they dealt with issues such a third party injury and wrongful death of the foetus, medical malpractice suits where the foetus was injured or died, the PW’s negligence, and the right to claim monetary benefits as a dependent. These early cases initiated discussions of legal foetal personhood. It would not be an exaggeration to maintain that today when foetal rights

\begin{footnotesize}
\textsuperscript{62} In the 1989 case of Webster v Reproductive Health Services (492 US 490), marking a significant change from Roe v Wade, the Court found that (i) a compelling state interest began at conception rather than viability; (ii) that a pre-viable foetus was also a potential human life, no less than a viable foetus. The author maintains that though the case was different from Roe, it did not explicitly grant foetal personhood. In what can be appreciated as a play of words, Webster maintained that the foetus, at all stages of development, was a ‘potential human life’ and not a person. Nonetheless, it was a step ahead of Roe.

\end{footnotesize}
jurisprudence is again grappling with such topics, they are just a revival of the bygone era.

**Early Cases Concerning Foetal Personhood:** In order to give a brief idea on the nature of cases that came before the courts prior to *Roe* (1973), a small discussion is being undertaken of the important cases falling under the law of tort and crime. A detailed debate about them in a chronological fashion has already been accomplished as a part of the chapter on Law of Tort and Unborn and some under the chapter Criminal Law and Unborn.

**Important Tort cases**

In 1872 the Supreme Court of California dealt with the subject of foetal personhood in *Daubert v Western Meat Co.*

- 1884 *Dietrich v Northampton* provided no recovery to the foetus for pre-natal injuries.
- 1891 Irish decision of *Walker v Great Northern Railway of Ireland* again marked denial of any duty on part of the third party towards the unborn for any pre-natal injuries.
- 1900 *Allaire v St. Luke’s Hospital* was again a denial case despite the foetus being full term.
- 1933, in *Montreal Tramways v Leveille*, some respite was afforded to foetal status as duty of care was read in the tortfeasor towards the unborn.
- 1946 *Bonbrest v Kotz* recognised foetal personality for pre-natal

64 139 Cal 480 (1903).
65 138 Mass 14 (1884). Sixty-two years elapsed before the rule denying recovery in such cases was changed in *Bonbrest v Kotz* (1946).
66 (1890) 28 LR Ir 69 (QB).
67 *Allaire v Saint Luke’s Hospital* 184 Ill 359 (1900).
68 [1933] 4 DLR 337 (Can Sup Ct). Facts: A PW, being seven months pregnant, was descending from a tram car belonging to the appellant company when, by reason of the negligence of the motorman, she fell, or was thrown, from the car and was injured. Two months later she gave birth to a female child who was born with club feet. The respondent, as tutor to his child, brought an action against the appellant company, claiming that the deformity of the child was the direct consequence of the negligence of the appellant company by which the mother was injured. It was upheld by the court.
injuries.

- 1949 in the American case of Verkennes v Corniea\(^\text{70}\) wrongful death of the foetus was recognised as compensable.

  On the civil side, cases following Bonbrest began to stretch the boundaries of wrongful pre-natal injury, viability, and Born Alive Rule for foetal cases. In 1949, the case Verkennes v Corniea was unique because in this wrongful death case, the foetus was stillborn. In previous cases of injury to the foetus, the courts allowed compensation when the child was subsequently born alive. Most wrongful death laws required a ‘person’ who had died.\(^\text{71}\) The status of the foetus in this respect was amusing—because it was yet to be born, it could not die!

  In a 1953 New York case of pre-natal injury, the court ruled that from the moment of conception, the foetus was a separate being able to recover for injury. This was in Kelly v Gregory\(^\text{72}\):

  \[
  \text{[W]}e \text{ ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common-law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.}
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  This case helped set the precedent that viability was not necessary for a valid foetal claim.\(^\text{73}\)

