Chapter 3

Feasibility of Foetal Rights in Abortion Era; Possibility of Prosecuting PW for foetal abuse

Foetal Rights in face of Abortion

Before one deals with foetal rights, it is necessary to provide a preface on abortion--The famous decision of the American SC in *Roe v Wade*\(^{241}\) established in America that each trimester of the pregnancy affords the woman particular rights. In the first trimester, she is relatively free to exercise her right of self-determination and is at liberty to decide whether she wants to continue with the pregnancy or not. Hence, the right to abort is almost absolute.\(^{242}\) In the second trimester also the option of abortion is available provided the woman’s health is not at stake. So, the right to abort is regulated accordingly.

The onset of the third and final trimester usually\(^{243}\) marks the point of foetal viability\(^{244}\). It is now that the State has a compelling interest in protecting potential life.\(^{245}\) In this period, abortion is proscribed, unless it is absolutely necessary to protect the woman’s life or health. In conventional understanding, it is essentially from this period onwards that the mothers’ right to free determination of her lifestyle has to be subservient to the well being right of the foetus for she has voluntarily exercised her right to *retain* the foetus.

*Roe* ruling has a problem because it gives almost absolute rights to abort in the first trimester, which is against foetal right to life.

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\(^{241}\) 410 US 113 (1973).

\(^{242}\) In fact the State would not normally interfere with her decision at all, barring that she chooses a licensed medical practitioner to perform the said abortion.

\(^{243}\) Though not necessarily.

\(^{244}\) The time when the foetus acquires the potential of sustaining itself and having meaningful life independent of the mother.

\(^{245}\) *Roe* was modified by *Planned Parenthood v Casey* 505 US 833 (1992), which replaced the trimester system with the point of foetal viability (whenever it may occur) as defining a state’s right to override the woman’s autonomy.
The proverbial ‘choice’ in abortions should be restricted to the choice of taking contraceptives or the choice of taking emergency contraceptive pills and not the choice of taking a life. If the choice is not exercised and the pregnancy has established itself, there is every reason why the future life should be protected.246

This trimester scheme roughly explains the status of abortion in the UK as well. In India, things are different as discussed after a few paras.

The argument in this thesis is to do away with the fixation of viability-connected-personality altogether and treat the foetus as a legal person from conception itself. This would penalise all the crimes and torts that are inflicted upon the foetus by all parties, mother or any third person. The foetus should be given a standing sans the condition of live birth or viability or any other condition for that matter. It is potential life, from the time it is conceived, that is pregnancy is confirmed, and hence become eligible for protection thence onwards. In order to understand the context better, it would be apt to mention the concept of ‘viability’ and the ‘Born Alive Rule’ here:

Presently the jurisprudence on foetal rights revolves around the point of viability. To elaborate, it is only if it can be established that the foetus was viable that it would get some semblance of personality and it is only upon viability that culpability can fixed on the perpetrator. Hence ‘viability’ is that stage of gestational development which is central to any crime/tort against the foetus.247 In other words, the child in order to be protected by Criminal or Tort Law must have reached such a stage of development so as to be capable of being ‘born alive’.

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246 Though, the provision of exceptions should always created.
247 Viability is that stage of foetal development when the foetus acquires the potential of sustaining itself and having meaningful life independent of the mother. The stage normally occurs anytime between 24 to 28 weeks.
The standard, primitive to that of viability was ‘quickening’. In olden days, because of lack of modern day scientific techniques of determining pregnancy and ascertaining gestational development, it was only when the mother evidenced the activity of the child or when it was otherwise crudely visible from outside the womb that the unborn could be treated as alive or capable of being born alive. It was only when it was born alive or displayed such capacity that it could be a subject of death/homicide or miscarriage respectively. Hence, quickening performed an evidentiary function.

Before the stage of quickening, it could not be proved that the child in utero was alive so law created an artificial understanding that the child was ‘first’ alive at quickening and made the production of a miscarriage thereafter a grave offense. Similarly, the law could not prove the offence of homicide until the unborn child was observed alive outside the womb, so the law adopted the presumption that children are stillborn, unless there was evidence of a live birth. Over a period of time, law became fixated with the ‘born alive’ doctrine in the sense that it was not until a live birth occurred at any time of gestation that the law could prove life, death and causation. Simply put, law punished death of the foetus as homicide and fixed culpability on the accused for any pre-natal injury caused to the

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248 ‘Quickening is the name applied to peculiar sensations experienced by women in about fourth to fifth month of pregnancy’: Ratanlal and Dhirajlal, The Indian Penal Code (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1795.

The IPC, 1860 does not use the term viability but quickening, though it is an outdated method of determining gestational age and is highly variable.

249 See n 394 for discussion on Henry of BrActon (ca. 1210–68), who was an English jurist, famous for his writings on Law, particularly ‘On the Laws and Customs of England’.

250 Miscarriage is the premature expulsion of the foetus from the mothers womb at any period of pregnancy before the term of gestation is complete. Medically, three different terms viz abortion, miscarriage and premature labour are used to denote this expulsion at different stages of gestation. The term abortion is used only when the ovum is expelled within the first three months, the term foetus when expulsion takes place between 4th to 7th month (before viability) and premature labour is used thereafter (for delivery of a viable child): Ratanlal and Dhirajlal, The Indian Penal Code (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1794.
foetus, only when it was born alive (even if it breathed for a non-consequential brief moment) or was ‘viable’ and causation of the injury could be established to the accused.

With the advent of modern obstetrical technology, especially ultrasound, quickening became irrelevant as a criterion of pregnancy; similarly, advances in obstetrics and foetology have transformed the logic of Born Alive Rule into absurdity.\(^{251}\) Now, it is possible to determine the existence of pregnancy within 6-12 days of intercourse\(^{252}\) and life can be detected through heartbeat within the first two months of pregnancy. Hence there is every reason to treat foetal injury and death as episodes suffered by ‘persons’. Needless to add, that they should be punished commensurately.

It is interesting to note that viability was originally not a

\(^{251}\) The Born Alive Rule was the result of unsophisticated medical knowledge and a high degree of pre-natal mortality. Primitive medical technology made it impossible to establish that a foetus was alive until it was born. The impossibility of determining whether and when a foetus was living and when and how it died led to the difficulty of ascertaining whether a defendant’s misconduct was the cause of a foetus’ death. In homicide cases, the Born Alive Rule provided an evidentiary standard for proving the corpus delicti of the homicide of an unborn child. Adoption of the Born Alive Rule avoided the difficulty of establishing a speculation.’ (Mamta K Shah, ‘Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Foetus as Potential Life’ (Spring 2001) 931, 937-38).

Presently the situation has changed drastically. Medical and forensic science have made it possible to determine with almost pointed accuracy as to when the deformity set in and why or what was the cause of death. Law should translate this development into granting legal personality to the unborn since conception.

