



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN



WHITE BLACK
LEGAL.

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL **TEAM**

Raju Narayana Swamy (IAS) Indian Administrative Service **officer**



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru

and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

FOETAL LEGAL PERSONALITY IN INDIA: EXPLORING JURISPRUDENTIAL DEBATES

AUTHORED BY - MAMTA YADAV * & LALIT MOHAN**

INTRODUCTION

*"I am the child. All the world waits for my coming. All the earth watches with interest to see what I shall become. Civilization hangs in the balance. For what I am, the world of tomorrow will be, I am the child. You hold in your hand my destiny. You determine, largely, whether I shall succeed or fail. Give me, I pray you, these things that make for happiness. Train me, I beg you, that I may be a blessing to the world"*¹

-Manie Gene Cole

A child is often regarded as a precious gift that is believed to bring blessings to humanity. Children are frequently regarded as a representation of divinity. While abortion is legally permissible in our country, there is an ongoing debate among researchers regarding whether a foetus should be entitled to the Right to Life as given under Article 21 of the Constitution of India. Furthermore, from a scientific perspective, a foetus can be characterised as an evolving human organism that undergoes development until the point of birth. Research has shown that the human embryonic heart initiates pulsation during the second or third week of gestation, signifying the onset of foetal development in the mother's uterus.

However, it should be noted that a foetus is not considered to be covered under Article 21 of the Constitution of India, 1950. Accordingly, the foetus will not be entitled to the benefits of Article 21 until it is born and successfully leaves the mother's womb. However, it should be noted that the status of the foetus does not necessarily mean that it is not entitled to any of the rights that are protected by the Constitution of India. According to the legal principle of '*Nasciturus pro iam nato habetur*', an unborn child is regarded as if it has already been born when its interests are being taken into account. This implies that a foetus inside the uterus of

*Research Scholar, Faculty of Law, University of Delhi, Delhi.

** Research Scholar, Faculty of Law, University of Delhi, Delhi.

¹ Mamie Gene Cole, *The Child's Appeal*, Poetry Explorer, <https://www.poetryexplorer.net/poem.php?id=10049198> (last accessed on June 3, 2024).

its mother is granted legal acknowledgement and safeguard. It is important to ensure the protection of foetus from any potential harm or adversity. It is crucial to consider the implementation of stringent laws to hold individuals accountable for causing harm to an unborn human.

As per Article 21 of the Constitution of India, the right to life and personal liberty cannot be denied to any individual, except in accordance with the due process of law. Firstly, it is necessary to analyze whether a foetus in the mother's womb may be considered a "person" in order to determine if they are entitled to the rights protected by Article 21 of the Constituion of India.

OBJECTIVE OF THE STUDY

The objective of this research is to examine the legal framework concerning foetal rights in India. This research aims to examine whether a foetus can be legally recognised as a "person" according to the Constitution, and subsequently, whether it should be granted the right to life. This study will explore the different laws that have been enacted to acknowledge and safeguard the rights of the unborn child. The objective is to draw attention to and potentially challenge the prevailing fallacies and misconceptions surrounding the legal status of the foetus. These fallacies have gained acceptance as the legally and morally correct viewpoint. One particularly peculiar misconception is the belief that a foetus is a 'person' with rights and responsibilities, including the right to life. However, it is a well-established fact that in many countries, there are statutes that permit doctors to perform actions on a foetus that would be unlawful if performed on a person who has already been born².

STATEMENT OF PROBLEM

Firstly, it is important to acknowledge that abortion is allowed under certain conditions. It is crucial to understand that several laws have been enacted to recognise the rights of an unborn child in specific situations, such as inheritance and protection from damage. This contradiction raises the question of whether the unborn is entitled to the Fundamental right to life as protected by Article 21.

² *Mckay v. Essex AHA* (1982) 2 AER 781. In India foetal death is legally permissible under the circumstances prescribed under The Medical Termination of Pregnancy Act, 1971.

VARIOUS LEGISLATIONS WHICH RECOGNIZES INTEREST OF UNBORN CHILD

It is widely accepted that a foetus or a child in the mother's womb is not considered a natural person. Nevertheless, there is an ongoing debate regarding whether it should be acknowledged as a juristic or juridical entity. According to legal regulations in all countries, a child '*en ventre sa mere*' is recognised as a legal individual who possesses the capacity to inherit, acquire, possess property, and exercise various other rights.

