Any study on the rights of child will be inadequate and incomplete without having a concern towards unborn. The right to life of a child presupposes an issue, when does his life begin? It is high time to legally settle this issue because as distinct from the earlier era, many factors like social environment, scientific advancement, personal freedom etc, will have its own influence in the matter of existence and development of the unborn.

Easier access to reproductive and genetic technologies has provided men and women with expanded choice with regard to the matters affecting the existence of the unborn. Abortion has been a threat to the physical existence of the unborn. Abortion means the expulsion (either spontaneous or induced) of a fetus from the womb before it is able to survive, especially in the first 28 weeks of pregnancy. The spontaneous expulsion is an act of nature, which is never a legal or moral issue. But the intentional expulsion of the pre-born child from the uterus before he or she has reached the age of viability is a problem of debate in the legal, medical, ethical, moral, political, and religious spheres. The American Medical Association defines abortionist as one who performs ‘Criminal abortions’.

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2 A criminal (illegal) abortion is any abortion committed outside the parameters set by law.
In any study where the status and rights of the unborn are involved, the following issues are relevant:

1. Understanding the nature, extend and impact of recognition of the rights of unborn in law.

2. The response of the society and religion to this issue.

3. Possibility to fill the vacuum so as to enable the child enjoying protection since the stage of unborn.

The justifiability and permissibility of abortion is a legal issue; an ethical, moral and religious issue also. It is a legal issue because it involves the question regarding the existence of a person to whom constitutional and legal rights may be bestowed upon; rather it involves the question of sustainability of the rights of the child from the womb itself. It is again a concern of law to decide whether the unborn has any property rights, right to privacy, right to life, right to liberty etc. Moreover law determines the parental duties, duties of care and compassion and the state’s interest in future life. It is an ethical and moral issue also, because it involves conflicts between the moral values of the society. In that sense, it may form part of the ethos of the land, which might have definite influences upon the civil legal system.

The religious aspect of abortion issue concerns the norms or prescriptions given by God or interpreted by the Sages or Fathers of the religion. It appeals to the will of God. The ethical and moral spheres need not have concern regarding the God- given norms. The ethical rights and duties are secular; they are based on considerations of human rights and welfare. In that sense, it is linked with the legal system. On the other hand, ethics cannot be fully delinked from religion; they are ethical duties that are religious. There is an enormous area of overlap, that, God has commanded much that is necessary for human welfare. And in that sense, “religious ethical” issues also form part of any legal system. In such a premise the concern towards the unborn, which is more embedded in the moral and religious ethos of the people gains importance. And thus, this study would
necessarily have concentration on the religious morality and the theological expositions regarding the concern towards the unborn.

**Ancient Indian Legal Thought & Hindu Religious Beliefs**

The basis for Ancient Indian Thought was the concept of *Dharma* which is a compendious term for all virtues that a human by instinct performs every good action, moral, social and legal. Jaimini says that *Dharma* is that which is indicated in *Vedas* as conducive to the highest good. *Ahimsa* was regarded as a facet of *Dharma*, which was punishable according to Hindu *Vedanta*. But the killing of a fetus was regarded as ‘*brahma hathya*’ which was the most dreadful crime known to Indian Legal Thought.

Again, *feticide* was prohibited and classified as murder, equal to the neglect of the *Vedas*. Hinduism, from time immemorial never appreciated abortion, because life was considered as a gift of God and marriage a Sacrament. *Atharvaveda* condemned abortion in any form. *Manu* observed that killer of fetus commits the same sin of killing a priest. It is again said that the killer of a fetus should be given severe punishment which should be a warning to the potential offenders and those who induce a woman to go for miscarriage by taking medicines shall also be severely dealt with.

In the oldest philosophical texts of *Veda*, we find the questions relating to the sanctity of life. The human individual, which is a complex of five elements (*anna, prana, manas, vijnana* and *ananda*), is the manifested form of the Eternal Being in the world. Birth is only the continuous existence of the Supreme Being.

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4 *ManuSmriti*, Chapter VII at p.317
5 *Ibid*
6 *Ibid*
9 Id. at p.127
as a cosmic being. The individual soul is hence actually eternal. It endures throughout the cosmic process. In other words, the individual is an aspect of the Transcendent in the universe, which, when liberated from all limitations, shall act with his centre in the Supreme. Hence, any act of wickedness towards this individual, even when he is inside the womb of his mother is an act against the Supreme Being.