However, the trauma of being a foetus presently, in India, is that because of the failure on part of the legislature to formulate any law recognising the status of a foetus as a legal person, and fixation of the courts to the Born Alive Rule, the inevitable conclusion in any given case is that since, in the eyes of the law, foetus never became a ‘person’, it cannot be said to have attained life, and therefore cannot be said to suffer death. In the other two countries, the USA and the UK, which are a part of this thesis, the status is somewhat different than an outright and blatant denial or indifference towards the unborn. The USA leads the world in terms of recognising foetal rights, having WD statutes and criminalising even the reckless behaviour of the mother towards the foetus. The UK is a close follower with reservations here and there.

precondition for ascertaining culpability of accused in crimes relating to unborn.\textsuperscript{253} It was introduced subsequently for reasons cited above and also to bring about a balance between self determination rights and foetal rights. It was as if a bargain had been struck between the mothers/to be and law that allowed the mothers in developed countries to enjoy the right of self determination until viability set in. There is nothing permanent with practices. So is the case with legal conventions and in the light of new developments and demands to treat foetus a person since conception, fixation to viability should be done away with. \textsuperscript{254} The demand is to remove viability as a mark defining the limit at which right of self determination expires because so called then, the State develops interest in potential life. It is this miraculous and hypocritical shift in stand that is problematic. If the focus is on being pro-choice, one should remain with the stand and say that abortion would be available as a matter of right (of self determination), so long as the operation does not endanger the life of the mother. Focus should remain with the mother. Instead, the pro choice nations, in an attempt to appease the moralists at the same time, couch the true effect by declaring that beyond viability, since the foetus is capable of living independently, abortion is impermissible.

There should be no ‘mark’ to decide personhood for the foetus. Foetus should be treated as a person, legal person from the very beginning of conception. Viability should be rather treated as the max limit till which the mother to be can undergo abortion safely.

Though the new stand is also producing the same effect namely the position of the foetus would contingent on the decision of the mother and her doctor in both cases but it would mark a paradigm shift in the reasoning behind the same. (1) While earlier it was \textit{apparently} foetal centric but hypocritical; now it becomes woman centric and more

\textsuperscript{253} See n 394 for discussion on Henry of Bracton (ca. 1210–68), who was an English jurist, famous for his writings on Law, particularly ‘\textit{On the Laws and Customs of England}’.

\textsuperscript{254} Text to n 155-163 for discussion on viability.
practical/logical. (2) It would at the same time mark removal of viability as a criterion for determining life of the foetus and pave a way for personhood of the foetus from conception rather than from viability and (3) the pro-choice nations also would not have a cause of worry because they get their rights as they were.

**Probability of co-existence of Abortion and Foetal Rights?**

One obvious difficulty that surfaces, if one argues in favour of recognising full legal personality to the unborn, is that since both the mother and the foetus are persons, both have almost the same set of fundamental rights, particularly the right to life. If both have the right to life, where does abortion fit? In India, the term used in legal literature is not ‘abortion’ but ‘termination of pregnancy’ medically, and ‘miscarriage’ generically. Pregnancy can be terminated medically only if the requirements of the Medical termination of Pregnancy Act, 1971 are fulfilled.\(^{255}\) It is an established fact that India is a pro-life and not a pro-choice country per legal policy, so abortion is not a right, as in the US and the UK.\(^{256}\) Indian law however provides for specific situations where the foetus/pregnancy can be terminated provided certain conditions are met and not as a response to the right of self determination or right of bodily integrity. One of the reasons behind such severe regulation of abortion in the country is the obsessive *Shastric* slavery of preference for the male child and the consequent malaise of female foeticide or sex selective abortions performed illegally. It is prudent and wise to continue with such regulation and not slavishly ape the west in terms of abortion rights if India is to fight and tackle the

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\(^{255}\) For relevant provisions of the Medical Termination of Pregnancy Act 1971, refer to ch 6.

\(^{256}\) Generally speaking, in the US and the UK, since one has a ‘right’ to abort, PW can do so, so long as her own life is not at risk. In advanced stages of pregnancy, because of increased risk to the host and also because of attainment of viability by the foetus, abortion is not advised by Doctors. Thus regulation comes in only at the later stage and this is how their laws have also developed.
menace.\textsuperscript{257} If abortion on demand is made available in India, as a right as in the USA and the UK, it would pave a way towards the damaging trend of forcible but completely legal abortions of female foetuses.

This is not to state that everything is alright with the present provisions of MTPA, 1971. Changes are required here and there.\textsuperscript{258} For instance, keeping recognised and specific situations in contemplation, there is a distinct need to increase the statutory upper limit of 20 weeks for medico-legal termination of pregnancy to \textit{n} number of weeks where ‘\textit{n}’ should remain a case sensitive numeral-purely dependant on whether the health of the host mother permits the termination. In any case, insofar as the upper limit of abortion or termination of pregnancy is concerned-the flat standard of 20 weeks should be done away with as it is unjust\textsuperscript{259} in light of advancement in medical science.

The argument in this thesis hence is not to denigrate the present pattern of circumvented abortion rights in India. The author in-fact maintains that with the suggested modifications to the MTPA, 1971 in place, the Indian model would perhaps be the best one available taking care of all conflicts especially the ones between right to self determination of the mother and foetal right to life.

\textbf{Extreme Regulation of Abortion Required}: In the USA and the UK where abortion is a matter of right in general\textsuperscript{260}, if the mother decides to abort the pregnancy in the exercise of her right to self determination, irrespective of whether her life is at stake or not, the foetal right to life would be treated as subservient. This is

\textsuperscript{257} It must be added however that once that stage of evolutionary development is reached where female foetuses are not discriminated against, we may have a law as progressive as the USA.

\textsuperscript{258} Specifically in section 3 of the MTPA, 1971 which states limited grounds of terminations of pregnancy. Elsewhere under an appropriate chapter, it has been argued in detail that those grounds should be increased and a few existing ones tweaked.

\textsuperscript{259} See \textit{Dr Nikhil D Datar v Union of India & Ors} SLP (Civ) XXXX 2008 (SC).

\textsuperscript{260} That is, before viability sets in.
problematic not only because it is morally upsetting and mentally disturbing but also because it blatantly goes against the foetal rights to life. **Foetus can and should be treated as a legal person having the right to life which should not be breached except in exceptional circumstances where its rights conflict with that of the mother.** The Indian MTPA 1971 specifies those rights.\(^{261}\)

It is apt to reiterate here that the author supports extreme regulation of abortion as is the case of India and not the liberal stand as is the case in the USA and the UK. The Indian policy behind almost banning abortion has one rationale (amongst many others) rooted in societal ideology and (mal)practices. Even for countries where sex selective abortions are not prevalent, this ideology behind the Indian model is not only morally and demographically healthy, it is also more conducive towards acknowledging the legal personality of foetus. In the author’s opinion, there is no need to dilute the stringent abortion laws even when the Indian society evolves to pull itself out of sex preferences.\(^{262}\)

If in the USA and the UK, legal abortion is liberally available till the point of viability—that is *totally* insupportable. This is because the stand suffers from two grave defects:

1. it is alright to take a pro choice stand, provided it be displayed consistently. It is hypocritical to maintain that a PW can abort as a matter of right (of self determination) and at the same time say that this right is available till the point of viability, as if to display some respect for potential life. Instead of taking viability as a criterion for determining the validity of abortion, heath of the

\(^{261}\) Certain modifications are required in the form of legal reforms in the light of the changed scenario of medical technology and societal maturity. Refer to ch ...

\(^{262}\) The obsession for the male child results in female foeticide-sex detection and selective abortion of female foetuses.
mother should be the only parameter for pro-choice nations. In simple terms, abortion should be allowed or forbidden not on the point of viability but on whether the emotional and mental health of the mother permits it. Alternatively viability may be treated as a mark of not foetal development but more as a mark of the time till when the host is safe to undergo abortion. That limit of safety, which is case sensitive, should be the checkpoint till which abortion should be made legal. And this should be allowed only in certain specific situations along the lines specified in the Indian MTPA, 1971. This way the whole perception towards abortion would shift from being holistic to being more practical. It is also more logical if the decision is taken from the angle of existing life (PW) than potential life (foetus), if one is projecting itself as a pro-choice nation. The problem with treating viability as a standard for denying or accepting abortion right has been dealt with detail in the later paras.