According to Hindu Law in India, it is believed that a son may have the right to request the reopening of the partition of ancestral property that took place during his time in the mother's womb, even if no share was allocated for him. According to the Law of Wills in both India and England, it is recognised that an unborn child is considered to be in existence. According to Section 99(i) of the Indian Succession Act, 1925, it is explicitly mentioned that any words indicating a relationship also apply to a child in the womb who is later born alive.

According to the Indian Penal Code, 1860, Sections 312 to 316 provide distinctions between a pregnant woman and a woman in the early stages of pregnancy, as well as between an unborn child and a developing unborn child. According to Indian Criminal Law, it has been established in a Madras Division Bench decision from over a century ago that a woman is legally recognised as being pregnant for the entire duration of her pregnancy³.

Moreover, from both a linguistic and legal perspective, a child is commonly defined as a human being. The term 'pregnant' in English refers to the condition of being with child, while the Indian equivalent '*antaswatta*' clearly indicates the existence of life within. However, if we were to consider the idea that an unborn child is not recognised as a natural person but rather as a legal person, it raises the question of whether a non-natural but legal person would still be entitled to the protection of the life, liberty, and property clauses.

According to the equality provisions of the Constitution, an artificial legal entity, such as a statutory corporation or a firm, has consistently been considered as a person⁴. This recognition ensures that every individual, including these entities, is entitled to equal treatment under the

³ *Queen Empress v. Ademma*, (1886) ILR 9 MAD 369.

⁴ Sandeep Narayan, *Rights and Status of Unborn*, Legal Service India, <https://legalserviceindia.com/legal/article-3345-rights-and-status-of-unborn.html> (Last accessed on 31 May, 2024).

law and equal protection of their rights. According to the Constitution life/liberty/property and equality provisions, an artificial legal entity, despite not being naturally occurring, is unquestionably recognised as a person. Thus, it has been argued that if an entity possesses life, it cannot be deprived of it without adhering to the required legal procedures. According to Article 21, a foetus or child in the mother's womb, while not recognised as a natural person, is deemed to have personhood. Thus, if it is established that the foetus or child possesses life, it must not be denied that life without a just and equitable procedure⁵. While the concept of life after death continues to be a metaphysical mystery, the existence of life before birth in the mother's womb is a well-documented physiological occurrence.

Various laws in India recognize the legal rights of a foetus. According to Section 6 of the Limitation Act, it is recognised that an unborn child holds the legal status of a minor. As per Section 2 (e) of the Indian Succession Act, a minor is legally defined as a person who is below the age of eighteen, which also includes an unborn child. According to Section 20 of the Hindu Succession Act, it is recognised that a child has the right to inherit property from their mother. According to my research, the legal perspective on this matter is that the foetus in the mother's womb is considered to have the same rights as a living child in terms of inheriting the property of a deceased person who did not leave a will. According to Section 13 of the Transfer of Property Act, 1882, an unborn infant is legally defined as a child or an infant that is still in its mother's womb. An unborn individual is not recognised as a living being and lacks presence. Nevertheless, it remains feasible to transfer property to the unborn child. Thus, it is apparent that the legal system has assigned considerable importance to the welfare of the unborn child. Furthermore, it is apparent that an unborn foetus possesses the same rights as a fully developed individual, given that the unborn child physically exists within the mother's uterus. The prenatal development of the foetus commences at the moment of conception, as it readies itself for the journey of life.

Various legislations, as previously mentioned, recognise and protect the rights of a foetus. Accordingly, it is our belief that the unborn child should be granted the fundamental right to life, as outlined in Article 21. This is because the unborn child initiates the process of growth and begins to experience life right from the moment of conception.

⁵ Raghav Ohri, *Supreme Court Upholds rights of Unborn Child*, The Economic Times (Oct 16,2023), <https://economictimes.indiatimes.com/news/india/supreme-court-upholds-rights-of-unborn-child/articleshow/104477198.cms?from=mdr> (Last accessed on 1 June,2024).

LEGAL PERSONALITY OF FOETUS

The criteria used to determine the status of different entities as 'legal subjects' vary depending on the legal system in question. Generally, legal subjects are entities that have the capacity to possess rights and obligations under the law. Some common criteria include having legal personality, being capable of entering into contracts, having the ability to sue and be sued, and being recognised as a separate legal entity from its owners or members. However, it is important to note that the specific criteria can differ significantly between jurisdictions and legal frameworks. Legal or juristic personality is bestowed upon an entity when it can be connected to the interplay of rights and duties within a relationship, in accordance with the concept put forth by Hohfeld.