Again, it is believed that through the procreation of a virtuous son, a Hindu saves himself\(^\text{10}\), and the child in the womb is treated as a person\(^\text{11}\).

In yet another version, killing the fetus, is condemned by Hinduism, as ‘\textit{Narayana}’ is the God in man who lives in constant association with ‘\textit{nara}’, the human being. He is the immortal dwelling in the mortals\(^\text{12}\).

It is again noteworthy that the pre-natal \textit{samskaras} provide for the rites through which a man placed his seed in a womb (\textit{garbha dhana}). The \textit{Garbhadhana Samskara} presupposed a well established practice for begetting offsprings where the beneficent gods remained helpful for the same. This, in other words, points to the divinity of life in the womb\(^\text{13}\).

The duties of a pregnant woman towards the foetus are also classified under three titles (i) the duties for preventing evil spirit from injuring the foetus (ii) the rules aimed at the prevention of physical overexertion so that the injuries to the foetus might be forbidden (iii) the rules for protecting the mental and physical health of the mother\(^\text{14}\).

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\(^{10}\) Baudhayana, Vers. 8, \textit{The Sacred Laws of the Aryas}, Max Mullaer(Ed.), Ahuja Book Co, New Delhi, 1990 at p.272


\(^{14}\) \textit{Id.} At p.67
In the laws of Manu, punishment was prescribed for those destroying the embryo (of a Brahmana), the sex of which was unknown\textsuperscript{15}. Naradasmrithi describes causing abortion as one of the aparadhas\textsuperscript{16}.

**Coparcenery in Mitakshara School**

This school of Hindu law recognizes the presence of unborn child on succession.\textsuperscript{17} According to this school, coparceners get share in the joint family property by virtue of rights conferred by birth. A coparcener is a ‘putra’ who includes a son, son’s son, son’s son’s son etc., up to four degrees of descent. That may very well include an unborn child, *i.e.*, even if he is in the womb at the time of partition, he assumes a right of share in his ancestral property.

**Theological Deductions against Abortion in Christianity**

In Christianity the controversy over abortion is compounded over many theological issues\textsuperscript{18}. Firstly, God is indeed the creator of life in general, of human life in particular. Secondly the life of a human being is the unity of body and soul which concept is fundamental to the belief of incarnation on which the Christian faith is built. Thirdly men and women are procreators with God the Creator, who is omniscient and personal and whose name is Love. In terms of genetics, men and women are the procreators of physical bodies of the off springs. Though we know almost nothing of the generation of the soul or ego that is beyond the analytical power of both the genetics and psychology, it is propounded that God gives the soul also through the parents. Fourthly, human beings are created ‘in the image of God’ which is the image that accounts for the humanism, the distinctively human character and quality of everyone. Fifthly, each human being is unique and irreplaceable. In the realm of being no one can take the place of others. With

\textsuperscript{15} G.Buhler, *The Laws of Manu*, Ahuja Book Co., New Delhi, 1990 at p.448  
\textsuperscript{16} Rama Jois, *Legal and Constitutional History of India*, at p.319  
respect to unborn human life also, it has been assumed to be true\textsuperscript{19}. Sixthly the definition and identity of human life must be in terms of personhood and not alone in terms of living tissues. Seventhly, true humanity is found not in individualization, but in human community. The creator decreed that “it is not good” for the creature to live alone. The human life since its inception maintains an indispensable relationship with its mother, other members and family and society. Eighthly, it is the incidental responsibility of the society to protect the human life from the very beginning itself, the violation of which attracts the punishment under the commandment “thou shalt not kill”\textsuperscript{20}.

The following issues shall also be examined in detail to derive how Christianity stands for the protection of the life, rather the human being, inside the womb.

\textbf{Sanctity of Life}

This is the primary criterion applied in the whole context of an abortion problem. The sanctity of life inheres in its being given by God and destined to be a human person who is to realize authentic personhood in communication with God. According to the Christian religious outlooks man is ‘sacredness’ in human biological processes. A life’s sanctity consists not in its worth to anybody. What life is in and of itself is most clearly to be seen in situations of naked equality of one life with another and in the situations of the congeners helplessness that is the human condition in the first place. No one is ever much more than a fellow fetus, and in order not to become confused about life’s primary values, it is best not to concentrate on degrees of relative worth we many later acquire. That is why it is pointed out: “Before I formed thee in the belly I know thee, and before you camest forth out of the womb I sanctified thee, and I ordained thee . . .”\textsuperscript{21}.