(2) Secondly, as already stated, it is OK to declare oneself as pro-choice and hail the right of self determination as a weapon of liberation in the hands of women. However, it is important to decide where the right of choice commences and when it expires. Like any right in the nature of individual entitlement, the right of self determination should also come with an expiry date. Moreover, it should also have reasonable restrictions imposed on the same so that arbitrary exercise is minimised.

Demanding right of Abortion and Legal Personality for the Unborn, whether Contradictory

One ground that clearly needs to be added to the ones already mentioned in the MTPA, 1971 under which pregnancy could be medically terminated, should be the extreme detachment of the mother from the unborn with the result that she does not want to carry on with the pregnancy. It is not hypocritical to advocate for foetal rights and personhood from the time of conception on one hand and supporting abortion on the other specifically in such
cases because if the mother herself, being the host, is unwilling to carry on with the pregnancy, there is absolutely no reason why the State should thrust it upon her to carry it till full term. It is here that foetal right to life should be treated on a lower footing than life of the expecting mother. If the child is unwanted, the emotional bond that is expected to exist between the foetus and the woman is absent. For all practical purposes, the PW does not see herself as a mother of that entity or the latter to be a part of her life. Though foetus should have a right to life, it must be life with dignity, a meaningful, wholesome life which would not be possible if the mother herself has not been able to form any emotional bonding with the foetus/would-be child. Here it is suggested that attempts must be made to provide therapy and consultation to the PW to persuade her to keep the baby.\textsuperscript{263}

**Liability of Mother for Injury/Death to the Unborn**

Moving away from abortion, a question arises that if injury or death occurs to the foetus where there was no intention of abortion, what should be the liability of the person responsible if that person is the mother? The liability can be divided into civil and criminal as follows:

**Civil Law of Torts’—**

Many of the principles of Tort law have been adopted from the English Common Law by the Indian courts as being consonant to the principles of natural justice. It is only when a particular rule is unsuitable to the local conditions that a departure is made.\textsuperscript{264}

Sir William Holdsworth, in the History of English Law\textsuperscript{265} opines that the only certain line of distinction between a crime and a tort is

\textsuperscript{263} The importance of therapy, consultation guidance and state help in difficult situations women found themselves in has been highlighted and discussed later in this chapter in detail.

\textsuperscript{264} Surendra Kumar v Distt Board Nadia AIR 1942 Cal 360.

that of ‘remedy’. If the remedy is damages, compensation or penalty imposed by a civil action, the wrong so redressed is a civil wrong. If the remedy awarded is in the nature of punishment to the accused enforced by the State itself, the wrong redressed is a crime. However, a liability in tort may co-exist with criminal responsibility. In other words, the same act may both be a crime as well as a tort.

In the following paragraphs, the status of foetal injury and death have been examined from the standpoint of being a tort and then a crime committed by the PW.

The question of granting personhood to a foetus is fraught with, not only legal but medical, social and personal tangles. In addition to this, grave ethical questions may arise as and when foetal rights come directly in conflict with that of the expectant mother or if the needs of the foetus and PW diverge. In *Winnipeg Child and Family Services (Northwest Area) v DFG*, McLachlin J of the SC of Canada said that:

"[T]o permit an unborn child to sue its pregnant mother-to-be would introduce a radically new conception into the law: the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation...for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth...each decision made by the woman in relation to her body will affect the foetus and potentially attract tort liability...the Common Law does not clothe the courts with power to order the detention of a PW for the purpose of preventing her from harming her unborn child."

However, there is nothing to prevent the State from making such a law or laws. Infact, if some semblance of personality is to be *really* granted to the foetus, it is but necessary that it be treated with respect right from the very beginning, that is, conception.

When we study the Law of Tort in regard to the PW-foetus

relationship, it essentially covers those cases where the PW herself is the tortfeasor and it is her acts of commission or omission that have caused damage to the unborn in the form of death or injury. Generally speaking, PW have been tort immune in this respect. However, the law of Tort is expanding steadily and thus the pigeonhole theory\textsuperscript{267} is untenable. It is under this expansion that claims of Wrongful death have been admitted by the USA as a part of the Civil Law of Torts.\textsuperscript{268}

For instance in the 1980’s itself, in \textit{Grodin v Grodin}, the Michigan (US) court allowed a child to sue his mother for taking an antibiotic that caused pre-natal injuries. The tort cases involving the PW and her foetus as adversaries retain the essentials of a classic tort action viz. existence of a duty of care, breach of that duty, consequent injuries to the foetus and damages. As Smith mentions, ‘these tort cases involve recognition of a standard of care that has been violated, recognition of a duty that has been breached, and evidence of injury and of proximate cause related to the alleged action or negligence’\textsuperscript{269}

As per Blank, this development in tort law of inculpating the PW for pre-natal injuries/harm to the unborn has been a paced development and is likely to become a permanent part of lawsuits. He maintains that,

\[T]\]he abrogation of intra-family immunity and the willingness of some courts to hold parents liable for pre-natal injury opens the door for increased action in this area. In a short time span, torts

\textsuperscript{267} ‘[The pigeonhole theory] resembles the 10 commandments with their precise specifications for sins. According to this theory, the law of Torts contains a net-set of pigeon holes, each containing a specific tort... If the defendants wrong does not fit any of those pigeon holes, he has committed no tort. Sir John Salmond is the chief supporter of this theory.’: SP Singh, \textit{Law of Tort} (5th edn, Universal Law Publishing 2012) 11.

\textsuperscript{268} Refer to ch 2 for discussion on Wrongful Death (WD).

against parents for pre-natal injury caused either by commission or omission have been recognised as a legitimate cause of action.\textsuperscript{270}

Also many jurisdictions like the UK under Congenital Disabilities (Civil Liabilities) Act, 1976 maintain the tortfeasors liability to compensate the foetus for injury suffered, even if the tortfeasor is the mother carrying that very foetus and guilty of negligently driving a motor vehicle.\textsuperscript{271} This is provided the foetus is born alive as a child later and not through a representative while in the foetal stage.

Some maintain it as an unnecessary and unacceptable intrusion into her right to autonomy/liberty and question whether it is human to censure her for something she did not intend…and so on. In a civil society everyone should be able to assume, and comfortably so, that one would not commit intentional aggression on the other and even if aggression results unintentionally, that the injured would be adequately compensated for the resulting harm. Same should be the case with foetus in the womb and the PW. It is arguable if any ‘rights of bodily integrity’ and ‘liberty’ issue is sufficient to negative the foetuses right to sue in tort through a representative. After-all, a harm has been caused to an entity. Also, the would-be mother, like any other person, already owed a general legal duty of not committing aggression intentionally or otherwise on others. Given this it would be unfair to hold that she cannot be held responsible for her actions towards the foetus that she is


\textsuperscript{271} Congenital Disabilities (Civil Liability) Act 1976 s 2—Liability of woman driving when pregnant: A woman driving a motor vehicle when she knows (or ought reasonably to know) herself to be pregnant is to be regarded as being under the same duty to take care for the safety of her unborn child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present, those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child.
carrying.\textsuperscript{272} Infact, in such cases, she should bear an additional burden of being extra cautious about the pregnancy. Though till now such burden is moral in nature in most jurisdictions, it nonetheless cannot be slighted away altogether.\textsuperscript{273}

Following three sub-heads emerge in regard to the foetus and PW under the Civil Law of Torts—

A) \textit{injury to foetus by PW} - woman should be held liable to pay damages if the child was wanted, but the mother was so negligent or reckless with the pregnancy that it resulted in injury to the foetus as a result of which the foetus suffered injury or deformity.\textsuperscript{274} This penalty should be imposed on the negligent mother irrespective of the gestational age of the foetus for it is potential life in any case. Here, essentially cases of gross substance abuse should be covered. Also should be covered the situations where a PW has endangered the life of the unborn by exposure to danger. Here, though the primary intention might not be to assault the foetus, (harm may come to it as a by-product of her conduct) still, negligence cannot be ruled out and gross episodes of this type should invite commensurate penalty.

