



Equilibrium between the Rights of Pregnant Women & Unborn Child in Indian Perspective

Shivangi

Law College Dehradun, Uttarakhand University

ABSTRACT

Part III of the Constitution of India, 1950 guarantees fundamental rights to all individuals. Article 21 of the Indian Constitution which covers protection of life and personal liberty of a person which is even extended to the unborn child. However, the right of an unborn child under Article 21 has been a debatable issue with various opinions and judgement on the same. The Indian legislature has well determined the rights of a pregnant woman but the rights of unborn child are still debatable. There are certain legislations passed by the Parliament as an extract of Article 21 of the Indian Constitution. Some of the legislations are the Medical Termination of Pregnancy Act, 1971 (as amended in 2021), Maternity Benefits Act, 1961, etc. Additionally, the Universal Declaration of Human Rights, 1948 recognizes the right to life and liberty as a fundamental right, without specifically mentioning the unborn child. It further provided that "all are equal before law." This principle could be interpreted as protecting the rights of unborn child from discrimination based on their status as unborn. This dissertation undertakes the analysis of the rights of the unborn child including the common law principles, and judicial precedents. It is essential to recognise the importance of protecting the rights of the unborn child, as they are the future of society.

Keywords: Unborn Child, Pregnant women, rights of the pregnant and unborn child, Constitution of India.

Introduction

Indian legislature has expressly determined the rights of a pregnant woman through various statutes such as Medical Termination of Pregnancy Act 1971 (as amended in 2021); Maternity Benefits Act, 1961 but the right of an unborn child is not that absolute as of the pregnant women. In the past, an unborn child was not considered a legal person with rights. However, with advancements in medical technology and changing attitudes towards the foetus, many countries have enacted laws granting various forms of protection to the unborn. The rights of the unborn child under personal laws are based on the same principles of those under the constitution of India, namely right to life and personal liberty. Personal Laws plays an essential role in shaping the rights of individuals, including the unborn child. By the end of the second month of the pregnancy, the foetus develops limbs and digits and by the end of the twelve week most of the major organs are formed. By the end of the twenty-four weeks, the body is covered with fine hair, eyelids, separate eyelashes formed. By the end of nine months of pregnancy the foetus is fully developed and is ready for delivery. It can be well stated that the foetus of 3 months (12 weeks) has well developed and a beating heart which implies the living state of the foetus. Also, the Indian Legislature in the MTP Act, 1971 has allowed the termination of the pregnancy up to twenty weeks and twenty-four weeks.

What is the meaning of Unborn child

The term "unborn" means who is not born. These unborn can also be classified based on the movement in the mother's womb. Under the Indian Penal Code, there are states of being for unborn child; the unborn child simpliciter (so to speak); the unborn child of a woman who is **quick with child**; and finally, the unborn child capable of being unborn alive. Presumably, it is possible for the last two states to overlap at least in part.

Protection of the unborn child

The Constitution of India provides protection to everyone against crime or any form of trouble caused to them, as it is the responsibility of the State. It is noteworthy that this protection also extends to individuals who are not yet citizens of a state but may acquire citizenship at birth. There is a growing trend towards recognizing unborn individuals as deserving of legal protection. Advances in science indicate that from the moment of conception, a foetus is

considered an individual. Research indicates that a foetus's heart begins to develop one month into pregnancy, which can be detected by listening to the heartbeat with a stethoscope.¹

In Indian law, specifically under Chapter V of the *Bhartiya Nyaya Sanhita, 2023*, in section 88, causing miscarriage to a woman is considered a criminal act and is punishable by law. It can be a physically and emotionally challenging experience for a woman to undergo a miscarriage, especially if it is due to someone else's actions. This section specifies that anyone who causes a pregnant woman to miscarry, except for saving her life, shall be punished with imprisonment for up to three years, a fine, or both. If the woman is further along in her pregnancy, the punishment can extend to seven years of imprisonment and a fine. The law also states that a woman who self-induces a miscarriage can be punished.