\textsuperscript{19} Recent genetic studies prove that long before birth it is possible to possess individualized consciousness, the uniqueness of genetic structure etc.
\textsuperscript{20} The 5\textsuperscript{th} of the 10 commandments given directly by God to his people through prophet Moses.
\textsuperscript{21} Jeremiah : 1:5
That is why it is taught in Christian theology that any interference with human life even inside the womb is an act against God and the sanctity of life.

Pope Pius XII said that every human being even the child in its mother’s womb receives its right to life directly from the God. Again, the Christian theologian Bernard Haring pointed out: “God alone is the author of life and death. No physician may pass and execute the sentence of death on one who is innocent”22. This arrangement is often couched in terms of right to life which is derived from God alone and enjoyed by humans. In turn, this approach relates to the inviolability of human life in the philosophical and natural law perspective. Thus it is contented that the purposeful termination of a pregnancy contains the moral malice of the violation of man’s most fundamental right – the right to life itself23.

Human Beings Do Not Have the Right to Take the Lives of Other Innocent Human Beings

This proposition is consistent both with Christian ethics in the purely theological sense and with natural law morality.

The word ‘innocent’ here is crucial. Traditional Catholic morality has defended just war, i.e., defensive- limited war waged for the protection of vital human rights; though they resulted in the foreseen taking of innocent life, particularly the lives of noncombatants. “The justification for thus taking innocent life is governed by the principle of double effect. Thus innocent (noncombatant) lives cannot be taken unless, for the demands of self defense, those lives are taken only indirectly, that is by an action “designed and intended solely to achieve some other purposes even though death is foreseen as a

concomitant effect. Death therefore is not positively willed but is reluctantly permitted as an unavoidable by product.\footnote{Edward Batchelor Jr., \textit{Abortion: The Moral Issues}, The Pilgrim Press, New York, 1982 at p.64}

Thus, though the basis of natural morality is the absence of the right of one human being to take the life of another, an important exception is admitted in two circumstances, which is well in terms with natural law: (1) when the life to be taken is not innocent human life (as in punishment for capital crimes and the case of just defensive war) and (2) the life taken is innocent but the taking of life is indirect.

**Taking of Innocent Life and the Principle of Double Effect**

The Christianity, especially the Catholic Church, takes the stand that the direct taking of innocent fetal or embryonic life is always and necessarily immoral. The only exception to the absolute prohibition of abortion is the situations of inevitable medical care to the woman the result of which may be the destruction of the fetus. The death of the fetus is the foreseen but unintended and indirect result of the life saving medical procedure performed on the mother. The basis for the principle of double effect is the common sense observation that an action can have a good as well as a bad effect or result. As a theological proposition it was first employed by Sir Thomas Aquinas, who made it a justification for the taking of life in self defense. In essence, the principle is that an action that has both a good and a bad effect may be performed if the good effect accomplished is greater than the evil effect and if, in addition, at least four other conditions are met: (1) the act must itself be either good or indifferent, or at least not forbidden with a view to preventing just that effect; (2) the evil effect cannot be a means to the good, but must be equally immediate or at least must result from the good effect; (3) the foreseen evil effect must not be intended or approved, merely permitted-for even a good act is vitiated if accompanied by an
evil intent; (4) there must be a proportionately serious reason for exercising the cause and allowing the evil effect.\textsuperscript{25}

The removal of a pregnant fallopian tube containing a living fetus, even before the external rupture of the tube is permitted thus, for the consequent death of the fetus will be produced only indirectly. On the contrary, a fetal craniotomy to save the life of the woman would not be justified because, in this case, the life of the fetus is taken directly by the act of crushing its skull. The intention is good, i.e., saving the life of the woman; but the means adopted is evil, i.e., directly taking the life of an innocent fetus brutally; hence fetal craniotomy is forbidden.

**Human Life Begins at the Moment of Conception**

This is a teaching about the nature of the life in question in abortion issues. The Catholic Hospital Association of the United States and Canada has specified the following as one of its guiding principles: “Every unborn child must be regarded as a human person, with all the rights of a human person, from the moment of conception.”