Presently, there is no law in India that governs the behavioural or lifestyle aspects of pregnant women. It would be difficult to articulate and establish a standard of care for the PW. However, it is definitely not impossible. The degree by which the liberties of the woman are curbed would have to be justified by the benefit that would ultimately accrue towards protecting the foetus. Behaviours that are already illegal, even in case of non pregnant women, like ingesting harmful drugs, may simply invite additional or special

\textsuperscript{272} The only hitch is presented by the non-recognition of the foetus as a separate legal person from that of the PW.

\textsuperscript{273} Text to n 341-342 for an elaboration on how various scholars have mooted this idea of reasonability to expect more careful approach by the PW towards the pregnant condition.

\textsuperscript{274} As a rule of tort this is possible because of the tenet \textit{injuria sine damnum}, which makes injuries without consequential damages actionable.
penalty for pregnant females. It is regular lifestyle choices and behaviours like consuming alcohol, not eating healthy, aversion to medication of any kind that would have to be sorted.

It must be added here that injury caused by the mother may also fit the bill of hurt, grievous hurt or an act endangering the personal safety of others under the domain of Criminal Law, if foetus is recognised as a person.

The ancient laws treated ‘quickening’ or viability as a criteria to even consider the foetus fit to be included in any legal discourse on civil or limited criminal liability; it was summarily excluded from being a subject of homicide. It could be aborted, otherwise damaged or extinguished but not murdered. All this needs to be changed now if foetus is to be acknowledged with full personality.

It must be noted here that the idea behind the argument is not to enable the foetus to sue once it is born alive—because that is old—the idea essentially is to acknowledge that a foetus can sue the mother for pre-natal injuries even while in the foetal stage, as a potential life through a legal representative. It is only then that personality would be deemed to exist in the real sense in the unborn.

(B) injury by third party— the party should be liable to pay damages if causation can be traced to his actus reus. Presently, in India the thrust is either not on the foetus at all but on the injury sustained by the mother or the focus is on whether the injured foetus was viable; normally, it is only when the foetus is proved as viable that the tortfeasor may be held liable to pay damages, if at all. The details of the same have been dealt with in the chapter on Tort Law and Unborn.

275 Text to n 390-392 for definition of ‘quickening’.
(C) **death by mother or third party**\(^{277}\) - where the child was wanted but it died because of the negligence of the mother or the third party, the person responsible should be penalised by way of damages; this is referred to as wrongful death claim, a relatively new area of Civil Law, traditionally inapplicable to the mother.\(^{278}\)

There are three issues with WD that have a bearing on the present chapter\(^{279}\): (1) whether abortion should be included in the same; (2) whether it should inculpate the PW for negligent or wilful deaths that are not legal abortions and (3) whether WD should include pre-viable foetuses.

The answers to the above are quite clear if one removes the haze that tends to settle on ones thought process while dealing with questions having difficult moral and social ramifications.

**Re Abortion versus WD:** In the USA, and all pro choice countries that follow the pattern of *Roe v Wade* for that matter, in sum and substance *Roe v Wade*\(^{280}\) legalised abortion and recognised this right in the pregnant woman with some reasonable conditions.\(^{281}\) Alternately, it can be said that *Roe* denied the unborn

\(^{277}\) Where death is caused by third party, see ch 2, ‘Tort Law and Unborn: USA, UK and Indian Scenario’. The present subhead under this chapter is confined to mothers’ liability only.

\(^{278}\) Wrongful Death statutes are civil law provisions that allow the relatives of a deceased person to recover damages from a third party responsible for that person’s death. While every US state has such a statute, they differ among themselves in relation to the application of such statutes to unborn children and also as to the state of development of the unborn child that is required for their application, that is whether the foetus should be viable or even pre-viability deaths may be accounted for. Also when the foetus is considered viable may be subjective and case sensitive.

\(^{279}\) Detailed discussion on the concept of WD has already been undertaken under ch 2, ‘Tort Law and Unborn: USA, UK and Indian Scenario’.

\(^{280}\) 410 US 113 (1973).

\(^{281}\) It may be useful to recall that India is not a pro-choice country. Abortion is illegal. Pregnancy however can be terminated under specific conditions prescribed by the MTPA, 1971. These conditions are very particular and limited to come within the ambit of ‘choice’. The author argues that even if and when Indians achieve the maturity of making a choice and the laws permit the same, legal right of or act of abortion should not be mixed or confused with WD flowing from the PW. In case of legal abortion, while there was no connection between the foetus and the mother
any legal status. Those who celebrated the decision of Roe may have a reason to fear if the ‘wrongful death claim syndrome’ becomes a trend.\footnote{282} This is because if foetal personhood is recognised either by the Judiciary or by the Legislature for the purposes of Wrongful Deaths, it may bring abortion also within its purview and thus dilute the protection given to abortion.

While dealing with WD and Abortion in the same vein, it is important to take a balanced approach to ensure that there is no contradiction whatsoever. Abortion would have to be kept available, whether on demand as in the USA or regulated as in India. Care would have to be taken to ensure that abortion is kept separate from WD committed by the pregnant female.\footnote{283} The question whether the child was wanted and expected or not, should be the dividing line separating the two.

In case of those nations where abortion is available on demand\footnote{284}, it would be difficult to interpret wrongful death statutes to include pre-viable foetuses because it would amount to making the PW liable for the WD of a pre-viable foetus but not guilty of any offence if the same foetal life is extinguished through abortion; additionally it would also be totally repugnant to include the PW as an accused for wilfully or recklessly and illegally terminating her pregnancy.

One must look into the object behind the two concepts—abortion was meant to be a right in the hands of the host—the PW and hence we read it as an ‘advantage’ in her. Contrary to this wrongful death,
as a concept was meant to essentially inculpate negligent third parties. It is not to say the pregnant females should be removed from its purview altogether. But that they may be covered in exceptional circumstances for wrongful deaths. Where death is desired and intended because the mother does not want a child or where death cannot be avoided due to medical reasons by the mother should be covered under abortion and where death of the unborn was never even imagined by the mother but it nonetheless died due to negligent behaviour of the mother (substance abuse etc\textsuperscript{285}), may be governed by wrongful death statues.

It is but natural that like any law, this provision would also have a flip side and innocent convictions might result, but all that may be seen as collateral damage—‘inevitable’ if the higher end of justice to the foetal status is to be achieved. So, as a general rule it would be in the fitness of things to not to exclude the mother from WD Statutes-though they should be covered with abundant caution and due investigation of facts.\textsuperscript{286}

With this, we come to the next important issue/problem with WD—

\textbf{Re Pregnant Woman and WD}

Though pregnant women have been conventionally kept immune from WD claims, there is no reason why, in proper cases, the mother should be excluded from being liable for the said death.\textsuperscript{287} In fact in repeated cases of substance abuse\textsuperscript{288} that results in death of the foetus, it should be employed to set an example. Also, if the

\textsuperscript{285} For details refer text to notes 287-298.
\textsuperscript{286} Though there is a strong dissenting view, that questions-‘should a PW get a lenient treatment than a third party, or perhaps, no punishment at all, simply because it is her foetus nestling within her womb. Many courts have answered in the negative.’
\textsuperscript{287} Though, in such cases extra care would have to be taken to differentiate accidental deaths from grossly negligent deaths.
\textsuperscript{288} The World Health Organisation (WHO) defines Substance Abuse as: the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.
State can do as much as to enter a very private domain of depriving the mother a choice of whether she should keep the child or not, for several reasons\textsuperscript{289}, the State can very well regulate the pregnancy further, in order to protect potential life and its rights.