According to Salmond, *'a person is defined as any entity that is recognized by the law as having the capacity to possess rights and be bound by legal obligations'*. The term 'person' can be further categorised into two distinct terms: natural person and legal/artificial person. It is important to understand the differences between these two categories⁶-

1. Natural person

Austin's definition of the term 'person' includes both physical and natural individuals, encompassing any being that can be classified as human. In the field of jurisprudence, the term 'person' is used to describe an individual who has their own distinct legal identity. From a research perspective, it is widely accepted that a live individual is commonly referred to as a natural person. Individuals possess the legal entitlement to commence a legal action or be the target of a legal action. Human rights and fundamental rights are established to protect the interests of individuals, as recognised by researchers in the field⁷.

Individuals are endowed with certain legal entitlements, commonly referred to as civil rights. These rights include the right to life, suffrage, privacy, marriage, pursuit of a profession, mobility, religious freedom, and other similar rights. The significance and practical value of these rights are applicable to human beings. Therefore, they are exclusively granted to individuals who are not artificial or legal entities.

⁶ R Sai Gayatri, *Legal Rights and Status of Peron, Unborn Child and Environmental Resources*, iPleaders (July30, 2021) <https://blog.iplayers.in/legal-rights-status-person-unborn-child-environmental-resources/> (Last accessed on 1 June, 2024).

⁷ *Ibid.*

According to jurisprudence, the term "natural person" is used to describe a human being who is rational and cautious in the broadest sense. The participants will receive all the privileges that are typically granted to residents of the area. An individual is typically classified as a natural person from the moment of birth until the time of death.

2. Legal or artificial person in the eyes of the law

Over time, the scope of individuals subject to legal jurisdiction has expanded. In the field of jurisprudence, a legal person is commonly defined as an entity or individual that has the legal capacity to initiate legal proceedings and can also be held accountable for legal actions in a court of law. For example, a legal entity can include various entities such as corporations, governments, idols, trade unions, and others. Through its authority, the law has the ability to transform an organisation into a legal entity with recognised legal status and value. The purpose of this action is to establish the legal identification of the plaintiff or defendant.

The law plays a crucial role in providing individuals with the necessary legal status to navigate judicial proceedings smoothly. Legal entities are granted rights and responsibilities by the law in order to fulfill the objectives of the law. It is important to understand that legal entities, such as corporations or organisations, are recognized by the law as separate entities from their owners or members. These entities are given certain rights, such as the ability to enter into contracts, own property, and sue or be sued in court. They also have responsibilities, such as complying with relevant laws and regulations, paying taxes, and fulfilling their contractual obligations. The purpose of granting legal entities these rights and responsibilities is to ensure that they can effectively operate and contribute to the objectives of the law, whether it is promoting economic growth, protecting public interests, or achieving other societal goals. The key idea to understand is that although all individuals are acknowledged as legal entities, not all legal entities are individuals⁸.

3. The legal status of an unborn child

As previously mentioned, it is widely accepted that an individual is considered a natural person from the time of their birth until their passing. Legal capacity and legal personality are attributed to individuals who possess inherent rights and responsibilities. Generally, legal personality is not attributed to an individual before birth or after death. For an individual to

⁸ *Supra* note 7.

have rights and responsibilities, it is essential that they are alive. However, a challenge is faced when dealing with the situation involving a foetus. Disciplines such as medicine and theology acknowledge that an unborn child is a living being.

According to Indian legislation, legal personhood is granted to a foetus upon birth, as stated in the statute. Based on legal criteria, a foetus that is inside its mother's uterus is not considered a legal person. However, an unborn individual is considered to have the same rights and protections as someone who has already been born. The individual is granted a restricted form of legal personality, to put it differently. If the foetus is delivered in a state of being alive, it will possess legal recognition. Unborn individuals are commonly not recognised as legal persons, in accordance with a widely accepted principle. However, there are situations where the developing embryo is granted specific legal rights and protections.

DEBATE SURROUNDING PERSONHOOD OF UNBORN

It is important to note that medical science does not specifically address the concept of foetal 'personhood'. However, it does widely acknowledge that human existence begins at conception. In the field of law, the significance of an unborn individual's personality is observed in the discussion surrounding the concept of legal personality. Over time, the legal definition of personhood for the unborn has been shaped by various factors, including moral and medical viewpoints⁹. However, it has also evolved to form its own unique interpretation within the legal system. The potential personhood of a foetus is a topic of debate among researchers, primarily because the legal system has traditionally determined legal capacities and protection based on the criterion of 'birth'.