But among the various sects of Christianity the question when does life in the womb begin, is one of dispute, of which the Catholic preaching is the most reliable and logical one also. The Church teaches that the fetus from the very moment of fertilization itself is a complete person.\textsuperscript{26}

**Concept of Ensoulment**

The Christianity condemns abortion due to the awareness that upon fertilization there is a unique, living person in existence and ensoulment\textsuperscript{27} takes place at the time of fertilization. It is illogical to argue that ensoulment takes place

\textsuperscript{25} Id. at p. 69


\textsuperscript{27} Soul is the spiritual or immaterial part of a human being, regarded as immortal
progressively over a period of time between fertilization and birth. Accordingly, it is impossible for progressive ensoulment to take place, just as it is impossible for a woman to be “semi-pregnant”.

But a perusal of the Pagan and Christian beliefs of 400 BC-322 BC, shows that there was a belief of “delayed ensoulment.” Aristotle\(^{28}\) taught that a fetus originally has a vegetable soul. This evolves into an animal soul later in gestation. Finally the fetus is “animated” with a human soul; which process is called “ensoulment.” This was believed to occur at 40 days after conception for mate fetuses and 90 days after conception for female fetuses.\(^{29}\)

St. Thomas Aquinas and St. Jerome also speculated as to when God infuses the Soul.

The modern preachings of the church, but clarity that although Aquinas and Jerome were not sure when ensoulment took place, they saw that this very uncertainty meant abortion must be sinful because it was impermissible to risk killing a being that might have a soul, even if no one could prove its presence. St.Jerome taught; “Some virgins (unmarried one), when they are with child through sin, practice abortion by the use of drugs. Frequently they die themselves and are brought before the ruler of the lower world guilty of three crimes; suicide, adultery against Christ, and murder of an unborn child.”\(^{30}\)

**Verdicts of the Holy Bible**

It is true that the scriptures do not mention the word “abortion”, but it does not mean that the Bible is not condemning it. The Bible doesn’t enumerate all the sins; but all the sinful acts are condemned by the sweep of the Commandments as varieties of serious sins like killing. The theological teachings of the Church on abortion are evolved upon the following biblical premises:

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\(^{28}\) 384 BC-322 BC

\(^{29}\) This 90 day limit is approximately equal to the end of the first trimester, the point at which the US Supreme court decided that states could begin to restrict a woman’s access to abortion.

\(^{30}\) *Supra* n.16 at p.214
1. God created man, the body and the soul in His own image.

2. God has known man as “persons” since before he was even conceived.\(^{31}\)

3. God has a plan for each man and values everyone

4. It is a sin to interfere with the plans of God

5. Human life begins in the womb\(^{32}\)

6. Children are a gift from God.\(^{33}\)

7. Children are the most innocent among us

8. It is a heinous sin to slay the innocent

Taking these principles as a body, the conclusion is only one that abortion is murder and that authentic Christians must both avoid and condemn it. In line

\(^{31}\) In scriptures, God personally names seven men, before they were even born;
(1) Ishmael- Genesis 16: 11
(2) Isaac – Genesis 17: 19
(3) Josiah – 1 Kings 13: 2
(4) Solomon – 1 Chronicles 22: 9
(5) Jeremiah – Jeremiah 1: 13
(6) John the Baptist – Luke 1: 13
(7) Jesus Christ Himself – Mathew 1: 21

\(^{32}\) Genesis 16 : 11 and 25 : 21- 26 (with Hosea 12 : 2-3
Romans 9 : 10 -13)
Exodus 21 : 22-15
Numbers 35,
Jeremiah 1:5
Isaiah 7:14; 44 :2, 24; 46 : 3 ; 49 : 1,2;53: 6
Job 3: 11 – 16;
10:8-2;31:15
Psalm 22:9-10: 139:13-16
Ecclesiastes 5 : 15; 11:5

\(^{33}\) Genesis 30 : 1-2,
Psalms 127: 3-5
with these principles, the following biblical teachings shall also be added, which can be interpreted as:

1. Human life begins at fertilization

2. Causing a spontaneous abortion is punishable

3. Abortion for rape and incest is never allowed

4. Abortion for birth defects is never allowed

5. Abortion for the mother’s mental health is never allowed

6. Abortion to conceal fornication or adultery is never allowed.

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34 Psalms 51: 3
   Luke 1 : 35-36
   Mathew 1 : 18-20

35 Exodus 21 : 22-25
   Number 35 : 22-34

36 Genesis 19 : 36-38,
   50 : 20
   Romans 8 : 28
   Genesis 38
   Ruth 4 : 18-22
   Mathew 1 : 3
   Luke 3 :33

37 John 9 :1-3
   Acts 17 : 25-29
   Psalms 94 :9
   Romans 8 : 28
   Leviticus 19 : 14
   Isaiah 45 : 9-12

38 Genesis 50:20
   Romans 8 :28

39 Genesis 16:2-4
   21:1-18
   Genesis 38
   Ruth 4 : 12
In addition, the responsibility to take care of the fatherless and pregnant women is caste upon the believers. Again the mental element is pointed as relevant and it is strictly warned not to follow the “master of this world.”

