

# The Legal Personality of an Unborn Child: A Comparative Analysis of USA & India

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## Abstract:

*The aim of this research paper is to study the legal personality of an unborn child under the international law governed by treaty conventions and other jurisdictions like USA and India. The controversy relating to the legal rights of an unborn fetus has been the subject matter of debate at both National and International level. The question that arises for consideration is whether the fetus can be granted the status of a human being from its very inception and conferred the status of a person or not. Through this research paper we seek to elaborate upon the competing interests of a fetus with the woman's rights and interests as guaranteed under International Conventions and Constitution of USA and India.*

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## 1. Introduction

The controversy relating to the legal rights of an unborn fetus has been the subject matter of debate at both National and International level. The question that arises for consideration is whether the fetus can be granted the status of a human being from its very inception and conferred the status of a person or not. Most of the legal systems in the world has treated the fetus as a part of the woman bearing it and has afforded it no rights as an entity distinct from her. "The reason that different values are given to life inside the womb and to extracorporeal life in the modern legislation of many states lies in the fact that the term "biological individual" is split into "human being" and "person"".

Such a dichotomy is rendered probable by the "legal capacity" with which the individual patronizes with.

*"It is precisely this use of the category of legal capacity, in positive law, that makes it possible to recognize the personal status of beings that are different from the biological individual, and some biological individuals continue to be denied their legal capacity."*<sup>233</sup>

It is also pertinent to note that the ambiguity relating to the legal personality of an unborn foetus in various jurisdictions across the world raises serious questions as to the legality of abortion.

However, Ronald Myles Dworkin, an American philosopher, jurist, and scholar of United States Constitutional law has argued that foetus is not a complete moral person from the moment of its conception. He has rejected the claim of the proponents of prohibition of abortion that the unborn has the right to live and

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<sup>233</sup> Teaching of the Catholic Church on Abortion, 'The Rights of an Unborn Child and Artificial Procreation', <http://www.priestsforlife.org/magisterium/rightsofunbornchild.html>.

abortion is murder or nearly as wrong as murder.<sup>234</sup> He argues that a fetus has not interests until the end of the third trimester. As the brain of a fetus is not sufficiently developed until the twenty-sixth week, it cannot feel pain which is further supported by scientific claims.<sup>235</sup> The question whether abortion should take place is dependent on the fact that the fetus has developed interests and not on the fact that it will develop interests if no abortion takes place. Something that doesn't have life cannot be said to have developed interests. A fetus would thus develop interests only when it can live on its own which happens only after the third trimester.

However, the fundamental question that needs to be resolved is whether the fetus' right to life if any, conflicts with the rights guaranteed to a pregnant girl which safeguards her right to health, life and in the interests of a female where the pregnancy jeopardizes her bodily injury or even life and where pregnancy is a consequence of rape or incest.

## 2. Rights of an Unborn Child v. Rights of a Pregnant Female

### 2.1 Under International Law

*'The Convention on the Rights of the Child ('Hereinafter referred to as the CRC), entered into force on September 2, 1990<sup>236</sup> is the first most widely accepted international legal instrument which embodies the recognition of human rights to Children.'*<sup>237</sup> The Convention enshrines, inter alia, every child's right to life and survival,<sup>238</sup> to a nationality,<sup>239</sup> to an identity,<sup>240</sup> to be heard,<sup>241</sup> to "freedom of thought, conscience and religion,"<sup>242</sup> and to health.<sup>243</sup> However, the convention is silent on the age at which childhood begins, and unclear regarding whether the rights reserved to children under the Convention apply to the unborn. The Convention leaves room open for interpretation of when the childhood may commence, at fertilization, at conception, or at birth or at some point between conception and birth.

However, paragraph 9 of the Preambular of the Convention quotes the 1959 Declaration on the Rights of Child, suggestive of protection available to an unborn child: "the child needs special safeguards and care, including appropriate legal protection before as well as after birth." The text of the Preamble to the Convention suggests that a "child" is considered to be child before birth and is therefore, entitled to legal protection. In sharp contrast to this claim, the Preamble of the convention doesn't define "child" for the purpose of the Convention, as State Parties to a treaty are not bound by the Preamble to the Treaty. It is a well-

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<sup>234</sup> "Sai Abhipsa Gochhayat, 'Understanding of Right to Abortion under Indian Constitution' <http://manupatra.com/roundup/373/Articles/PRESENTATION.pdf>; Ronald Dworkin, *Freedom's Law: the Moral Reading of American Constitution* (OUP 1999)."