The initiation of personhood for the foetus is a topic of debate. The topic becomes more complex when the assertion is challenged by the Pregnant Woman's (PWs) right to bodily autonomy, which is an integral part of her individual rights.

The basic problems concerning the notion of foetal rights can be enumerated as follows:

1. Contingency of Birth

Throughout history, the legal systems of India, England, and the United States have recognised

⁹ John Seymour, *The Legal Status of Foetus*, Oxford Academic, (July 2000) <https://academic.oup.com/book/3714/chapter-abstract/145104433?redirectedFrom=fulltext> (last accessed on 1 June, 2024).

the right of an unborn individual to inherit property. According to the research conducted by John Salmond¹⁰, it has been found that there are no legal restrictions in place that prevent an individual from owning property prior to their birth. The ownership is contingent upon the potential occurrence of his birth; however, it remains authentic and presently exists. A man may settle property on his wife and the children to be born of her. Or he may die intestate and his unborn child will inherit his estate.

Apart from the fear that the legal system might not be able to cope with the consequences of disturbing an age old tradition, two main reasons why the courts have refused to recognise any right of the foetus while in utero are-

- (1) That it would enable the parent or some other guardian to take legal action before the child is born and even when it perishes before birth. Any such suit would require an unequivocal evidentiary proof that the act of the defendant was the proximate cause of the injury to the foetus; and
- (2) It would also require an assessment, by the court, of damages that are commensurate with the injury suffered by the foetus. In earlier times when technology provided limited support, both these matters became manageable only after childbirth.

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

2. Controversy about when Foetus Becomes Separate

This controversy arose primarily because of the age old understanding that foetus is just an extension of the PW and also inadequacy of medical science to provide evidence with certainty, of any separate foetal injury. Given this roadblock, it was very difficult to ascertain when there would deemed to be a separate injury to the unborn; if at all this was a possibility. It must be reminded that there was never a shadow of doubt about the PWs claim to compensation for the injuries suffered by her because of, say, the attendant doctors' negligence, under a medical malpractice suit¹¹. But for anyone to claim compensation for and on behalf of the foetus, the plaintiff had to establish four things:-

1. That the defendant had a duty of care towards the plaintiff foetus

¹⁰ John Salmond, *Jurisprudence* (6th edn, London: Sweet and Maxwell 1920) 277.

¹¹ *Legal Status of Unborn Children In India*, Law Bhoomi (March 24, 2020), <https://lawbhoomi.com/a-study-on-the-legal-status-of-the-unborn-child-in-india/> (last accessed on 31May, 2024).

2. That he breached that duty
3. That there was injury suffered by plaintiff foetus in consequence and
4. That the defendants' act was the proximate cause of that injury.

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

Extending the example of medical malpractice or negligence, regarding defendant's (physician in this case) duty of care to the unborn, the unborn (through its representative) must also demonstrate that by causing the injury, the doctor breached his duty of care towards it. It has historically been very difficult to establish. The unique relationship between the doctor and his pregnant patient is, in most situations, contractual. Since the foetus is not capable of entering into any legally binding contract with the doctor treating the host PW, it would seem to be impossible for the physician to owe any contractual duty of care to the unborn child. However, the situation can be resolved by treating the foetus to be a third party beneficiary to whom the doctor owes at least an indirect duty of care. Two reasons can be advocated in this regard:-

- (1) The attending doctor, upon accepting the PW as his patient, agrees not only to look after the well-being of the PW but also of the unborn; the latter being the reason why the PW is under his care in the first place.
- (2) Whatever treatment is administered to the PW, directly affects the unborn and in that sense the unborn also becomes his patient in its own right¹².

3. Pregnant Women v Unborn

If foetal rights have to have any significant meaning in the real sense, then, as many jurists argue, the PW should owe a duty of care to her unborn child. The author is in full support of the argument and insists that if a PW ingests toxic substances such as heroin other narcotics (as an example), it should be viewed as a violation of the foetal right to wholesome life and a serious breach of duty on her part. It is high time that the courts should recognise, and

¹² *Id.*

overwhelmingly so, the tort of maternal malpractice (analogous to the existing tort of medical malpractice).

For instance, if in a given case, despite the due care being displayed by the attending doctor in transmitting the necessary warnings, the PW made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice should be taken as sufficient to exonerate the doctor and inculcate the PW for the WL of the child so born¹³. It is the PW (both parents in case of a joint decision to retain the pregnancy) who is responsible for the pain, suffering and misery wrought upon the child; hence it is only logical for law to inculcate her for the tortious act. Thus, we can see that the concept of foetal rights is much more complex than one might imagine.