Preachings of the Fathers of the Church

There were three important sects within early Christianity of which two, viz.; Jewish Christianity and Gnostic Christianity which were not succeeded. But the 3rd one called Pauline Christianity was flourished. The Christianity was surrounded by a mosaic of other competing religions within the Roman Empire, including Judaism the Greek state religion, Mithraism, the Roman State religion and various mystery religions. Expect Judaism, most of the other religions allowed women to have abortions and allowed parents even to kill newborn babies by strangulation or exposing them as methods of population control.

Due to the influence of the gentiles to Christianity the fathers of the church were vehement to teach the believers about the sanctity of life and the sinfulness of abortions Barnabas taught: “You shall not kill either the fetus by abortion or the new born.”

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40 James 1:27  
Zachariah 7:9-10  
Isaiah 1:23,10:1-2  
41 James 2:14-26  
Mathew 23:3-4,11,12  
Mathew 25:31-46  
42 Genesis 9:5-6  
Jeremiah 7:5-6  
Matthew 25:34-40  
Galatians 6:9-10  
43 Numbers 35:33  
Romans 12:1-2  
Leviticus 18:21,24,29-30  
44 Letter of Barnabas circa 125 BC
Athenagoras preached: “We say that women who induce abortions are murderers and will have to give account of it to God.”

Tertullian condemned abortion since murder has been prohibited and thus is to destroy the fetus in the womb. It makes no difference together one destroys a life that has already been or one that is in the process of birth.

The Didache which dates from the first half of the second century BC states, “Thou Shalt not murder a child by abortion…The way of death is filled with the people who are…murderers of children and abortionists of God’s creatures.”

The synod of Elvira, held in Spain in 306 BC held:” if a woman becomes pregnant by committing adultery, while her husband is absent and after the act she destroys the child in the womb, it is proper to keep her from communion until death, because she has doubled her crime.

In 1588, Pope Sixtus V tried to discourage abortion by reserving confession to the Holy See alone, a practice enforced only for a handful of the most egregious sins. It soon became evident that this arrangement was impractical, so just three years later Pope Gregory XIV returned the power of absolution for abortion to the local Bishops. Today also, only the priests delegated by the Bishop can hear confessions for the sin of abortion. The II Vatican Council qualified induced abortion as the most heinous crime.

Pope John Paul II taught:

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45 *Cira* 155-225 BC.
46
47 Known as the teaching of the twelve apostles
48 *Didache* 2; 2.5:1-2
49 *Synod of Elvira*, Canon 63
51 Pastoral constitution on the Church in the Modern world gaudium et spes, n.51: *Abortus necnon infanticidium nefanda sunt crimina*
“…the Church firmly believes that human life, even if weak and suffering is always a splendid gift of God’s goodness. Against the pessimism and selfishness, which cast a shadow over the world, the Church stands for life. .....

The Church is called upon to manifest anew to every one, with clear and stronger conviction, her will to promote human life by every means and to defend it against all attacks, in whatever condition or state of development it is found. .....

Thus the Church condemns as a grave offence against human dignity and justice all those activities of governments or other public authorities, which attempt to limit in any way the freedom of couples in deciding about children. Consequently any violence applied by such authorities in favour of……...and procured abortion must be altogether condemned and forcefully rejected.”

Islamic Views

_Quran_ vehemently opposes any act against the foetus. This can be observed in different Surahs (chapters) of _Quran_. A Muslim is not permitted to opt for abortion for plea of want or for the fear of economic hardships or because it is the result of extra marital relationship or force rape. It repeatedly says “Kill not your children for fear of want. Killing of them is a great sin “and “Not take life which Allah has made sacred- except for just cause”. Every human being has the right to be born, right to be and right to live as long as Allah permits. Right to life is absolute- even in cases of rape or concerns regarding fetal deformity.

_Hanafis_, but permits abortion before fourth month, if it poses a threat to the life of the mother. _Maliki_ prohibits abortion after implantation has taken place. _Shafi_ School preaches that Zygote should not be destroyed.