It would be worthwhile to reiterate that presently, most wrongful death statutes cover only 3\textsuperscript{rd} party negligence and not 2\textsuperscript{nd} party, that is, the mother; so the mother is excluded from the purview of it. In other words, the countries that entertain wrongful death claims, the kith and kin of the dead foetus, in case it dies due to the negligent behaviour of anyone else but the mother only is allowed to sue on behalf of the dead foetus for its ‘wrongful death’.

There is no law in the USA, UK or India prescribing that the expectant mother has to behave in the way that her ‘condition’ requires her to but the question is--if she does not behave in the required fashion, why should she not be prosecuted for engaging in self-destructive behaviour that poses a risk of harm to the foetus (like excessive consumption of alcohol, drugs etc)? Why should the child, if it is born with deformities because of the stated behaviour, or dies because of the same, not be allowed to sue the mother for its pre-natal injuries or premature death?

When Does Conflict Arise: If foetus is given personhood, it would be in law, an entity independent of the mother and have its own set of rights which it can invoke against the mother through a representative \textit{even before it is born}. Presently, it is an established fact in the law of tort, and the UK and USA are definitely unanimous on this, (though the latter has graduated from the rule

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\textsuperscript{289} For instance in India, apart from numerous holistic and religious reasons, prevention of sex selective abortions is one of the major concerns why abortion has not been given a free way. Despite protests and demands from pro-choice feminist circles, abortion remains heavily regulated and circumscribed through the Medical Termination of Pregnancy Act 1971. Hence, India is by and large a pro life country more by compulsion of societal and religious dogmas and practices than by choice. In the USA and the UK, though abortion laws are lenient than that of India, there are regulations pertaining the same; it is not a lawless issue.
and entered the radical group of countries profusely entertaining wrongful death claims) that a foetus can sue 3rd parties for injuries suffered pre-natally *provided* it is born alive. This it does through a representative. It is only when personality of the foetus is recognised in the former sense (that is in the foetal/unborn stage) that the rights of the unborn apparently come in direct conflict with the PW (and questions of such nature arise and can be multiplied). It is here that the difficulties associated with criminal and civil cases against pregnant women present themselves with complete perplexity-moral and intellectual. It is now that one tends to question or think about the legitimacy or advisability of imposing criminal or civil sanctions on pregnant women for the harm they have caused to their unborn children-while exercising their right of bodily integrity or self determination.

It must be pointed out that such moral and intellectual complication is virtually absent in imposing the duty of care towards negligent third parties in civil or criminal matters for there is no reason for conflict of rights.290

Instead of avoiding the matters altogether, the question of whether a duty of care is ever owed by a mother to her unborn child should be decided conclusively and in the affirmative by the Legislature. This would also enable the Courts not to circumvent the tough questions whenever they arise. A suggestion to the effect has been mentioned in the above paras.

**Why Inculpating PW Necessary Now:** On a philosophical note it may be added here that the concept of obligation has undergone a tremendous shift in meaning over the years. Some may even see it as desacralisation of this world but it is a reality that duties that came to us automatically once upon a time as second nature, no longer motivate us. We have become so accustomed to thinking in

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290 Though there are other issues that remain- whether the injury or death can be traced back to the negligent act for one and whether the foetus was of adequate gestational age to be even considered for maintaining action.
terms of ‘rights’ and neglecting our innate duties that there is no option left but for the legislature to step in and convert them into legal duties, so that their breach either becomes a civil wrong or criminal offence. It is in this spirit that the Legislature of India passed the Parents and Senior Citizens Act 2007 and it is the same spirit that a law should be passed regulating destructive behaviour during pregnancy. In reality it translates into placing reasonable restrictions on the right to bodily integrity and self determination of the PW, once a decision to keep the pregnancy has been taken.

In cases of PW versus the foetus, it is submitted that the relationship is in a league of its own and hence it is totally unfair to carve out a complete analogy between actions brought for pre-natal negligence against third parties and such actions brought against a mother by her child. Perhaps it can be argued that the liability of a PW to her unborn child can be sustained in exceptional cases where the damaging act was in breach of a general duty of care owed by the woman and not where the damaging act was a harmless lifestyle choice. This minimal liability needs to be prescribed through law and it is time that at least an educative/persuasive provision be inserted into the laws defining the pleasant duty of a mother to follow a routine which is conducive to health of the foetus or prohibit reckless behaviour which may pose a danger to the foetus.291

What happens if in the exercise of her right to self determination, the PW refuses to undergo a medical treatment whether invasive or otherwise, that is necessary for the health or life of the unborn? Presently, the legal situation is that although the foetus is protected in a number of different indirect ways,292 an unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights. In order to remove this injustice, it

292 Like a PW is usually not prosecuted during the time of pregnancy.
is recommended that a law be created citing irresponsible conduct having a bearing on the pregnancy and accompanying penalties/punishments.\textsuperscript{293}

However it must be cautioned that while pregnancy may be declared to increase a woman’s personal responsibilities, breach of which might be penalised, it should not diminish her entitlement to decide whether or not to keep the pregnancy. This, it is argued in the thesis, should be allowed not on the basis of viability but on the basis of the health and circumstances of the mother.\textsuperscript{294}

Finally, it may be said that death of the foetus, if wrongful, should include mother also as the tortfeasor. Infact, in proper cases death of the foetus should also be brought within the fold of the homicide statutes (Criminal) and the mother or a third party, as the case may be, should be punished for murder\textsuperscript{295}, causing death by negligence\textsuperscript{296} and not only child destruction\textsuperscript{297} as it is viewed presently in the UK or as causing miscarriage as in India.\textsuperscript{298} There is nothing morally or logically questionable in maintaining this stance, nor is there any need to equate it with the abortion right of the mother.\textsuperscript{299} This is because there is a huge difference in the two situations—in the former, the child was wanted and expected, perhaps already loved as a part of the family. In the latter, there is no emotional attachment because the host herself does not want to sustain the unwanted pregnancy. The emotional bond is completely absent. While legislating, one should not ignore such emotional and social parameters if the required law is to be grounded in reality and

\begin{footnotesize}
\begin{enumerate}
\item Refer to ch 4, ‘Confinement of Pregnant Women for Protection of Unborn’.
\item For details, see the suggestions in regard to amendment of the MTPA, 1971 that give out the reasons for terminating pregnancy legally.
\item Refer to ch 6, ‘Criminal Law and Unborn: Indian Scenario’.
\item See generally ch 6, Part II and III.
\item Text to n 461-476 for definition of ‘child destruction’.
\item Refer to ch 6 for the relevant sections of the MTPA, 1971.
\item On one hand we provide the mother with the right to abort and on the other hand she becomes liable to be punished for negligent behaviour which results in death of the foetus.
\end{enumerate}
\end{footnotesize}
is looking for social acceptance.

Re Whether WD should cover Pre-Viable Foetuses

Since this aspect has already been covered in the previous chapter under the head ‘Viability in WD Cases’ a repetition has been avoided here.