SCHOOLS OF JURISPRUDENCE AND THE FOETUS

Legal debate surrounding foetal rights draws upon various schools of jurisprudence.

Positive Law School: This school of thought places significant emphasis on codified laws and judicial pronouncement as the main sources of legal rights. Existing legislation, including the Indian Penal Code, 1860 provisions that make it a crime to cause harm to pregnant women, and the Medical Termination of Pregnancy Act that allows for abortion in certain situations, contribute to the legal framework concerning the unborn.

Natural Law school: According to the Natural Law school of thought, it is believed that there are certain rights that are inherent to all individuals. These rights are said to be derived from reason or nature, and often include the right to life. Researchers who support the concept of foetal rights under natural law contend that the foetus inherently possesses the right to life starting from conception, irrespective of its viability or the circumstances of the woman.

Utilitarian School: Utilitarianism is a philosophical school of thought that places emphasis on the maximization of overall well-being in society. When evaluating abortion laws and policies, researchers consider both the potential rights of the foetus and the woman's right to bodily autonomy.

¹³ Mamta K. Shah, 'Inconsistencies in the Legal Status of Unborn Child: Recognition of a Foetus as Potential Life' (Spring 2001) 931, 937-38.

PERSONHOOD TO BE ACKNOWLEDGED BEFORE BIRTH

The concept of viability has been defined as the specific gestational age at which an embryo or foetus is regarded capable of independent life, thereby marking the beginning of personhood, as mentioned above. Based on research, the jurisdiction and viability of a foetus pertain to its capacity to survive independently outside of the uterus. However, it is crucial to acknowledge that the embryo acquires more capabilities at an earlier phase of development. At the moment of conception, the zygote has an equal capacity for life as the unborn at any later stage. By the sixth week of gestation, the developing baby has already fully developed all of its major organs. By the eighth week of development, the embryo demonstrates cerebral activity. Research suggests that consciousness is typically attained within a range of six to twenty-six weeks¹⁴.

Traditionally, quickening, which refers to the moment when a pregnant woman first perceives the movement of the foetus, has been a significant milestone that usually takes place between 18 and 20 weeks. The research above demonstrates that there are several significant developmental milestones that occur during the prenatal period. These milestones can be taken into account when identifying the critical moment that marks the beginning of personhood. The granting of critical status to viability appears to be irrational. Based on this, it can be contended that once fertilisation takes place, as the new creature promptly initiates growth and development, there exists the possibility for life to commence at conception. It is logical to conclude that personhood would likewise commence simultaneously.

According to philosophers such as Dworkin, who contend that personhood is achieved when an entity attains rationality, it is clear that the embryo is unable to reach the requisite level of rationality as mandated by the law. This is due to the fact that numerous countries still mandate that legal personhood is only granted to individuals who have been born alive, even if they are still in the womb or in early childhood. According to the law, it is not permissible to deprive children of their individuality. They are acknowledged as legal entities with specific rights and a certain level of obligations. Thus, the requirement for reason (in order to attain personhood) appears to be in conflict with its own illogical nature.

¹⁴ Ravi Kanojia, *Rights of an Unborn Baby Versus the Social and Legal Constraints of Parents: Birth of a New Debate*, Journal of Indian Association of Pediatric Surgeons (Jul-Sep, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2788452/> (last accessed on 2 June, 2024).

NEW ISSUES ON FOETUS

The field of medicine has experienced substantial growth in recent years, resulting in the emergence of new concerns pertaining to the unborn child. For instance, it is argued that the foetus should be granted a legal right to receive medical treatment, which should be distinct from, yet comparable to, the pregnant woman's right to seek healthcare from her physician¹⁵. Proponents argue that by increasing the responsibility of doctors for the health of unborn children, if a doctor fails to detect genetic defects or medical problems in the foetus before birth, and in some cases, fails to take appropriate measures to either terminate a severely defective foetus or provide therapy during pregnancy, the doctor should be held accountable for medical malpractice after the child is born. The newly recognised foetal right is commonly known as the right to not be born with a life deemed unworthy due to medical negligence or wrongful life (WL). As the pregnant woman (PW) possesses an autonomous legal recourse against the attending doctor, she has the choice to initiate legal proceedings against the doctor for the concept of wrongful birth (WB).