<sup>235</sup> Clifford Grobstein, *Science and the Unborn: Choosing Human Futures* (Basic Books 1988) 13.

<sup>236</sup> G.A. Res.44/25, (CRC) U.N. Doc. A/RES/44/25(September 2, 1990), 1577, U.N.T.S. 3.

<sup>237</sup> Abby F. Janoff, *Rights of the Pregnant Child v. Rights of the Unborn under the Convention on the Rights of the Child* 22 Boston University I.L.J. 163 (2004).

<sup>238</sup> Convention on the Rights of the Child, 1990, Art. 6.

<sup>239</sup> *Id.*, Art. 7.

<sup>240</sup> *Id.*, Art. 8.

<sup>241</sup> *Id.*, Art. 12.

<sup>242</sup> *Id.*, Art. 14.

<sup>243</sup> *Id.*, Art. 24.

established principle that Preamble doesn't have any obligatory force of its own.<sup>244</sup> The International Court of Justice has observed that "*the Preamble to the United Nation Charter forms the moral and political basis for the legal provisions thereafter set out. Such considerations do now, however in themselves amount to rules of law.*"<sup>245</sup> Therefore, it cannot be argued conclusively, that the Preambular Paragraph 9 to the Convention can ascertain the true scope of the word "child" mentioned under the Convention.

The Preambular text, however, can serve as a guiding aid to the interpretation of the Convention. The *Vienna Convention on Law of Treaties, 1969*<sup>246</sup>, Article 31 states that "meaning to be given to the terms of the treaty in their context and the context for the purpose of the interpretation of a treaty shall include its preamble." Since, there is no definition of the meaning of the term "child" mentioned under the Convention; recourse can be taken to the Preambular Paragraph to the Convention which shall serve as guiding tool for interpretation. When the meaning of the term "child" is interpreted in light of the preamble to the Convention, it is can argued that the Convention seeks to protect the right to life of the unborn and other rights mentioned under the Convention.

To the contrary, if the Preambular Paragraph 9 doesn't seem to provide any meaning to the term "child" as mentioned under Article 1 of the Convention, so as to extend it to provide legal protection to the unborn, then what is the purpose of the Preamble. Alston concluded "its significance is to endorse the already very widespread practice of taking whatever measures the state considers 'appropriate' with a view to protecting the fetus . . . What is 'appropriate' in that regard is for each state to determine for itself . . . provided that other human rights guarantees were not thereby violated."<sup>247</sup> The observation of Alston is in consonance with the Drafting history of the Convention which did not resolve the ambiguity related to the meaning of the term "child", so as have a universal adoption of the Convention through widespread possible ratification.

## **2.2 Debates on the Definition of the term "Child" and the Rights of the Unborn**

During the drafting process of the Convention, certain concerned State raised issues as to ambiguity in the definition of the term "child" which did not specify the minimum age requirement of childhood and the rights of the unborn. Hence, the Convention purposefully, did not address the ambiguity related to the meaning of the term "child" under the Convention. As noted by the International Committee of Red Cross, different state Parties adopt a different approach while incorporating the provisions related to the legal right of the unborn. As a consequence, the effect of the silence on the controversy as to the minimum age requirement of when childhood begins under the Convention will be widespread possible ratification. The International Committee of Red Cross made observations as to the result of

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<sup>244</sup> Philip Alston, The Unborn Child and Abortion under the Draft Convention on the Rights of the Child, HUMAN RIGHTS QUARTERLY (Baltimore) February 12, 1990, 156, 169.

<sup>245</sup> Ethiopia v. South Africa; Liberia v. South Africa, (Second Phase) 1966 I.C.J. 6, 34; Abby F. Janoff, Rights of the Pregnant Child v. Rights of the Unborn under the Convention on the Rights of the Child 22 Boston University I.L.J. 163, 168 (2004).