Legal Status of Unborn Child

No right is conferred on an inborn child, unless it has or any part of its body has emerged out of the mother’s body. It is believed by many and

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52 Pope John Paul II, _Apostolic Exhortation Familiaris Consortio_, para 30.4 – 30.6
recognized by law that only by this process of birth that the fetus becomes a person who is capable of enjoying rights. In English law the presumption is that a child inside the womb is a part of mother’s body.\(^{53}\)

At the same time, in England as well as in India, courts have maintained that injury caused to a fetus in mother’s womb is actionable as tort.\(^{54}\) Accordingly, an unborn child is provided with a right to sue for injury inflicted on him while he was inside the womb; his right to sue become ripe, only when the child born alive\(^{55}\). In India, under the Hindu Law, a son was entitled to have reopened the partition of the joint family property taking place while he was in the mother’s womb.\(^{56}\)

Still, the international community has moved forward a little more; many of the international human rights documents defend to certain extend the rights of the unborn. This attitude is explicit when the Covenant of 1966 says that capital punishment shall not be carried out in the case of a pregnant woman\(^{57}\). In USA, the right to life of a person is protected from the moment of conception.\(^{58}\)

**Abortion in Civil Law**

The civil legal system is also concerned with abortion. In practice, in a number of countries including the US, Canada and the People’s Republic of China it is legal until the moment of birth. And here it is attempted to analyse, to what extent, the jurisprudence of social and religious morality and the expositions of natural law on abortion is recognized by various legal systems.

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54 P.S. Achuthan Pillai, *The Law of Tort*, Eastern Book Co., 1994 at p.371’ see also, *R. V. Tait*, (1989) 3WLR, where the Court of Appeal quashed the conviction of a burglar on the ground that ‘threat to kill a foetus’ is not an offence directed against ‘another person.’
56 See also, section 99(1), Indian Succession Act, 1925
57 Article6, Para 5 International Convention on Civil and political Rights,1966
58 Article4, American Convention on Human Rights: “Every person has the right to have life respected. This right shall be protected by law and in general from the moment of conception. …”
The fundamental norm of the religious morality i.e., the sanctity of life has been recognized as the foundation of the international morality also. The International Convention on Rights of the Child (CRC), adopted by the General Assembly of the United Nations on November 20, 1989 reiterates the positions taken by the Universal Declaration of Human Rights 1948, which have been adopted and proclaimed by various States about the "equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace in the world", and that the United Nations has proclaimed that childhood is entitled to special care and assistance.

In particular the CRC asserts: "States Parties recognize that every child has the inherent right to life" and that "States Parties shall ensure to the maximum extent possible the survival and development of the child".

Regarding abortion, the CRC bears in mind that, "as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

Does it necessarily follow from this that the right to life of the pre-born child is protected? Acknowledging that the reference to the rights of the child "before as well as after birth" does appear in the Preamble in the then draft Convention, at the same time a statement in the travaux préparatoires - the preparatory materials - makes it clear that the contentious issue of the child's rights before birth is a question to be determined by individual states parties.59

In Australia, section 42 of the Crimes Act, 1900 defines the offence of Child destruction: “A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to childbirth and before the child is born alive—

(a) prevents the child from being born alive; or

59 www.priestsforlife.org
(b) contributes to the child's death;
is guilty of an offence punishable, on conviction, by imprisonment for 15 years."

In England, the Abortion Act 1967 is still the law governing abortions in England, Scotland and Wales. Technically the law did not legalize abortions, but rather provided a legal defense for those carrying them out. Abortions can legally be performed under certain conditions - the first is that continuing with the pregnancy involves a greater risk to the physical or mental health of the woman, or her existing children, than having a termination.

The woman's "actual or reasonably foreseeable future environment" may be taken into account.

Abortion up to 24 weeks is also allowed if there is a substantial risk that the child when born would suffer "such physical or mental abnormalities as to be seriously handicapped".

An abortion must be agreed by two doctors (or one in an emergency) and carried out by a doctor in a government-approved hospital or clinic.

In US abortion is almost legalized. The technique of ‘partial-birth abortion’ was legalized in the United States after the decision of the Supreme Court in the case of Roe v. Wade in 1973, which authorized the different States to issue measures permitting artificially induced abortions.