Again in the *State of Haryana v Santra*¹⁶ the apex court had considered the issue of WB. In this case, one Santra opted sterilisation to avoid pregnancy but unfortunately, she conceived and ultimately gave birth to a female child. Despite the individual's efforts to avoid pregnancy, they ultimately became pregnant and gave birth to a female offspring. The birth was attributed to a negligent sterilisation procedure conducted by the surgeon. Upon conducting a thorough examination of various legal decisions pertaining to the issue at hand and establishing the existence of significant negligence, the Supreme Court has reached the conclusion that Santra, an individual who already had seven children and expressed a willingness to participate in the government's sterilisation initiative, made a conscious choice to undergo sterilisation. The patient was issued a certificate validating the successful completion of the procedure and ensuring permanent infertility. The presence of the illegitimate child had further increased her financial burden, for which only the attending physician can be held responsible. Thus, it can be argued that the individual in question possesses the legal entitlement to request full reparation from both the State Government and the medical professional, with the purpose of providing financial support for the child's upbringing until they reach the age of puberty. The court suggested that while damages for the birth of an unwanted child may not hold much value

¹⁵ *Id.*

¹⁶ AIR 2000 SC 1888.

for those already living in affluent conditions, they should not be denied to individuals living below the poverty line or belonging to the labour class who rely on daily wages as ordinary labourers. This is particularly relevant in cases of medical negligence, as it is important to understand the factors that contribute to such negligence and the impact it has on patients. The additional categories of rights also apply to cases of foetal abuse, which encompasses instances of substance misuse or reckless actions by the mother during pregnancy. It is widely recognized among researchers that the mother bears the majority of the stress associated with pregnancy. Nevertheless, it is important to note that this does not suggest that terminating a pregnancy should be seen as a routine procedure for the sake of convenience or societal expectations.

Women often experience sexual assault, including rape, within the context of marriage and even within their own families. Women are often forced into pregnancy with the expectation of giving birth to a male child, and are sometimes pressured to undergo abortions to terminate female foetuses. Moreover, the high occurrence of illiteracy, limited knowledge, and societal stigmas act as barriers that impede their capacity to obtain and employ efficient methods of contraception. There are several factors to consider. Thus, in the Indian context, it would be unreasonable to solely attribute the responsibility of conception to the pregnant woman. It is important to consider the need for additional justifications for abortion, alongside the existing Medical Termination of Pregnancy Act (MTPA) of 1971. According to the MTPA, 1971, a woman's right to have an abortion is only applicable if her situation falls within the specified circumstances. Regarding the responsibility of a pregnant woman towards the foetus, it can be stated that if a woman knowingly and willingly engages in an activity that leads to pregnancy, she should be regarded as having made a decision and, consequently, must assume responsibility for it. When a woman seeks an abortion, it should not be seen as her right to 'self-determination' or choice; rather, it indicates her desire to evade responsibility following her decision.

CONCLUSION

There appears to be a limited understanding of the concept of human personality in India. It is commonly believed that personality development starts at birth and ends at death. In both prenatal and postmortem scenarios, the entity that does not exist continues to display behavior that is based on rights. Even after the death of a human individual, their will continues to hold

authority over the living, especially when it comes to testamentary succession.

The author observes that significant political, social, and economic factors are involved in the granting of legal identity to individuals. The rationale for granting legal status to certain entities and denying it to others is a topic of research interest. For example, animals lack the ability to achieve a level of significance that would enable them to gather enough legal support to be recognized as persons. Thus, they continue to exist as belongings. Similarly, it can be observed that a foetus does not have the support of advocates or activists to obtain legal personhood within the system. Minors lack complete legal competence as they do not possess the ability to enter into contracts, among other limitations. However, it should be noted that minors are still entitled to their fundamental rights. Similarly, it is suggested that legal protection should not be denied to the unborn. When examining the interests of a foetus, it is crucial to thoroughly assess current data on the various stages of foetal development and the latest advancements in technology that can aid in the prevention, enhancement, or treatment of foetal issues.

The research would aim to establish whether certain interests of the foetus warrant a degree of legal safeguarding throughout all phases of development, including the consideration of the right to life from the moment of conception. For foetal rights to have meaningful impact, it is essential for the pregnant woman (PW) to be legally obligated to provide care for her unborn child. If a pregnant woman consumes harmful chemicals, it should be considered as a potential infringement upon the unborn child's right to a healthy life and a notable lapse in responsibility on her behalf. Jurist should promptly acknowledge and strongly support the recognition of the tort of maternal malpractice, which is comparable to the already established tort of medical misconduct.