<sup>246</sup> Vienna Convention on Law of Treaties, 23 May, 1969, 1155 U.N.T.S. 331.

<sup>247</sup> Philip Alston, The Unborn Child and Abortion under the Draft Convention on the Rights of the Child, HUMAN RIGHTS QUARTERLY (Baltimore) February 12, 1990, 156, 169.

the drafting process, “*The notion of child has not been made clear,*” the Red Cross wrote, “*this silence seems wise and will facilitate universal application of the Convention irrespective of local peculiarities.*”<sup>248</sup>

This ambiguity pertaining to the reading of the Convention can be best answered by the response of Austria towards the Polish proposal, dated 12 October, 1978 noted, “*The scope of Article IV is not clear. There is a possible inconsistency between ‘the child’s’ right to adequate pre-natal care and the possibilities for legal abortion provided in some countries.*”<sup>249</sup> The International Committee of Red Cross along with seven other States submitted their observations regarding the ambiguity in the meaning of the term “child” as submitted by Poland in their Article IV of the Proposal.<sup>250</sup> Barbados observed, “*How far should [the child’s right to life] go? Does the child include the unborn child or the fetus [sic]? Under specified circumstances, should a fetus [sic] be aborted without an offence being committed or at the relevant time was the fetus [sic] a human life?*”<sup>251</sup> New Zealand asked, “*Does the definition [of a child] begin at conception, at birth, or at some point in between?*”<sup>252</sup>

These concerns raised by various representatives of States depict the uncertainty that remains unresolved as to the scope and extent of the meaning of “child” as mentioned under the Convention. The Working Group in 1980 adopted the views suggested by the First Revised Draft on Convention on Rights of the Child [hereinafter referred to as the First Revised Draft], thereby, resolved the ambiguity and uncertainty in the definition of the term “child”, however, temporarily. Article 1 of the First Revised Draft defined child as “every human being from the moment of his birth to the age of 18 years unless, under the laws of his state, he has attained his age of majority earlier.”<sup>253</sup> Consequently, the language adopted by the Polish Proposal was rejected which entitled the right of protection to the unborn. However, the final draft of the Convention embodied the initial uncertain status as to the protection of the unborn.

#### **a. Development of the Preamble**

The First Revised draft did not contain any provision as to the protection to the unborn. The Holy See moved an amendment to the Fifth Preambular Paragraph to the convention by adding the expression, “before or after birth”. The States who voted in favour of the amendment “stated that the purpose of the amendment was not to preclude the possibility of an abortion.”<sup>254</sup> Those who opposed the

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<sup>248</sup> Janoff (n. 6) 170.

<sup>249</sup> United Nations High Commissioner for Refugees, Report of the Secretary-General U.N. Doc. E/CN.4/1324 (1978); Id., 171.

<sup>250</sup> Sharon Detrick (ed.), United Nations Convention on Rights of Child: A guide to Travaux Préparatoires (1992). Seven countries including Austria, Barbados, France, Madagascar, Malawi, New Zealand, and Portugal are the states which submitted relevant comments; Janoff (n. 6) 171.

<sup>251</sup> U.N.C.H.R., Report of the Secretary-General, U.N. Doc. E/CN.4/1324; id., 36, 42 (1978); Janoff (n. 6) 171.

<sup>252</sup> U.N.C.H.R., Report of the Secretary-General, U.N. Doc. E/CN.4/1324/Add.5 (1980); Janoff (n. 6) 171.

<sup>253</sup> U.N.C.H.R., Report of the Open-Ended Working Group Established by the Commission to Consider the Question of a Convention on the Rights of the Child, U.N. Doc. E/CN.4/L.1542 (1980); Janoff (n. 6) 171.

<sup>254</sup> U.N.C.H.R., Considerations 1989 Working Group, U.N. Doc. E/CN.4/L.1542 (1989); Sharon Detrick (ed.), United Nations Convention On Rights of Child: A Guide to Travaux Préparatoires 102 (1992); Janoff (n. 6) 172.

amendment suggested that the “Preambular Paragraph should be indisputably be neutral on issues such as abortion.”<sup>255</sup> The State parties consented to the inclusion of the expression “before as well as after birth” from the 1959 Declaration on the Rights of the Child.<sup>256</sup>

The Working Group made a recommendation to include the following statements in the *Travaux Peparatoires* observed that “In adopting this Preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties.”<sup>257</sup> However, some delegates expressed their concerns that legal protection has been given to the unborn child in all national legal jurisdictions.<sup>258</sup> To address their concerns, it may be reasonably inferred that the Article 1 of the Convention could include an unborn child irrespective of the Preamble. In finality, the text of the Convention did not resolve the controversy related to minimum age of childhood.