**Criminal Law—**

The present section is confined to explore the treatment of pregnant women under Criminal law in the UK, USA and India in case their act or omission results in injury or death to the foetus. Hence, the following paras deal with matter under the following subheads:

(A) *injury by mother*

(B) *injury by third party, dealt with elsewhere as a chapter on Unborn and Criminal Law*

(C) *death by mother (Death of the foetus caused by third party is again a part of the chapter on Unborn and Criminal Law)*

It must be clarified at the outset that the main concern of the present section is not to evaluate whether the foetus is recognised as a legal person under the criminal laws—that has been done in a separate chapter; the focus of this part is to ascertain the possibility, feasibility and desirability of inculpating the PW for crimes committed against the unborn (in the nature of harm or death).

To begin with, since in Criminal Law, the foetus is not recognised as a legal person for most crimes[^300], not much can be written about the culpability (or the lack of it) of the PW regarding the same. Consequently, generally speaking[^301], the only provisions in which

[^300]: This is because it is not recognised as a legal person but only as an adjunct of the PW most of the times.
[^301]: Exceptional provisions and developments that do hint at making the PW liable for crimes against the foetus have been dealt with towards the end.
the PW may be indicted for crimes against the unborn are (a) causing miscarriage-abortion that is not legal or attempt thereof; (b) child destruction or attempt thereof, which essentially translates into killing the unborn during the process of childbirth (advanced stages of pregnancy).

The concept of causing hurt or injury to the foetus which may attract criminal liability does not exist and hence it is presumed that a foetus is a non-sentient being, incapable of suffering hurt or grievous hurt at the hands of anyone, including the PW. Fovargue and Miola state that medically also, the foetus is a live entity while inside the mothers’ womb and a separate one too so there is no reason why criminalization of injuries to the foetus should be limited to homicide or why criminalization of pregnant women who cause [sic] injuries to a foetus should be prohibited. On the other hand, there is every reason to condemn maternal ill-treatment of the unborn child.

Prior to some form of abortion, death of the foetus in Criminal Law is termed as foeticide or foetal homicide. (for the pro choice countries like the US and the UK). For India, a pro-life, or anti-abortion nation, the term may be used for any killing of the unborn foetus that does not fit the bill of medical termination of pregnancy under the Medical Termination of Pregnancy Act, 1971.

It may be relevant to add that Wrongful Death remains a civil wrong and not a criminal offence. Meaning, homicide of a foetus is still not culpable in the same sense as murder or other forms of culpable homicide of adults. This is the status of unborn in the criminal laws of UK, India and the US as well. Though in the USA,

\[302\text{ Infact, most of the crimes against human body should be made punishable in case of a foetus as well.}\]
\[304\text{ It translates into legal abortion if done under the statute law and as illegal foeticide, miscarriage otherwise.}\]
the extent of culpability and consequent remedies are stringent than
the other two countries.\(^{305}\)

In the USA, state and not federal law cover most crimes of
violence. Hence each of the 50 states has made their own laws on
foeticide or crimes against the foetus in general. The depth to which
these states recognise personhood in the foetus is however different.
For instance, out of these, around 38 recognise unborn or the
foetus as a victim of homicide, but only 23 maintain that foetus is a
legal person from conception-throughout the period of pre-natal
development.\(^{306}\) The remaining states recognise protection to the
foetus at some later stage than from conception-this also varies
within the remaining 12 states. For instance, California treats
killing of a foetus as homicide but does not treat killing of an
embryo, which is prior to 8 weeks of development, as homicide.
Many states still remain wedded to the old standard of quickening
or viability and do not treat the foetus as a person (potential legal
victim) till that concerned stage of gestation is attained.\(^{307}\)

Foetal homicide Laws such as the Unborn Victims of Violence
Act, 2004 of the USA are increasingly recognising mother of the
unborn as persons who could assault foetuses. (though the
indigenous foetal homicide statute--the Indian MTPA, 1971 is far
from achieving that) Hence they are being prosecuted, and
controversially so, for crimes against the unborn. South Carolina,
and Mississippi are some examples where laws have been used to
make PW accountable for the outcome of their pregnancies.\(^{308}\)

\(^{305}\) Refer to ch 5 for details on UVVA, 2004.
\(^{306}\) National Conference of State Legislatures (NCSL) database
\(^{307}\) Text to n 390-392 for definition and relevance of ‘quickening’.
\(^{308}\) For example, in Rennie T Gibbs v State Of Mississippi, SC Court Of
Appeals (filed may 19, 2010), the unborn child of 15-year-old Rennie Gibbs
(in 2006) died after 36 weeks. An autopsy of the foetus showed traces of a
metabolite of cocaine. Her doctors informed the authorities that she had
tested positive for drugs while pregnant, and she was arrested on a charge of
‘depraved heart murder’—a legal phrase used when it’s alleged that a ‘callous
In the United States, courts are increasingly according legal rights to the unborn and are thus willing, in principle and often in fact, to intervene to restrain the liberty of PW in the interests of their unborn children. The inclination of the English courts has generally been, in line with the Born Alive Rule, not to recognise the autonomy of the unborn child and so to accord priority to the interests of the PW. Hence, the trend has picked up in the USA. The UK and India however are still a long way to go.

**UK Position**

The accepted view of foetal status under Criminal law of Homicide, since mid 90’s in the UK is that, ‘Violence towards a foetus which results in harm suffered after the baby that has been born alive can give rise to criminal responsibility.’

So, the fixation is on the requirement of being born alive. Normally, the aspect of viability is also added to the fixation of liability. Meaning, any pre-natal injury to the foetus would be a criminal offence only after it has attained viability and provided it is born alive. Once this happens, even if it dies after one miniscule second, the requirement of Criminal Law to inculpate the offender would be satisfied. Conversely, there would be no crime committed under Criminal Law if the injury happens before viability or if the injury happens after viability but the pregnancy does not result in live birth (it is stillborn).

For the Legislations, in the UK, they have the Abortion Act 1967,

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309 Attorney General’s Reference (No 3 of 1994) (1998) AC 245, 254. Here, the accused had stabbed a PW in the abdomen, causing her to go into premature labour. She gave birth to a live child who survived for 121 days. In this particular case, the foetus did achieve live birth and thus the rights attached to all human beings crystallised at that point. The logic of Attorney General makes live birth mandatory if any criminal liability for harm or homicide to the foetus has to be fixed.
and the Infant Life Preservation Act, 1929. The former gives grounds for legal abortion whereas the latter makes child destruction an offence. However, the mother is never inculpated for crimes against the foetus.

In 1991, through section 37(4) of the Human Fertilisation and Embryology Act, 1990, some changes were made to the Abortion Act, 1967. Section 1(1) of the Abortion Act, 1967, which gave the grounds for medical termination of pregnancy, the gestational age till which abortion was a legal possibility was made till 24th week. If it exceeded 24th week, abortion could not be carried out legally at all. It also amended section 5 of the Abortion Act, 1967 (for the smooth operation of the Infant Life Preservation Act, 1929) and stated that it would NOT be an offence under the Infant Life Preservation Act, 1929 if pregnancy was terminated by a medical practitioner and in consonance with the provisions of the Abortion Act, 1967. This ensured that if a medical practitioner under the Abortion act terminated the pregnancy, it would not amount to the offence of child destruction under the Infant Life Preservation Act, 1929.