**Important Criminal Cases**

As for the cases falling under Criminal Law, the legal principles

\(^\text{69}\) 65 F Supp 138 (1946).
\(^\text{70}\) 229 Minn 365, 38 NW 2d 838 (1949).
\(^\text{71}\) That is, death was to be necessarily preceded by live birth. Stillborn foetuses’ were not of any legal consequence, even for WD statutes.
\(^\text{72}\) 125 NY S 2d 696.
\(^\text{73}\) At least in America, importance of viability as a necessary condition for recovery by/on behalf of the foetus was beginning to dilute. In other countries, UK and India, viability or some gestational stage (like quickening) remained relevant…it remains so till date.
more or less remained constant till before Roe. The thumb rule being that punishment for pre-natal injuries resulting in death of the unborn was possible if the injuries were inflicted post viability (initially quickening) and there was live birth.\textsuperscript{74}

Presently, the status remains much the same, except that in the USA. The USA leads the world in ensuring that the assailant of a PW, 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. Much of the credit of this status goes to the 1970’s case of Keeler v Superior Court of Amador County\textsuperscript{75} which is an important case in relation to the status of the unborn child in Criminal Law that came about prior to Roe.

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’, 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. This ruling was a setback for foetal recognition.

Unhappy with the California Supreme Court’s decision, the

\textsuperscript{74} Refer to ch 5; see also text to n 83.
\textsuperscript{75} Keeler v Superior Court 2 Cal 3d 619.
legislature responded by creating a new category of murder that added foetuses to the list of possible murder victims. However, despite the amendment, the trend of the courts was towards denying any claims of personhood to the foetus.

It is against the backdrop of this negative trend that the U.S. Supreme Court was bombarded with *Roe*. It was to become a landmark judgement not only because of the moral complications it sought to iron out, but also because it set in a trend—a trend as a result of which foetal issues converged to abortion in such a huge way that the world was blinded of any other issue for a long time to come.

**Pollution Spread by Roe**

How *Roe* polluted almost every other judgement revolving around the unborn, would be clear from the fact that just two years post *Roe*, in 1975, *Toth v Goree*[^76] happened in which the PW of three months gestation met with an automobile accident and suffered a miscarriage. The Michigan Court ruled that a nonviable foetus was not a ‘person’ under the Wrongful Death Act. This, despite the truth that the Court, in *Roe v Wade* had not extended the condition of viability to cases unrelated to abortion. However, since viability appeared to be a handy criterion of denying compensation to the tortfeasor, it came to be used in non-abortion cases as well. Since *Roe* had recognised almost an absolute right to abortion during the pre-viable stage, it was relegated to the position of something dispensable, unimportant and by-passable. Consequently, PW who had lost their non-viable foetuses due to wrongful injury or death got a raw deal for a long time to come under Tort Law.

As already mentioned, the criterion of ‘viability’ which essentially was invented as a benchmark for allowing or disallowing abortion by the US-SC in *Roe*, bled into other foetal issues, not only under Tort but Criminal Law as well. For instance, in 1976, in *The People*

The California Court of Appeals denied a wrongful death charge because the foetus was only thirteen weeks of gestation. The Court of Appeal held that a non-viable foetus under 24 weeks did not qualify for a murder charge even though the California legislature had amended the criminal statutes in the 1970’s after *Keeler v Superior Court of Amador County*, to include foetuses. One can only imagine the force of the precedent set by *Roe* citing which, the court found that until the capacity for independent life was attained, there was only a potential human life. Judge Fleming maintained,

> [T]he underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a nonviable foetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a PW, a father (as here), or a third person.

The Court in *Roe* might not have meant to treat abortion and WD/injury cases in the same vein, but the later judgements somehow clubbed the two categories.

Since we are on the impact of *Roe*, it must be mentioned that though the Common Law, traditionally, has been parsimonious in awarding rights to the unborn, there were courts which were radical enough to grudgingly or wholeheartedly bestow such awards. However, the instances were so sporadic that they failed to make any dent in the social or legal consciousness.

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77 59 Cal App 3d 751.
78 In this brutal case of spousal abuse, the husband said that he did not want the foetus to live and then kicked his pregnant wife in the stomach and back while repeating ‘bleed, baby, bleed’.
79 *Keeler v Superior Court* 2 Cal 3d 619.
80 59 Cal App 3d 757.
81 See *Montreal Tramways v Leville* [1933] 4 DLR 337 (Can Sup Ct).
**Degree of Protection Accorded to Foetus**

*Roe* focused on viable foetuses and post birth period; being born alive being a mandatory requirement for claiming rights. This historical reliance on birth and viability, as the point at which legal protection vested in the developing human, has perhaps been the greatest hindrance in the foetus acquiring no personhood till date.