The Basic Law for the Federal Republic of Germany guarantees that "Everybody has the privilege to life" and it ought to stretch out to the life of the unborn. In 1993, the Federal Constitutional Court of Germany held that "life starts, as per the built up organic physiological information, on the fourteenth day after organization" and the Constitution ensures the privilege to life to an embryo and it is a legitimate individual from the conception.

American Convention on Human Rights, 1978 Article 4.1 states that, "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life²."

The Right to life of an Unborn child in India

The right to life is a very broad concept and this is the most fundamental of all. In India, right to life has been recognized under Article 21 of the Constitution which says that "No person shall be deprived of his life and personal liberty except according to procedure established by law" and it also guarantees the right to life for unborn children. Protection is granted to both the foetus in the womb and the growing child. Legislation also offers additional protections for children. The unborn child is recognized under various legal frameworks, including property and criminal laws. Traditionally, this right has been interpreted as applicable to those who are born; however, courts have sometimes expanded this interpretation to include the unborn child, particularly in cases concerning reproductive rights and abortion. Numerous judgments assert that the unborn child has the right to life. Nevertheless, this extension is not absolute, and courts have consistently upheld a woman's right to make decisions regarding her body and health, especially with respect to abortion.

In the case of *X v. Union of India*³, The panel led by Chief Justice D.Y. Chandrachud dismissed a request for terminating the pregnancy, noting that the legal limit of 24 weeks had already been surpassed and the Medical Board's evaluation indicated no immediate threat to the petitioner's life. The Court expressed hesitance regarding the need to halt the foetal heartbeat, citing ethical concerns. In cases involving the rights of the unborn child, the Indian Judiciary has sought to balance the competing interests. While recognizing the potential for life in the foetus, the courts have repeatedly upheld the woman's autonomy and her right to make decisions about her pregnancy, particularly in cases involving medical complications or foetal abnormalities.

Statutory Rights given to the Unborn Child in India

There are no clearly established laws or statutes that outline the rights of an unborn child. However, various laws and acts reference the rights of unborn children. In India, unborn children have rights related to life, health, and protection from harm. These rights are embedded in Article 21 of the Constitution, which upholds the right to life as a fundamental entitlement. Nonetheless, the legal framework in India specifies certain rights and protections that are relatively limited. The legal principles concerning the rights of the unborn are influenced by legislation, judicial rulings, and constitutional principles, demonstrating a careful balance between protecting foetal rights and honoring the autonomy and rights of the mother.

a) Hindu Succession Act, 1956

Under Hindu Law, which governs a considerable segment of the Indian populace, significant property rights are granted to unborn children. The Hindu Succession Act of 1956 recognizes the right of an unborn child (on the condition that it is born alive) to inherit property from deceased ancestors. In a joint Hindu family governed by the Mitakshara system, an unborn child is regarded as having a theoretical share in the ancestral estate. If a family member passes away and leaves behind a pregnant widow, the child she is expecting is entitled to inherit a portion of the joint family property, provided that the child is born alive. As a result, the unborn child is viewed as a co-parcener, with the right to claim a share of the ancestral property. This principle is additionally supported by Section 20 of the Hindu Succession Act, 1956, which states that a child in the womb at the time of a person's demise will have the same rights to inheritance as if they were born before that death.

b) The Transfer of Property Act, 1882

The Transfer of Property Act, 1882 is a law that regulates the transfer of property in India between individuals who are alive. According to Section 5 of the Act, such transfers must take place between living persons. Nevertheless, the Act includes provisions regarding the transfer of property for the advantage of individuals who have yet to be born. The aspect of transferring property for the benefit of unborn individuals is mainly addressed in Section

¹ National Council for Education and Research Training

² Article 4 of American Convention on Human Rights, 1978

³ 2023 SCC OnLine SC 1338

13 of the Transfer of Property Act. This section specifies the conditions under which property can be transferred for the benefit of an unborn person. The section states:

“Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property”

The direct transfer of property to an unborn person is not permissible. There are two conditions in which the transfer is done:

- **Prior Life Interest**

To ensure that a transfer to an unborn individual is valid, it is essential to have a prior interest established for the benefit of that unborn individual. This rule ensures that a living person maintains ownership of the property during their lifetime until the unborn child is born. Following the end of this life interest, the property is transferred to the unborn individual, who must be in existence by that time.