### **b. Development of Article 1**

The First revised draft defined child as “*every human being from the moment of the birth*”<sup>259</sup> under Article 1 of the Convention. In response to this language of Article 1, several States claimed that childhood begins at conception, rather than at birth, subsequent to which, Morocco proposed an Amendment that the expression ‘from the moment of the birth’ should be deleted from this Article in order to resolve the controversy.<sup>260</sup> Morocco’s definition was finally inserted into the wordings of Article 1(1) of the Convention; however, the ambiguity relating to the definition of “child” was not resolved. The proposal put forth by Malta and Senegal for defining childhood commencing at conception was withdrawn in light of the vote for the text of the Preamble<sup>261</sup> which called for “*legal protection, before as well as after birth.*”

### **c. Ratification of Treaty**

Till date, 192 countries except USA and Somalia have signed the Convention on Rights of the Child making it the most widely adopted and ratified convention in the history. The ambiguity relating to the definition of the term “child” seems to be wise and is likely to induce widespread ratification, as observed by the International Committee of Red Cross<sup>262</sup> since the laws of various states vary in their approach towards the legal protection offered to the unborn.<sup>263</sup> This

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<sup>255</sup> Ibid.

<sup>256</sup> U.N.C.H.R., Considerations 1989 Working Group, U.N. Doc. E/CN.4/1989/48 (1989). See also, A Guide to Travaux Preparatoires (n. 23) 108, 110.

<sup>257</sup> Ibid.

<sup>258</sup> A Guide to Travaux Preparatoires, (n. 23) 109.

<sup>259</sup> Id., 115; Janoff (n. 6) 173.

<sup>260</sup> U.N.C.H.R., Considerations 1989 Working Group, U.N. Doc. E/CN.4/L.1542 (1989). See also, A Guide to Travaux Preparatoires (n. 23) 115.

<sup>261</sup> U.N.C.H.R., Considerations 1989 Working Group, U.N. Doc. E/CN.4/1989/48 (1989). See also, A Guide to Travaux Preparatoires (n. 23) 117-18.

<sup>262</sup> Janoff (n. 6) 173; A Guide to Travaux Preparatoires (n. 23) 22.

<sup>263</sup> Abortion laws of states parties provide evidence of these disparate views. For example, the Holy See considers “that a human being is to be respected and treated as a person from the very moment of conception.”

Under Islamic (Sharia) law, the legality of abortion often depends on “whether the abortion is performed before ensoulment, the time at which a fetus gains a soul,” which is commonly considered to be 120 days after conception.

ambiguity, essentially allowed various States to ratify this convention without altering their views on the subject.

### 3. Legal Personality of an Unborn Child in USA

The legal system in USA has treated foetus as an integral part of the woman bearing it and has afforded it no rights as an entity separate from her, with a few exceptions carved out to this general rule which is necessary to protect the rights and interests of born individuals.<sup>264</sup> The Courts have recognized the rights of the fetus which are traditionally enjoyed by persons in that they view fetus as an entity separate from the woman bearing it with interests that are presumably, hostile to the pregnant woman. The social determination of how the legal system should view the fetus should be informed by a careful consideration of all potential implications.<sup>265</sup> The creation of fetal rights traditionally similar to those granted to a person doesn't address the important concerns pressing a need for legal protection to a fetus but creates an adversarial relationship between the woman and the fetus by granting State the power to regulate woman's behaviour during pregnancy. These laws, however, conflict with the Fundamental rights available to a woman under the Fourteenth Amendment which embodies a woman's bodily autonomy and therefore, they should be interpreted in such a manner, which doesn't impinge upon the constitutionally guaranteed rights of a woman.