The degree of protection afforded by law to human beings, amongst other things, is dependent on the age as well. This fact is clearly demonstrated, for instance, in minors being accorded lesser rights than adults. Explained graphically, one can draw a graph for the same as follows:

![Graph showing legal rights dependence on age](image)

On the graph, one can see that in the foetal stage, there is no personality and hence no rights. Then, a stage known as ‘quickening’ has been recognised as important because a few jurisdictions, like India, provide some protection to the foetus indirectly at that stage.\(^{82}\) Traditionally however, birth has been considered as THE point at which the capacity criterion was

\(^{82}\) The Indian Penal Code 1860 maintains quickening to be relevant to increase the punishment of the offender: refer to ch 6, *Criminal Law and Unborn: Indian Scenario*.


satisfied and the human being became a person in law. Later, viability of the foetus became a significant milestone and still is in most jurisdictions, to extract protection of the law.

Keeping this progress apart, it is clear that increasing degree of personality is assumed to exist in the human being as it grows eventually into a minor and then an adult (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, the author argues that there is no justification for denying the unborn all 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 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.

The author strongly advocates that the unborn, at all stages of development, should have the same protection. Discriminating between pre-viable and viable foetuses to provide legal protection does not augur well at all with the current state of medical advancement.

**On Unprotected Status of the Unborn— from injuries and murder before viability**

The result of courts being evasive in decisions and the legislature being lethargic in coming up with a law governing foetal abuse and crimes (without the limitations of viability or live birth) has led to a complete isolation of the foetus *in utero*—it is left in a vacuum in which it exists as something undefined—waiting to be viable or to be ultimately born when it will, miraculously, become something, if it
is fortunate enough to reach these stages.

Unborn children are thus in a uniquely unprotected position. It is strange indeed that even animals get a voice in the world against cruelty and death. In India as well, though there is capital punishment, it is reserved as a method of last resort. In short, most other living beings, from rabid animals to serial murderers, traitors are protected from unreasonable or arbitrary death. Because unborn children do not have lives recognizable in a court of law, however, they are not granted protection till they achieve a certain developmental stage.

*Roe* did the damage of establishing a precedent, citing which the unborn was denied personhood in cases of abortion. In addition to this, as already stated, it also introduced the concept of viability which, over the years, did not keep it confined to only abortion cases and spilled into wrongful injury and death. Consequently, no substantial jurisprudence allowing personhood to the foetus could develop in cases concerning foetal injury and wrongful death in the pre-viability stage.

The author argues that advancement in medical technology has assured at least two things concerning the foetus: (1) that the foetus and the PW are genetically different beings since conception and that (2) the foetus has life since conception. Given this, law consequentially needs to 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. The days of maintaining that the aspect foetal personhood is thorny and thence evading the matter or of describing that foetus is not a person, but it is also ‘not nothing’ are long gone. We can now aggressively maintain that we are on much surer ground and that foetus should be regarded as a person
Personhood to be Acknowledged before Birth

For reasons already mentioned, viability has been considered as the gestational age that merits recognition as the mark of inception of personhood. However, this is subject to the jurisdiction and the law one is dealing with; because live birth is still a requirement in many countries for according any personality to the unborn.\(^{84}\)

Viability signifies that the foetus has the capacity to survive outside of the womb. However, it would be pertinent to mention that the foetus acquires other potentialities much earlier. For instance, at conception, the zygote has the same potential for life that the unborn of any later stage might have. A six-week-old foetus has all its major organs. At eight weeks, the foetus has brain activity. Sentience is achieved between six and twenty-six weeks. Historically, quickening, or the age at which the PW first feels the foetus move, has been an important milestone that can happen anytime between 18-20 weeks.