- **Absolute Interest**

The entire property must be transferred to an individual who has not yet been born. The transfer to someone who is still to come must be fully executed, with no further transfers permitted to any other parties. An interest that is valid solely during someone's lifetime cannot be given to a person who has not yet been born. Conveying property to an unborn individual is permissible only if it includes the transfer of a complete interest instead of a life estate.

Section 20 of the TPA, 1882 specifies the prerequisites for granting a vested interest to a person who has not yet been born. While an unborn individual cannot take possession of property right after their birth, they can obtain a vested interest in it as soon as they are born. When real estate is transferred with the intention of benefiting an unborn individual, that person gains a vested interest upon birth, even though they may not be able to immediately exercise their rights regarding the property.

c) **Bhartiva Nvaya Sanhita, 2023**

Under section 92 of the BNS, 2023 which states **Causing death of quick unborn child by act amounting to culpable homicide**, “ *Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.*

Explanation. —This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure”

The rights of the pregnant women in India

The rights of women during pregnancy encompass the options and legal entitlements afforded to those who are expecting. Traditionally, the responsibilities associated with childbirth and infant care have predominantly fallen upon women across different cultures.

➤ **Benefits under the Maternity Benefits Act, 1961**

The Maternity Benefit Act was originally introduced in 1961 to safeguard the employment rights of expectant women. Maternity benefits refer to the financial support or allowances that women receive from their employers or the government during pregnancy and after childbirth. These benefits specifically cater to women who are expecting. The aim of this law is to guarantee paid leave for pregnant women both before and after they give birth. Additionally, it seeks to empower women by promoting equal opportunities to balance their careers with their personal lives. In India, the Maternity Benefit Act is applicable solely to organizations that employ 10 or more people. An amendment to the Maternity Benefit Act was passed and approved by the president on March 27, 2017. The Maternity Benefit (Amendment) Act, 2017 took effect on April 1, 2017, modifying significant elements of the Maternity Benefit Act of 1961. Below are the main provisions and notable changes introduced by the Amendment Act of 2017.

- Paid maternity leave has now been extended from 12 weeks to 26 weeks.
- The eligibility for paid leave has been expanded to include eight weeks prior to the expected due date, increasing from the previous six weeks; this benefit is also now available to commissioning and adoptive mothers.
- A 'Work from Home' option has been introduced, which can be taken after the paid leave period, subject to terms and conditions agreed upon by the employer.
- Establishments with more than 50 employees are now required to provide an in-house creche facility.
- Women are allowed to utilize the creche facility up to four times a day.
- It is now mandatory to educate women about their rights regarding maternity benefits.

➤ **Bhartiva Nvaya Sanhita,2023**

In India, inducing a miscarriage is considered a significant crime under the *Bhartiya Nyaya Sanhita, 2023*. Experiencing a miscarriage can bring both physical and emotional pain for a woman. The legal framework addressing offences related to miscarriage is contained in Chapter V of the BNS, which focuses on crimes against women and children.

❖ **Section 88: Causing Miscarriage**

This section indicates that any person who intentionally causes a pregnant woman to lose her pregnancy, unless done in good faith to save the woman's life, shall face imprisonment for a term that may last up to three years, or a fine, or both; and, if the woman is in the later stages of pregnancy, the punishment shall be imprisonment for a term that may last up to seven years, and shall also be liable to fine.

Section 89: Causing miscarriage without woman's consent

This section states that whoever commits the offense under section 89 without the consent of woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to **ten years, and shall also be liable to fine**.

❖ **Section 90: Death caused by act done with intent to cause miscarriage:**

- Clause (1) states that whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to **ten years, and shall also be liable to fine**.
- Clause (2) states that where the act referred to in sub-section (1) is done without the consent of the woman, shall be punishable either with **imprisonment for life, or with the punishment specified** in said sub-section.
- In the further explanation it is given that it is not essential to this offence that the offender should know that the act is likely to cause death.