Until recently, the law did not recognize the existence of the fetus except for a few very specific purposes. As the Supreme Court stated in 1973 in *Roe v. Wade*,<sup>266</sup> "the unborn have never been recognized in the law and the law has been reluctant to afford any legal rights to fetuses "except in narrowly defined situations and except when the rights are contingent upon live birth." Since, these exceptions required a live birth requirement, it in that sense that they were in consonance with the view of fetus being a part of the woman. The fetus was not awarded any rights independent of the pregnant woman and it was only after live birth that the fetus acquired interests as a separate legal entity.

Before 1946, the Courts did not allow tort claims for prenatal injuries. However, in the present scenario the Courts allow tort claims for compensation against third parties for the afflictions he or she has suffered as a result of any injury inflicted on the pregnant woman.<sup>267</sup> The intention in granting recovery in cases of prenatal injury is to compensate the postnatal child for the affliction it must bear. Recovery is not, therefore, a recognition that the prenatal child has legal rights."<sup>268</sup> Hence, the law of fetus doesn't grant any rights to the fetus qua fetus. Therefore, it was consistent with the view that it did not recognize a fetus an entity separates from the pregnant woman. Recognition of such fetal interests was necessary to protect

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In England, Scotland, and Wales the Abortion Act of 1967 allows abortion "virtually on request" due to the "broad interpretation about what constitutes a threat to [the mother's] health." Abortion Act 1967, s. 1(1).

<sup>264</sup> Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 *Yale L.J.* (1985).

<sup>265</sup> *Ibid.*

<sup>266</sup> 410 U.S. 113 (1973); *Ibid.*

<sup>267</sup> Miriam Hyman, 'Live Birth: A Condition Precedent to Recognition of Rights' *Hofstra Law Review* 805, 825 (1976); Johnsen (n. 33).

<sup>268</sup> *Ibid.*

the rights and interests of the born persons including the child and the parents. Essentially, this doesn't create any conflict with the interests of a woman.

Since the decision of the Court in *Roe v. Wade*<sup>269</sup>, the Courts have increasingly granted rights to fetus which doesn't require a live birth requirement. Traditionally, the courts did not consider destruction of fetus inside the utero as homicide; the alleged victim must have been born alive.<sup>270</sup> However, the Supreme Judicial Court of Massachusetts recently became the first American court to take a contrary viewpoint. It held that a fetus is a person within the meaning of the Massachusetts vehicular homicide statute, and thus a potential homicide victim.<sup>271</sup> Similarly, several states have adopted legislations which criminalize the destruction of a fetus.<sup>272</sup>

However, the creation of fetal rights by cutting across traditional line of common law and adoption of legislation which protects the interests of a woman and the expectant father not contingent upon subsequent live birth is a step forward to hold that third parties responsible for the negligent or criminal destruction of fetuses is therefore consistent with, and even enhances, the protection of pregnant women's interests. Yet this creation of fetal rights in future may take a dangerous turn in the sense that they might conflict with the pregnant woman's interest. The law not only recognizes the fetal rights in cases where it is expedient to protect the interest of the subsequently born child and his or her parents but also the conferment of rights on fetus qua fetus. The effect of this realization is that it grants fetus, a personality independent of the pregnant woman and in certain cases, such a creation of interest might conflict with the rights of a woman.

In one such instance, the Michigan Court held that a child could sue her mother for the discoloration of the child's teeth as a result of consumption of tetracycline during pregnancy.<sup>273</sup> Another court has suggested that a woman may be sued by her child for not preventing its birth if she had prior knowledge of the probability of its being born "defective."<sup>274</sup> In this the court saw no sound public policy which should protect those parents from being answerable for the pain, suffering, and misery which they have wrought upon their offspring.<sup>275</sup> Even, the child abuse statute of California provides the parents to furnish necessary food, clothing, shelter or medical attendance" and the same extends to fetuses for the purpose of this section and penalizes the parents for violating this provision.<sup>276</sup>

Furthermore, there have been cases where woman have been ordered to blood transfusion to benefit the fetus and have gone to the extent of women undergoing cesarean operation instead of a vaginal delivery against their wish.<sup>277</sup> These cases, elaborate upon the threat that may be posed by creation of such fetal rights which may conflict with the interest of a woman.

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<sup>269</sup> 410 U.S. 113 (1973).