The above discussion lays bare that there are in-fact several significant developmental points interspersed through the gestational age that can be taken into consideration for deciding the compelling point which marks the beginning of personhood. Why then viability has been granted that critical status appears illogical. Given this, it can well be argued that once fertilization occurs, since the new organism (which immediately begins to grow and develop) has potentiality, life begins at conception and it makes logical sense for personhood to begin simultaneously.

For scholars like Dworkin (who base the acquisition of personhood on rationality being achieved by an entity) it is obvious that the foetus cannot reach the compelling point of rationality

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\(^{83}\) Provision of legal abortion can be regarded as an exception to this rule.

\(^{84}\) Refer to ch 2, ‘Tort Law and Unborn: USA, UK and Indian Scenario’ intro portion for elaboration on the Born Alive Rule.
while in the womb or even until several years into childhood. Still law cannot refuse personality to children—they are legal persons with rights and some level of responsibilities. Hence the requirement of rationality (for attainment of personhood) clearly appears to be an irrational point in itself.

**Social Recognition as mark of Separate Entity**

For a PW, happily anticipating the imminent birth of a child, there is no doubt that the entity inside her womb is already a baby irrespective of the gestational age.\(^{85}\) It is this attachment that persuades women to take home images from the 20-week scan in order to show friends and family their ‘baby’. The unborn is important not only for the would-be mother but is a subject of interest for the whole social environment of the PW. In those terms, it acquires a personality much before birth. ‘Birth is just a transition of anonymity to public standing.’\(^{86}\)

According to political scientist Robert Blank, advanced technology has increased a foetus’s social recognition as an individual entity and as a person before birth.\(^{87}\) In India, in particular, an unborn is spoken of not only with care and distinct attitude, but even mourned over like an adult in the unfortunate circumstance of miscarriage or homicide. The foetus is socially recognised and hence part of the community of persons long before actual birth. Since law is or should be a reflection if societal thinking, it makes perfect sense to accord personality to the unborn since conception itself.

Another aspect of this social recognition theory is put forth by theorists like Maguire who advocate what they term as ‘personhood

\(^{85}\) Though it can be maintained that the attachment increases, with time.


through social recognition’. 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 adds that in the light of such social recognition, if the same claim is put forth by the foetus, how is it that it becomes 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.

**Employing Legal Fictions**

One important argument that can be put forth regarding foetal standing comes by analogising them to children. Children can and do exercise their legal rights through their agents, usually their parents or other guardians authorised to take legal action in their name. If the law can ascribe this vicarious agency to them, then there is no reason why foetuses should be left in a lurch.

Also, if an unborn has no right of action for pre-natal injuries, while in the *in utero* stage, ‘we have a wrong inflicted for which there is no remedy, for, although the PW may be entitled to compensation for the injury she might have suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child.’

It is not that law is handicapped to deal with such violation of natural justice. Legal fictions are a weapon to be used in such technical or tricky situations. Agreed that the general rule permits only a person capable possessing legal rights as capable of initiating an action in the court of law, but nothing prevents the legal system to employ fiction so that the foetus also gains that capacity (which

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89 See *Bonbrest v Kotz* 65 F Supp (1946) at 141 where the argument has been developed for a child born alive suing for pre-natal injuries.
in the real sense can be exercised by foetus’ agent). ‘Legal fictions, it is said, provide a mechanism for preserving the established rule while ensuring a just outcome.’

The not so publicised case of *Doe v Scott* is unique because a physician was appointed guardian *ad litem* to represent the interests of the unborn. Because standing for the foetus was recognised through a guardian, the foetus was able to ‘participate’ in the lawsuits. So, the ruse often taken as a ground for denying personality to the foetus can be overcome by appointing an agent that would give the much necessary legal standing to it. In future, if the courts or the Indian legislature gives personhood to the foetus, it would have been fascinating to study cases being argued from the perspective of the foetus as a direct party.

Earlier there was a doubt about the legal sustainability of this rule as the legal fraternity feared that it might trigger speculative litigations on part of a parent or guardian to take legal action against the attending doctor in the name of the child even while the child is *in utero*.