Child Destruction is the name of a statutory offence in England and Wales primarily. It refers to the crime of killing an unborn but viable foetus, that is, a child capable of being born alive, which has been fixed at 24 weeks gestation. Meaning, if the unborn is killed beyond the 24th week and it is not done in consonance with the Abortion Act, 1967, it would be an offence of child destruction under the Infant Life Preservation Act, 1929. The purpose of the offence is to criminalise the killing of the child during birth because

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310 Refer to ch 5 for definition of child destruction (n 464-479).
311 Because advancement in medical technology made it possible to save a foetus of 24 weeks gestation in case of pre-mature birth.
it is neither legal abortion\textsuperscript{312} nor homicide\textsuperscript{313} as per the UK Laws.

Fovargue and Miola believe that with the introduction of the Infant Life (Preservation) Act in 1929, the scales were tipped for the first time in the direction of maternal rather than foetal welfare:

\begin{quote}
[N]otwithstanding the fact that the Act continued the serious view taken of child destruction and abortion, it was the first statute to permit abortion, albeit in very circumscribed situations, and therefore acknowledged the existence of both foetal and maternal interests in relation to pregnancy.\textsuperscript{314}
\end{quote}

Nonetheless, no legislation ever mentioned anything about inculpating the PW for foetal abuse and crimes with result that they remain unpunished offenders till date.

**Indian Position**

In India there are primarily two laws that deal with foetal homicide. One is the Medical Termination of Pregnancy Act, 1971 and the other is the Pre Conception and Pre Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. Many believe that the former legalises abortion in India, whereas the correct legal position would be that it declares abortion as illegal. Though on health grounds, it does state when and in what circumstances a foetus can be medically terminated. Hence, foetal homicide, in Indian laws exists not in the nature of generic abortions, but in the nature of ‘termination of pregnancies’.

Apart from this, the general Criminal Code of the country that is the IPC, 1860 In India sections 312 and 315 of the Indian Penal Code, 1860 contain provisions wherein a PW may be indicted for

\begin{quote}
\textsuperscript{312} The offence of child destruction is not abortion, legal or illegal (which is referred to as unlawful procurement of miscarriage in section 58 of the Offences Against the Person Act 1861).
\textsuperscript{313} Child Destruction is also not murder, manslaughter or infanticide either.
\end{quote}
crimes against the unborn.\textsuperscript{315}

Section 312 provides that if the woman is ‘with child’, which means pregnant simpliciter and not when the unborn has reached the stage of quickening, causes herself to miscarry, she faces the possibility of a lesser punishment-viz. maximum 3 years, \textit{with or without} fine as compared to the stage where she is ‘quick with the child’-where the punishment is maximum 7 years \textit{with} fine. This demonstrates that the act of causing miscarriage at an advanced stage of pregnancy has been treated as a graver offence, though at no stage does it amount to homicide.\textsuperscript{316} Thus, the section goes so far as to provide some acknowledgement to foetal personality but falls short of reading full personhood in favour of the same.

Section 299 (culpable homicide) of the Indian Penal Code, under Explanation 3 clearly states that: ‘the causing of the death of child in the mother’s womb is not homicide. Ratanlal and Dhirajlal, which is an authority on Criminal Law of the Land, mentions that the causing of death of an unborn child where it is totally inside the mothers womb is an offence under section 315(\textit{act done with intention of preventing the child from being born alive or to cause it}.

\textsuperscript{315} Causing miscarriage: Indian Penal Code 1860, s 312 states that: Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation: A woman who causes herself to miscarry, is within the meaning of this section.

Indian Penal Code 1860, s 315: Act done with intent to prevent child being born alive or to cause it to die after birth: Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

\textsuperscript{316} Ratanlal and Dhirajlal, \textit{The Indian Penal Code} (32\textsuperscript{nd} enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1794.
to die after birth)\textsuperscript{317} but not 299 or 300.\textsuperscript{318} At the same time, section 299 states that ‘it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.’ Hence, one unequivocal circumstance that makes an unborn a subject matter of homicide is (as mentioned under section 299, Expl III), when during childbirth some part of the unborn is already out of the PW.

Section 315 of the IPC, 1860 is the Indian equivalent of section 1 of the Infant Life Preservation Act 1929 of the UK with some modifications. In order for the PW to be guilty of any offence under this section, the concerned act or omission must be committed by her while the child is inside the womb. If the child is allowed to be born alive and then the act or omission is intentionally committed by the PW, as a result of which it dies, it would then be homicide of an alive human being—an offence not under this section but under section 300 (murder).

Otherwise also, the IPC 1860 does not use the expression abortion anywhere; the word used is miscarriage, which may be understood synonymously to ease understanding of the concept. The provisions of the same have been mentioned above already.

Coming back to the MTPA, 1971 and the PCPNDTA, 1994 both statutes were primarily formulated to curb the menace of sex selective abortions, which is an obsession in the country. While in the early 70’s the thrust was just to project India as a pro-life (as

\textsuperscript{317} Indian Penal Code, 1860, s 315—Act done with intent to prevent child being born alive or to cause it to die after birth: Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

\textsuperscript{318} Ratanlal and Dhirajlal, The Indian Penal Code (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1295.
against a pro-choice) nation and that foetal life could be terminated only per law and that too in certain given situations; in the mid 90’s the purpose was different. Advent of superior medical technology had made sex detection a possibility and when such technologies began to be misused, a need was felt to regulate the same, which resulted in the PNDT Act, 1994. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT), was amended in 2003 and termed as ‘The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition Of Sex Selection) Act (PCPNDT Act)’ to improve the regulation of the technology used in sex selection. It bans sex selection for the purposes of foeticide. Both laws are a part of the criminal law of the country.

Insofar as the culpability of the PW for harm suffered by the foetus is concerned, if personality is conferred on the foetus, thereby granting it the rights and interests of a legal person, then it is the demand of logic and common sense that it must be protected from all harm, including that inflicted by the mother. Presently, there is no legal or societal sentiment or inclination regarding the same in India.

**Contradiction:** It is often argued that there is a contradiction in maintaining that while the mother can intentionally terminate the pregnancy in the form of legal abortions (she can do it in India through the MTPA only), without regard to the rights of the foetus, the same mother becomes liable to the foetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at the same stage.\(^\text{319}\)

It is true that sometimes cases may assume a strange implication just because abortion is legal. For instance, in cases of foetal homicide by women hosts, their offence is reduced to nothing but maternally-induced criminal foetal homicide by a non-state

\(^\text{319}\) Just as in cases of pre-viable abortions being non-criminal and WD during the same stage being an offence.
approved method and not abortion—the state approved method of terminating pregnancies.\textsuperscript{320}

If one looks at it this way, there does seem a contradiction in maintaining that pre-viability abortion is a woman’s protected choice (till the 24\textsuperscript{th} week in most pro-choice countries and upto 20\textsuperscript{th} week under the MTPA\textsuperscript{321}) and at the same time prosecuting pregnant females for substance abuse (or negligent behaviour in general) if it results in death of the unborn even in the pre-viable stage.

Hence the author argues that the standard of viability itself should be done away with in order to decide whether foetus is aged enough to be granted legal personality. It is ‘life’ the moment it is conceived and merits to be treated like any other natural person from that instance.

The idea is never to shift focus from the well being of the PW; abortion, if it is permissible, in the restricted form suggested, should be allowed so long as the health of the PW permits the same. Contrary to the present position, where the shenanigan adopted reflects as if the state is interested in the life of both the mother and the foetus. On one hand, it conveniently refuses to grant any legal personality to the unborn and on the other hand displays concern for the ‘life’ of the foetus by denying the right of legal abortion by choosing the arbitrary standard/limit of viability because apparently at viability the foetus gains the capacity to exist independent of the host mother.\textsuperscript{322}

In short, barring the exception of legal abortion if this life is deliberately taken away or negligently extinguished, it would merit criminal prosecution. If such a prosecution becomes a reality in

\textsuperscript{320} Assuming that their foetuses were non viable at the time of the concerned homicide.