<sup>270</sup> Johnsen (n. 33); Commonwealth v. Cass 467 NE2d 1324, 1328 (1984).

<sup>271</sup> Ibid.

<sup>272</sup> California Penal Code, 1986, s. 187.

<sup>273</sup> Grodin v. Grodin 102 Mich. App. 396 (1980).

<sup>274</sup> Curlender v. Bioscience Laboratories, 106 Cal App 3d 811, 829 (1980); Johnsen (n 33) 604.

<sup>275</sup> Ibid.

<sup>276</sup> California Penal Code, 1986, s. 270.

<sup>277</sup> Johnsen (n. 33) 605.

### 3.1 Constitutional Limitations on Recognition of Foetal Rights

In *Roe v. Wade*<sup>278</sup>, differentiated fetuses from persons on a basic and legal note and observed that the extension of the rights to fetuses reflects an affirmative value choice by the State not based on biological fact. The Court rejected the claim that the State can avoid the complexities pertaining to the legal capacity of a fetus by simply, equating it with a person. These observations emanate from the ruling of the Court in *Roe* that even a viable fetus is not a person under the Fourteenth Amendment and are further substantiated by the Court's observation of legal status of a fetus in non-abortion context. The Court, further observed that while adopting the concept of fetus which conflicts with the right of the women to terminate their pregnancy, the State can override the interests and rights of the pregnant woman that are at stake.

It is argued that creation of such fetal rights against the pregnant woman would impinge upon the woman's body and personal life. The Court in *Roe* and other cases recognized the current expansion of the fetal rights may have the effect of jeopardizing the women's rights of liberty and privacy interests. The Constitution protects the rights guaranteed to them from State Intervention. The Court has observed that the "right to be left alone" is specifically important when the intrusion by the State pertains to physical or the body of an individual. The Court noted that: "No right is held more sacred, nor is more carefully guarded than the right of every individual to the possession and control of his own person."<sup>279</sup> The right to be free from government control of one's physical person has been described as the right to "personal privacy and dignity,"<sup>280</sup> "personal security,"<sup>281</sup> and "bodily security and personal privacy." The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.

In *Rochin v California*<sup>282</sup>, the Supreme Court observed that subjecting criminal suspects to medical procedure amounts to a violation of the rights guaranteed under the Fourteenth Amendment. The attempts of State intervention which have been protected by the Constitution involves those cases where the State usually exercises control and authority to a large extent for e.g. criminal defendants which reflects the expansion of fetal rights in a manner which is against the sacrosanct nature of civil liberties.<sup>283</sup> However, one of the judges while pronouncing an order

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<sup>278</sup> 410 U.S. 113 (1973).

<sup>279</sup> *Union Pacific Ry v. Botsford*, (1891) 141 U.S. 250, 251. It was noted that under common law court has no power to require plaintiff in tort claims to submit to surgical examination for the purpose of verifying injuries. See also, *Terry v. Ohio* (1968) 392 U.S.

<sup>280</sup> *Schmerber v. California*, (1966) 384 U.S. 757, 767. The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.

<sup>281</sup> *Ingraham v. Wright*, (1977) 430 U.S. 651, 673.

<sup>282</sup> (1952) 342 U.S. 165, 172, the Court held that the forcible pumping of a criminal suspect's stomach violated the individual's Fourteenth Amendment due process rights, and was "conduct that shocks the conscience." This was despite the fact that individual was a criminal suspect; police officers witnessed the suspect swallow two pills, which they believed to be narcotics, in an attempt to hide them from the officers; the stomach pumping involved an isolated instance of intrusion; and the Court stressed that it must review criminal convictions from state courts "with due humility."