According to the Roe decision, most laws against abortion in US violated the constitutional right of privacy under the Due Process Clause. The decision overturned all laws outlawing or restricting abortion that were inconsistent with its decision.. Roe is one of the most controversial and politically significant cases in

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60 It describes an abortion technique used in the final months of pregnancy, during which there is an intra-vaginal partial birth of the living fetus: the content of the brain is then sucked out before delivery is complete

61 410 US 113(1973)
U.S. Supreme Court history. Its lesser-known companion case, *Roe v. Bolton*, was decided at the same time.

The central holding of *Roe v. Wade* was that abortions are permissible for any reason a woman chooses up until the "point at which the fetus becomes ‘viable,’ i.e., potentially able to live outside the mother's womb," albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Court also held that abortion after viability must be available when needed to protect a woman's health, in the companion case of *Roe v. Bolton*.

The *Roe v. Wade* decision prompted national debate that continues to this day. Debated subjects include whether and to what extent abortion should be illegal, who should decide whether or not abortion is illegal, what methods the Supreme Court should use in constitutional adjudication, and what the role should be of religious and moral views in the political sphere. *Roe v. Wade* reshaped national politics, dividing much of the nation into pro-*Roe* (mostly pro-abortion) and anti-*Roe* (mostly pro-life) camps, and inspiring activism on both sides.

*Roe* critics say the ruling is illegitimate because it strays from the text and history of the Constitution, and imposes abortion policy on the states and Congress contrary to American principles of federalism and democracy. Another criticism of *Roe* (though not one made by the dissenters in the case) is that the majority opinion failed to recognize the personhood of fetal human life either beginning at conception or later. Supporters describe *Roe* as vital to preservation of women's right to liberty, personal freedom, and privacy.

There is a legal development after this case. It was deduced from the deliberation of the Supreme Court of the United States which states that the term "person" as used in the 14th Amendment of the Constitution is not applicable to

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62 In *Fower v. Woodward* 38 SE 2d 42 but it had earlier been held emphatically that viable fetus is a person in the eye of law having certain rights and privileges and exclusion of viable fetus from the status of person would be unsound, illogical and unjust (in the year 1964). In *Whitener v. South Carolina* 49 SE 2d 777 (SC 1997) the same was followed.
the unborn child, and that until the moment of birth it is possible to put an end to this child's life without incurring judicial action. On the other hand, the legislation of the various States all specify that during birth, when an infant has fully emerged from the mother's womb and shows even only the slightest sign of life, he or she is a person in the eyes of the law, so that, from the legal standpoint, to deliberately deprive the child of life would be homicide. On the other hand, it is legally permissible to kill this child during birth, on condition that the child still remains partially inside the uterus.

According to those who champion this method of abortion, it can be rapidly performed without hospitalization under a local anesthetic. The abortion is preceded by a three-day preparation involving mechanical dilation of the cervix. The operation takes place in five stages: first, guided by ultrasound, the person carrying out the abortion, possibly after reversing the position of the fetus in the uterus, takes hold of the feet with forceps. He then draws the legs of the fetus from the womb causing the birth and extracting the baby's whole body apart from the head. Next, he makes an incision at the base of the infant's skull through which he inserts the point of a pair of scissors to puncture the cranium. A tube is then inserted through which the brain and the content of the cranium are sucked out. At this point, to conclude the abortion, the head, now reduced in size, is extracted and the dead infant delivered.

It seems that this technique was first used in 1979 as an alternative to the more usual technique for late-term abortions (which consisted in injecting the fetus with a lethal drug, extracting it and removing the limbs). A bill aimed at prohibiting partial-birth abortion was presented to the House of Representatives of the United States Congress on 14 June, 1995. President Clinton made his opposition to it. Nonetheless, the bill was presented to President Clinton on 5 April; he vetoed it. To overcome the Presidential veto, Congress was asked for a two-thirds majority, which was impossible to achieve at that time. On 16 April 1996, eight American Cardinals and the President of the Bishops' Conference wrote to President Clinton expressing their "dismay" at the veto with which he had opposed the bill. In their letter, they warned the President of the risk of "moving
our nation one step forward toward acceptance of infanticide", and denounced the spreading "culture of death" and mentioned the "recent decisions of the two federal courts of appeal seeking to legalize assisted suicide (or euthanasia)".