The role of State in protecting the rights of the pregnant women and unborn child in India

In India, it is the government's essential duty to protect the rights of pregnant women and their unborn children by ensuring access to safe and legal abortion services under the Medical Termination of Pregnancy (MTP) Act, providing thorough information on reproductive healthcare, promoting institutional deliveries through programs like the Janani Suraksha Yojna, and actively opposing practices such as sex-selective abortions by implementing the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, all while honoring a woman's right to make informed decisions about her pregnancy and bodily autonomy. The government's obligation to uphold these rights requires that women and girls not only obtain comprehensive reproductive health information and services but also attain favorable reproductive health outcomes, such as decreased rates of unsafe abortions and improved mental well-being, along with the capacity to make informed choices that are free from violence and discrimination.

1. Legal protection for Pregnant Women

- **Medical Termination of Pregnancy Act, 1971 as (amended in 2021)**

In September 2021, the Medical Termination of Pregnancy (Amendment) Act of 2021 was enacted, raising the upper limit for legal abortions from 20 weeks to 24⁴ weeks. Although the amendment did not establish a right to abortion on demand for pregnant individuals, it was viewed as a significant step forward in the modernization of abortion laws in India. This change occurred due to numerous appeals made to Indian courts by women with unwanted pregnancies who were seeking safe medical assistance beyond the allowed gestation period. The MTP Act of 1971, revised in 2021, outlines the circumstances under which abortions are legally permitted in India. The amendment raised the allowable gestational limit for abortion to 24 weeks for "specific categories of women." These categories are detailed in section 3B of the MTP Rules, 2021, as indicated by the MTP Amendment Act, and include survivors of rape and incest, minors, women experiencing a change in marital status (such as through divorce or widowhood), women with disabilities, those with foetal anomalies, and individuals facing emergencies, disasters, or humanitarian crises. Notably, the amendment expanded access by replacing the phrase "married women" from the 1971 law with "any woman," allowing all pregnant individuals to seek abortions regardless of their marital status.

In *X v. Union of India*⁵, the petitioner turned to the Supreme Court to request permission for an abortion under the MTP Act of 1971. She became aware of her pregnancy at about 24 weeks due to a condition called lactational amenorrhea, which causes breastfeeding women to skip their periods. After initially facing resistance at a healthcare facility, the petitioner quickly approached the apex court to obtain access to necessary medical care. In a significant shift during the Supreme Court proceedings, the arguments concerning fetal viability and the rights of the unborn child were prioritized over the petitioner's right to reproductive autonomy. Although she met the legal criteria related to mental health issues, her reproductive rights were assessed against eligibility criteria for abortion beyond 24 weeks, and she was determined to fall short. The Court observed that she did not qualify for protections under Section 3(2B), which applies to survivors of sexual assault, minors, individuals who are divorced or widowed, persons with disabilities, those with mental health conditions, cases of fetal abnormalities, or pregnancies occurring during humanitarian crises. Furthermore, she did not meet the criteria for

⁴ X v. Principal Secretary, Health and Family Welfare, Govt. of NCT Delhi SLP(C) No. 12612 of 2022

⁵ *Supra Note 3*

Section 5 protections, which permit abortion when it is necessary to safeguard the woman's life. The bench led by Chief Justice D.Y. Chandrachud rejected her request for pregnancy termination, pointing out that the legal limit of 24 weeks had been exceeded and that the Medical Board's assessment revealed no immediate risk to the petitioner's life. The Court also expressed reluctance to order the stopping of the fetal heartbeat due to ethical considerations.

- **Maternity Benefit Act, 1961**

The Maternity Benefit Act of 1961 is crucial legislation that protects the rights of working women during their pregnancy and maternity. It guarantees that pregnant women do not lose their employment benefits and receive financial assistance during their maternity leave. This Act is applicable to workplaces such as factories, mines, plantations, government offices, and shops that employ 10 or more individuals. Eligible women are entitled to 26 weeks of paid maternity leave for their first two children and 12 weeks for any subsequent children.