The author reiterates that in the present world of general technological advancement, should such a case come before the court of law, the court would have less difficulties to deliver justice. The age-old excuses of trouble in determining the existence of the child before birth, extent of pre-natal injuries to the foetus, the proximate cause of any such injuries, and the fair amount of compensation for them have all become inexcusable and surmountable. It would be easier now for the courts to avoid speculative and perhaps unjust resolution of such cases, now that advances in medical science enable a greatly increased prediction, diagnosis, prevention and treatment of pre-natal injury or defect.

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91 321 F Supp 1385 (ND Ill 1971).
New issues on Foetus

The scope of medicine has increased manifold these days which has given rise to new issues pertaining to the foetus. Academicians and scholars have used this development to demand advanced rights for the unborn, for instance, many argue that the foetus ought to have a legal right to medical care independent of but parallel to the PW’s right to care by her physician. Having increased the responsibility of the doctor towards the unborn thus, they insist that a failure to diagnose genetic defects or medical problems of the foetus before birth and, in some cases, failure to intervene either to abort a seriously defective foetus or to provide therapy *in utero* should be sufficient for the unborn, after birth, to inculpate the doctor for medical malpractice.

This new foetal right has been termed as the right not to be born with a life not worth living caused by medical malpractice or wrongful life (WL). Since the PW has a separate right against the attending doc, she can sue him for wrongful birth (WB). 92

The new categories of rights even extend against the mother in cases of foetal abuse involving substance abuse or irresponsible behaviour during pregnancy. 93

Wrongful life Cases: Ever since *Roe* liberalised the abortion regime by accepting that it is only upon viability that the state develops compelling interest in the unborn, wrongful life cases came to the fore. Cases of botched abortions resulting in foetuses born alive but distorted and retarded became not only a medical but a legal problem to deal with as well.

Ethically heavy questions such as whether such foetuses, upon being born alive, should have a claim for its injuries became very difficult to answer. If this question was answered in the affirmative,

92 These issues though peripheral to the topic at hand, have been dealt with in ch 2, ‘Tort Law and Unborn: USA, UK and Indian Scenario’.
93 Refer to chs 3 and 4 for elaboration on PW’s/mothers culpability for foetal abuse.
another difficult one that cropped up was whether the foetus could sue only the physician and the medical establishment for medical mistakes or also the mother who authorised and underwent the failed abortion. Though some jurisdictions have come to an answer, this remains by and large an issue that is yet to be settled.

Wrongful birth Cases in India: Though WL cases, that is, claims by newborns for defective life against the doctor or mother have not arisen in India, there has been a steady increase in WB cases (that is, claims by mothers against doctors or health authorities). Few important ones have been discussed briefly in the following paragraphs.

In the State of Kerala, Represented By v P.G.Kumari Amma\(^\text{94}\), the respondent underwent a sterilisation operation but conceived nonetheless. She claimed that there was negligence on the part of the doctor who had performed the operation and that hence she was entitled to relief. The State resisted the claim stating, primarily, that it was not necessary for a sterilisation operation to always be 100 percent successful. It also argued that if the woman did not want the child, she should have opted for an abortion.

The Kerela HC decimated the contention stating that though pregnancy of the woman despite sterilisation did not ipso facto indicate negligence on part of the operating surgeon, it was no defence that she could have undergone abortion (which would have been justified under the Medical Termination of Pregnancy Act, 1971). The court strictly noted that, ‘such a defence has never been considered as an answer to a claim for damages in Law.’

The court noted that, ‘The story of unwanted pregnancy, failed sterilization, consequent compensation etc is a long one. While of recent development in India, it has been a potential topic of

\(^{94}\text{Unreported, Kerela High Court, 13 December 2010).}\)
actionable tort in other countries.\textsuperscript{95}

Clarifying that it was possible in the present times to inculpate professional men like a physician for negligence, the court stated:

[\textit{L}aw initially was very reluctant to attribute negligence to a professional man. It was concerned with the reputation, status and the alarming consequences that would result by attributing negligence to professional men. Law did not remain static. It marched forward. It then evolved principles whereby professional men too were attributed with negligence.

It is an established fact today that even doctors, despite being experts in their fields are not infallible.