On 20 September 1998, the United States Senate failed in a second attempt to overcome the presidential veto: 64 senators voted to pass the bill, but it would have taken three more votes to nullify the presidential veto. However, 24 States had already equipped themselves with legislation to prohibit the procedure locally. In October 1999, the bill banning partial-birth abortion was again presented to the House, but once again more votes - two - would have been needed to pass it. Finally, on 29 June 2000, the Supreme Court of the United States decreed with a decision of 5 votes to 4 that the law of the State of Nebraska that prohibited the procedure was unacceptable.

This once again called into question all laws of that kind which had previously been accepted by the different States. Following the decision, federal judges nullified laws totally preventing the practice of partial-birth abortion in the States of Michigan, Illinois and Wisconsin.63

Even after Roe, the American courts have felt that embryos were persons and the best interest of the child ‘in vitro’ is that its right to be born alive should be protected.64

Thus in US, the conflicts between the religious social morality and the positive law is on a high in this regard.

Indian Law

In India the acts affecting the life of an unborn is made punishable; in that direction the natural law school associated with various religious theories is

63 http://www.google.com

64 Davis v. Davis 842 SW 2d 588 (1992)’ see also the discussions in Planned Parenthood of Central Missouri v. Danforth, (1976) 428 US 52
recognized. The main offences are: (1) Causing miscarriage and (2) Injuries to unborn child.

**Causing Miscarriage**

Section 312 of the Indian Penal Code provides that whoever voluntarily causing a woman with child or quick with child to miscarry, otherwise than in good faith for the purpose of saving the life of the woman is punishable.

It is pertinent to note that the obsolete 1st Century notion of Christianity, influenced by Aristotle, of delayed ensoulment where the 90 days period of conception has acquired a striking resemblance in India. ‘Quickening’ is the name applied to peculiar sensations experienced by a woman about the 4th month or fifth month of her pregnancy. The symptoms are ascribed to the first perception of the movements of the fetus.

Again, abortion induced at any point of time of the pregnancy is also punishable. But, under the Medical Termination of Pregnancy Act, 1971, pregnancies may be terminated by registered medical practitioners, under the following circumstances:

(a) where the length of the pregnancy does not exceed 12 weeks, if the medical practitioner is, or

(b) where the length of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than two registered medical practitioners are, of the opinion, formed in good faith that-

(i) the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health, or

(ii) there is a substantial risk that if the child were born alive, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Where the pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

In result, the 1971 Act makes abortion legalized, with all its exceptional clauses and explanations.\(^{65}\)

**Injuries to Unborn Child\(^ {66}\)**

Again, section 315 of the Penal Code says that doing an act without good faith with intent to prevent the child being born alive or to cause it to die after birth is an offence. As per section 316 causing death of a quick born child by an act amounting to culpable homicide is a grave offence with punishment for 10 years’ imprisonment and fine.

Thus it is obvious that the belief in the sanctity of life and the notion of rights woman, which goes contrary to the former, are intertwined in our legal system.

**Conclusion**

In the light of the above discussions, it is an irony that an entity conferred with property rights and certain allied rights, right in tort etc., lacks the very fundamental and legal rights like right to life.

\(^{65}\) In *Vijay Sharma’s* case it was but held that the intent of the Act was to avoid wastage of health, strength and life of mother.(AIR 2007)

\(^{66}\) The expressions in the Penal Code(Sections 312 to 316) ‘a woman with child’, ‘a woman quick with child’, ‘unborn child’, ‘quick unborn child’, etc., show that a woman during the entire period of her pregnancy is carrying a person of the child having all the dignities of life.
It is possible to understand that the religious morality regarding abortion is an influencing factor in any legal system. The religious philosophies form the principles of natural law and the civil law applies the natural law amidst the changing and particular cultural circumstances of a particular region, either by directly promulgating the conclusions of this ‘religious originated natural law’ or by specifying and making determinate, what has been left indeterminate.

About the status and rights of unborn child, a full stop must be given by the legal system itself. Whatever be the arguments, it is scientifically proved that a child born alive comes out of the womb, at the end of the developmental process in the womb. The life inside the womb thus demands respect.

Parental autonomy will be given concern, when the mother may be forced to undergo abortion in order to protect her own life. This is justified for the reason that no person be compelled to sacrifice his or her own life for the existence of another person. Any contrary choice by the parents will be equated with a ‘proxy choice’ and the proxy chooser shall act in the best interest of the child only.\(^67\)

\(^67\) See the discussions in, Fienberg, Joel, *Harm to Others*, Oxford University Press, New York, 1984 at p.101;