In the case of *Municipal Corporation of Delhi v. Female workers (Muster Roll) and Anr. (2000⁶)*, The Supreme Court determined that the Act of 1961 does not limit maternity leave rights to just regular female employees, thus including those who are casually employed or on a daily wage basis. It is a fundamental aspect of a woman's life to bear children. Employers should be accommodating and provide whatever support is necessary to facilitate a working woman's ability to give birth. They must also recognize the physical difficulties a working woman encounters in fulfilling her job responsibilities while pregnant or caring for a newborn. The Act aims to ensure that working women are granted benefits in a respectful way, allowing them to manage motherhood without fear of repercussions for taking time off before or after childbirth.

2. The Constitutional Provisions

The Constitution of India outlines several fundamental rights that the government must safeguard, including the right to equality and protection against discrimination (Articles 14 and 15) and the right to life (Article 21). Legal interpretation of the right to life includes the rights to health, dignity, freedom from torture and cruel treatment, and the right to privacy. India is also a signatory to several international agreements, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), all of which recognize reproductive rights. Moreover, Article 51(c) of the Indian Constitution establishes an obligation to uphold international laws and treaty commitments. In addition, the Indian government has a constitutional duty to provide legal remedies for violations of fundamental and human rights. Article 39(a) requires the government to promote fair access to justice and to provide free legal aid to ensure that "opportunities for justice are not denied to any citizen due to economic or other disabilities." In the case of *Neetu Bala v. Union of India*⁷, the court ruled that limiting job opportunities for women solely because of pregnancy was both unreasonable and illegal, violating Articles 14, 16, and 42 of the Indian Constitution. It also highlighted that such discrimination would be contrary to India's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Labour Organization's Maternity Protection Convention, and the Universal Declaration of Human Rights (UDHR). In this case, the petitioner challenged the State's decision to deny her appointment to the Short Service Commission solely on the grounds of her pregnancy. Likewise, in *S. Amudha v. Chairman, Neyveli Lignite Corporation*⁸, The Madras High Court ruled that the employment rules categorizing women who are over four months pregnant as "temporarily unfit" for any kind of work are not valid. Citing this regulation, the respondent attempted to delay the petitioner's hiring until she delivered her baby. The Court concluded that this restriction violates Articles 14 and 21 of the Indian Constitution.

- **The Directive Principles of State Policy**

The Directive Principles of State Policy (DPSP), outlined in Part IV of the Indian Constitution from Articles 36 to 51, act as guiding tenets for the government to promote social justice and the welfare of the state. While these principles are not legally binding, they direct the government to create laws and policies that protect the rights of pregnant women and their unborn children.

Articles 39 (e) and 39 (f) mandate that the state must ensure the health of women and children is not compromised and that they are not coerced into economic activities that jeopardize their well-being. These articles advocate for safe working conditions for pregnant women and shield them from dangerous employment. Additionally, they ensure that children, including those who are unborn, are raised in a healthy environment with dignity and that prenatal care and maternal health support are provided to protect the unborn child's welfare.

Article 42 of the Constitution states that "the state shall make provisions for securing reasonable and humane working conditions and for maternity relief." This implies that the government should guarantee fair and just working conditions and offer maternity benefits to working women, including paid leave, medical expenses, and other allowances.

Conclusion

In India, there is presently no specific law that addresses the rights of the unborn child. Nevertheless, the Supreme Court has recognized that the unborn child's right to life and personal liberty is protected under Article 21 of the Constitution. An unborn child has the same rights as any citizen, which calls for legislative changes to ensure these rights are upheld. This involves creating a nurturing environment for development and holding parents liable for any negligence that could harm the foetus. A woman's personal life should allow her the freedom to make decisions for herself. It should ultimately be

⁶ SLP (C) 12797 of 1998

⁷ 2016 SCC OnLine P&H 602.

⁸ 1989 SCC OnLine Mad 234.

up to the woman to choose what to do with her body, whether she wishes to continue with the pregnancy or terminate it. Even though there are legal protections for unborn children, these are often conditional and limited, with the law mostly emphasizing the health and autonomy of the pregnant woman. Ongoing ethical debates surrounding foetal rights, particularly concerning abortion and reproductive rights, continue to shape Indian legal principles, and future legal developments are anticipated to highlight the ongoing conflict between foetal rights and personal autonomy.