\textsuperscript{321} The author argues elsewhere that this needs to be reviewed in the light of improved medical technology etc.

\textsuperscript{322} Text to n 155-163 for details on viability.
India and/or elsewhere there are several possibilities that may arise.

Abortions would become extremely regulated and not an open-on-demand choice. The contradiction that resulted from the existence of viability as a standard would disappear and theoretically speaking, there would be no problem in prosecuting the PW for deaths of foetuses that result from negligent behaviour including substance abuse. Amongst the adverse effects that may result, there are basically two—one, the very thought or prospect of a criminal prosecution for drug-damaging the unborn foetus may be seen as a burden, a dis-incentive to bear a child in the first place. Habitual women addicts or those who stubbornly refuse to change their lifestyle for pregnancy may opt this over getting their liberties curbed.323

Secondly, if at all the woman gets pregnant, the pressures of choosing abortion over retaining the pregnancy may increase to avoid prosecution.324 The author however maintains that this may not happen in the Indian scenario, because abortion in the form of medical termination of pregnancy is already too circumscribed. It is suggested that if the US and the UK also adopt this model with some tweaking here and there325, the issue may be resolved to a

323 Refer to ch 6. ‘Confinement of Pregnant Women for Protection of Unborn’ for details.


According to Janssen, a clear criterion for deciding what is punishable and what is not is supplied by the distinction between legal and illegal drugs. Whatever the lack of moral difference between a PW who harms her child by ingesting legal alcohol and another PW who damages her child by ingesting illegal cocaine, there remains a sharp legal difference. [T]he law simply has never had the capacity to treat all behaviours that produce a particular outcome the same. The mere fact that some bad behaviours are beyond the reach of the legal system, due to constitutional or other facts, does not mean that society should leave unpunished bad behaviours which are within the reach of the legal system. As with any legal issue, a line must be drawn somewhere, and here it can easily be drawn between legal and illegal behaviours.

325 Refer to ch 6 for suggestions for improvement in MTPA, 1971.
Prosecution of women for such acts may also cause many women to avoid seeking help for addictive behaviour. Moreover, there might arise a tendency to hold women accountable for any behaviour during pregnancy, including smoking, jogging, or not taking prenatal medicines regularly. It is submitted however that if the judiciary follows a balanced approach or in case of a legislation, if it is plugged of loopholes, such fears may easily be rubbished as exaggerated or unfounded.

The author wants to re-emphasise that the logic presented in case of WD resulting from a tortious act of the PW, would apply here as well. In cases of abortion (on demand), a life is cut short because it is not wanted by the mother or cannot be sustained by the mother for medical reasons, whereas in cases of foetal homicides/injuries, resulting from the negligent acts of the mother, the life so curtailed or damaged was very much in contemplation of the family. It is hence submitted, that if the focus is on granting personality to the foetus, the mother should not be given immunity for crimes committed negligently or intentionally against the foetus. Read thus, prosecution of pregnant females for substance abuse (or negligent behaviour in general) if it results in death of the unborn in the pre-viable stage or any stage would not appear contra to the legal right of abortion.

The US legal system has definitely graduated from maintaining legal status for the unborn in the law of Torts to now claiming prosecution under Criminal Law. A PW can now open herself to criminal prosecution if she ends the life of her foetus other than by

\[^{326}\text{You either do not get pregnant at all or if you do, remain prepared to shoulder the responsibilities that go with it. There is no wriggling out mid way via abortions.}\]

\[^{327}\text{That abortion (on demand) is not to be compared to WD because in case of the latter the unborn is wanted and expected and already a part of the family in most cases; whereas in case of the former, there is no bond between the PW and the foetus that is seen as a burden.}\]

\[^{328}\text{Refer to ch 5 for relevant case law.}\]
means of a legal abortion. This position is at least clear in the USA.\textsuperscript{329} The UK is reluctant in doing the same and still sticks to the ‘Born Alive Rule’ for various reasons.\textsuperscript{330} In India, there has not been an occasion to think regarding the same. Claims are too few and far between to make any dent in the law of precedent or find favour with the Legislature. Hence, we conveniently follow the UK pattern of colonial times which categorically maintains that a foetus is not a person in Criminal law and hence not of consequence.\textsuperscript{331}

Particularly in relation to prosecuting the mother for crime against her unborn foetus, the progression for even the USA has not been smooth. After a stiff initial resistance that lasted years, there is only now some evidence of a trend towards supporting criminal sanctions against pregnant women for injuries caused by them to their foetuses.\textsuperscript{332}

For the UK, the decision of the House of Lords in \textit{Attorney-General’s Reference (No. 3 of 1994)} gives us a clear possibility however that the English law will follow the footsteps of that of the United States in extending criminalization of those who harm a foetus.\textsuperscript{333}

To conclude, the time of hankering for maternal autonomy and freedom of choice is gone and the task largely achieved.\textsuperscript{334} Presently,

\textsuperscript{330} Refer to ch 5, ‘Criminal Law and Unborn: Introduction and USA/UK Scenario’.
\textsuperscript{331} Though indirect protections in the form of regulated abortion right, death in the process of child birth, causing miscarriage etc exist and carry different degrees of punishments.
\textsuperscript{332} Refer to ch 4, ‘Confinement of Pregnant Women for Protection of Unborn’ for details.
\textsuperscript{334} Though the author argues that the scope of the choice presently given to women in the pro choice world in the form of almost absolute right of abortion in the first trimester, following Roe versus Wade is too wide and not in favour of foetal rights. It needs to be regulated along the lines of the Indian MTPA, 1971. The choice should lie in the choice of not conceiving by using
it is time to accord precedence to foetal protection over maternal autonomy. Some may treat it as a blow to self determination rights of PW and may claim that maternal actions should remain free from pre and post birth sanctions. They may maintain that to recognise foetal abuse is to criminalise pregnancy\textsuperscript{335} or, if it is coming under the purview of torts, take the law of tort to an absurd limit. No woman after all can provide a perfect womb. However, the author submits that like any other right in the nature of individual entitlements, the right to bodily integrity and self determination also should be reasonably regulated.

While in this chapter it was highlighted (1) how PW have been kept immune from any legal liability—be it tort or crime against the foetus; (2) how such a lack of prosecution results in adversities to the foetus/foetal rights and finally, (3) how such prosecutions have now become desirable. The following chapter probes into questions such as whether mothers’ right to free determination of lifestyle has to be subservient to the rights of the foetus, once she voluntarily exercises her right to retain the foetus\textsuperscript{336}. Should pregnant women be prosecuted for engaging in self-destructive behaviour that poses a risk of harm to the foetus? Can or should such pregnant women escape liability if their behaviour results in injury/death of the unborn. Such episodes are an offshoot of the maternal foetal conflict theory as well. In the light of the importance that they have

\textsuperscript{335} J Robertson & L Paltrow, ‘Foetal Abuse: should we recognise it as a crime?’ (1989) 75 ABA Journal 39.

\textsuperscript{336} ‘No woman can call herself free, until she can choose consciously whether she will or will not be a mother’: Margaret Sanger. However, her culpability, if any can/may be fixed, once she makes a choice of continuing with the pregnancy and then follows a reckless lifestyle is a case to be considered by the legislatures of individual countries.
acquired\textsuperscript{337}, it merits a detailed discussion.

The next chapter essentially presents the other side of the coin maintaining that punitive action need not necessarily provide the requisite solution to such cases.

\textsuperscript{337} Though only in the UK and USA and not in India.