In the present case, the woman was presented with the very dilemma that she wanted to escape by resorting to sterilisation operation—of whether to have a child or an abortion. The court noted that:

[I]t was improper on part of the health authorities to expect that, if its doctors fail, the plaintiff would undergo an abortion with its attendant risk, pain and discomfort. Accordingly the plaintiff was entitled to damages for loss of future earnings, maintenance of the child upto trial, maintenance of the child in the future, the plaintiff’s pain and suffering upto the time of the trial and future loss of amenity and pain and suffering, including the extra care that the child would require.

Again in the \textit{State of Haryana v Santra}\textsuperscript{96} and \textit{State of Punjab v Shiv Ram}\textsuperscript{97}, the apex court had considered the issue of WB. In this case, one Santra opted sterilisation to avoid pregnancy but unfortunately, she conceived and ultimately gave birth to a female child. She attributed the birth to a negligent sterilisation operation conducted by the surgeon. After referring to various decisions on

\textsuperscript{95} (Unreported, Kerela High Court, 13 December 2010) para 7.
\textsuperscript{96} AIR 2000 SC 1888.
\textsuperscript{97} (2005) 7 SCC 1.
the issue, and after finding that there was gross negligence, the SC held that since Santra already had seven children and wanted to take advantage of the scheme of sterilization launched by the State Govt, she had consciously chosen sterilization. A certificate was issued to her to the effect that her operation was successful and she was assured that she would not conceive a child in future. The unwanted child had added to her monetary burden for which none else but the attending doctor was responsible. Hence, she was entitled to claim full damages from the State Govt. as well as doctor to enable her to bring up the child at least till she attained puberty. The court also hinted that:

[D]amages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.

In *P.G. Kumari Ammas*\(^{98}\) case the court culled out the following principles after perusing through a number of decisions and concerned literature on whether and when a doctor’s liability for negligence may arise: (i) If a doctor fails to act towards his patient with the standard of care reasonably to be expected of him, and as a foreseeable result of the doctor’s breach of duty a child is born whose potential for life would have been lawfully terminated but for the doctor’s negligence, the law entitles the mother to recover damages for the foreseeable loss and damage she suffers in consequence of the doctor’s negligence.(para 31)

(ii) The mother is entitled to damages for the financial loss incurred in the upkeep of the child although adulthood and for the financial loss suffered, because of loss of earnings or the incurring of expenses as a result of her obligation to the child which she

\(^{98}\) (Unreported, Kerela High Court, 13 December 2010) para 31.
would otherwise have sought to avoid.

**On Abortion issue being Peripheral**

The author intends to clarify and establish that though abortion is an issue surrounding foetal personhood, it is not the only, in-fact not even the main issue. Unfortunately however, cases like *Roe* have resulted in foetal personhood being caught up in the mire of abortion.

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 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.

Nonetheless, since abortion deals with foetal life/death, it merits some attention. Legal scholar Ronald Dworkin maintained that opposers of abortion do so because of moral complications within their conscience. They believe that life in itself has an intrinsic or sacred value. Thus, just like a priceless work of art should not be destroyed whimsically, abortion should not be used with caprice. Dworkin asserted that people who believe in the intrinsic value of human life at all stages must not impose their views on all of society. With this argument he maintained that abortion, at least until the age of development where the foetus gained the mental capacity to feel pain, must remain legal.99

This argument of Dworkin can be countered by the one given by ethicist Rosalind Hursthouse who maintains that biological or psychological milestones are not critical factors in adjudicating the morality of abortion. She writes,

[T]o think of abortion as nothing but the killing of something that

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does not matter, or as nothing but the exercise of some right or rights one has, or as the incidental means to some desirable state of affairs, is to do something callous and light-minded, the sort of thing that no virtuous and wise person would do. It is to have the wrong attitude not only to foetuses, but more generally to human life and death, parenthood and family relationships.  

The author has maintained elsewhere that 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.

**Mothers Responsibility to Carry the Pregnancy Through**

It is conceded that it is the mother who is at the receiving end of most of the pregnancy related stress. But that does not mean that one should abort as a matter of routine and social convenience.

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

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101 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.
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.

About responsibility of a PW towards the foetus, the following can be maintained at the most: If a woman makes a conscious and voluntary decision of engaging in an act, the biological consequence of which is pregnancy, she should be deemed to have made a choice and must therefore take responsibility for it. If now she demands an abortion, it should not be viewed as her right of ‘self determination’ or choice; rather it amounts to her right to evade responsibility once she has chosen.

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

It needs to be mentioned that in rape situations, or minors pregnancy—where the actors involved cannot be expected to appreciate the consequences of the act etc, it cannot be maintained that the PW has assumed any responsibility, and so her right to demand an abortion originates.\(^\text{102}\)

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

\(^{102}\) Or in other words, foetus’ claim to live becomes less strong. See generally JJ Thomson, ‘A Defense of Abortion’ (1971) 1 Philosophy and Public Affairs 47.
should translate into limiting her freedom and autonomy. Legal scholar John Robertson, who specialises in bioethical issues, argues,

[T]he mother has, if she conceives and chooses not to abort, a legal and moral duty to bring the child into the world as healthy as is reasonably possible. She has a duty to avoid actions or omissions that will damage the foetus and child, just as she has a duty to protect the child’s welfare once it is born until she transfers this duty to another. In terms of foetal rights, a foetus has no right to be conceived or, once conceived, to be carried to viability. But once the mother decides not to terminate the pregnancy, the viable foetus acquires rights to have the mother conduct her life in ways that will not injure it.103

Conclusion

In the field of medical science, unimaginable feats are being accomplished. For instance, there is research being undertaken to (1) lower the age at which a baby born prematurely may survive that is, to push back the threshold of viability; (2) look into foetal development and disability; (3) ascertain how far such disability may be remedied prior to birth, for example by foetal surgery in utero or drug therapies administered to the foetus in utero; and (4) determine whether the latter stages of gestation the foetus may be transferred to an artificial womb (research into partial ectogenesis).104

In short, developments in science continue to blur the boundaries between the foetus and a newborn infant on one hand and the requirement of concepts like quickening or viability on the

104 See generally Amel Alghrani, Margaret Brazier, 'What is it? Whose it is?: Re-positioning the foetus in the context of research' (2011) 70(1) Cambridge Law Journal 51. It is important to mention that this chapter excludes discussion on foetal research deliberately, to retain focus on more pertinent aspects of the topic at hand.
other hand. In the wake of all this, the law-medicine interface becomes even more important, if law is to have any social relevance. Otherwise it would become stale and obsolete and continue to foster age old concepts like ‘viability’ in the name of law.

Whether the foetus has any claims to protection or not is, in the opinion of the author, no longer a challenge before the legal system— the challenge lies in making the system realise the fact that we can no longer avoid recognising the legal status of the foetus.

In India there is a paucity of activists who would advocate the cause of the unborn and assert in a meaningful way (on behalf of the unborn) that they have legitimate interests to be protected. Such protection is supplied in case of even animals, and consequently imposes on human beings certain duties of respect. The duties in turn restrict the latter’s freedom of choice and action. If the same can be accepted by law for animals, it can work for the foetus as well.

Finally a word about the scheme of this research; through this thesis, the author aims at highlighting, if not removing, the prevalent fallacies and misconceptions (which, over a period of time, have acquired the status of legally and morally correct view) about the correct legal status of the foetus; most bizarre being the notion that a foetus is a ‘person’ with rights and duties—that it has the 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’.\(^\text{105}\)

An attempt has been made to identify commonalities and differences in the treatment of an unborn under the legal systems of the UK, USA and India. In order to provide a clear visualization and better understanding of the topic of study, the entire work is divided

into 7 chapters, each dealing with a different aspect of the foetal status.

The next chapter, that is chapter 2, explains the position of the unborn in the law of Tort. It has been chosen as the first chapter because, if there is any branch of law that presents the most intricate problems in relation to rights of an unborn, it is the Tort law. In the law of Torts, as a general rule, only the party that has suffered injuries at the hands of the tortfeasor can sue. So, if a PW is a victim of negligence on part of a certain tramways as a result of which the child is born with several deformities, the PW can clearly sue for damages. However, whether the child can sue for pre-natal injuries is a question to be probed. Likewise there are several other issues that require debate and settlement.