<sup>283</sup> A number of state courts have held that the right to refuse medical treatment as protected by the right to privacy extends to situations where the treatment is necessary to preserve the patient's life. As one court stated, "The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The

compelling the woman to submit to caesarean operation observed the inherent contradiction and said; “The power of a court to order a competent adult to submit to surgery is exceedingly limited. Indeed, until this unique case arose, I would have thought such power to be non-existent.”<sup>284</sup>

This observation may create an exception to the prohibition of State action through which the rights of fetus would be recognized similar to when state intervenes in adults’ personal decisions. However, the law speaks to the contrary. The Supreme Court has affirmed that independence in matters related to childbearing is embodied in the constitutionally protected “right to personal privacy” and “individual’s right to an independent decision making in certain important matters”.<sup>285</sup> Hence, the state is not only prohibited from taking any steps which infringes the rights directly protected but also prohibits State’s intrusion in any way which affects the decision making autonomy in important matters. Even though the Constitution doesn’t provide for any specific right related to right of access to contraceptives, states intervention on access to contraception and thereby, “prohibiting women from using contraception must be narrowly tailored to serve a compelling state interest because they interfere with the right to decision making autonomy in matters of childbearing.”<sup>286</sup>

In the case of *Cleveland Board of Education v. LaFleur*<sup>287</sup>, wherein a rule required the teachers to take maternity leave of five months before the expected childbirth without pay was challenged as violative of the Due Process clause of the Fourteenth Amendment. The Court said that restriction placed on the pregnant teacher without any pay is excessively restrictive and interferes with the freedom of personal choice in matters of family planning and marriage. Similarly, the rights of a pregnant woman are impinged upon through the creation of fetal rights which imposes a burden on her which controls her actions may be detrimental and will be as deleterious as the effect of the restriction in *LaFleur*.

Hence, in finality, it may be argued that to impose any restriction on the women’s guaranteed freedom of privacy and liberty through the creation of fetal rights which may appear potentially hostile to hers should meet the test of compelling state interest. It must also, be narrowly tailored and the state must prove a high threshold of justification that the law is drafted with precision to achieve its legitimate aim and objectives by the adoption of least drastic means.

### **3.2 Legal Personality of an Unborn Child in India**

In India the interests of a fetus have been recognized in the Medical Termination of Pregnancy Act, 1971 and Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection

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value of life is lessened by the failure to allow a competent human being the right of choice.” One court has stated that, even when an individual is mentally incompetent, because the right to refuse medical treatment is a “very personal right to control one’s own life,” the correct standard to be used in deciding whether to withdraw life-sustaining treatment “is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself.”

<sup>284</sup> *Jefferson v. Griffin Spalding County Hospital Authority* (1981) 247 Ga 86, 89.

<sup>285</sup> *Johnsen* (n. 33) 617.

<sup>286</sup> *Carey v. Population Servs International*, (1977) 431 U.S. 678, 688; *Ibid.*

<sup>287</sup> (1974) 414 U.S. 632.

Act of 1994). It is also further recognized by the IPC which deals with the offences relating to causing of miscarriage and of offences relating to injuries to unborn child. These provisions that deal with such offences are embodied in Section 312-316 of the IPC.

While the Courts in India have recognized the right of reproductive autonomy as a fundamental right guaranteed to a woman under Article 21,<sup>288</sup> the legislature has also placed reasonable restrictions on such rights through the Medical Termination of Pregnancy Act, 1971 and Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994, which has further been upheld by judicial pronouncements. Furthermore, various statutes in India have recognized the unborn fetus as a legal person for subject to the live birth requirement. One such instance is of the Transfer of Property Act.<sup>289</sup> Section 20 of the Hindu Succession Act, 1956<sup>290</sup> has conferred a right to succeed to the father's estate on a child who was in the mother's womb when the father died.

It is pertinent to note that women have been granted a fundamental right under Article 21 and the same should be protected by respecting the dignity, right of privacy and right of independence in decision making in matters related to child bearing. As the Hon'ble Supreme Court has observed, "This right also recognizes her right to indulge in procreation or to abstain from the same. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity and also her insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling state interest" in protecting the life of the prospective child."<sup>291</sup> Hence, the termination of pregnancy is available only under the circumstances mentioned under the statutory provisions of the Medical Termination of Pregnancy Act, 1971. These statutory provisions can thus be viewed as reasonable restrictions on the fundamental rights available to a woman under Article 21 of the Constitution. It is in this respect, that the validity of these state restrictions has to be tested on these rights guaranteed and to the extent to which they limit such rights.

In *Nand Kishore Sharma v. Union of India & Anr*<sup>292</sup>, the Constitutional validity of Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act was challenged as violative of Article 21 of the Constitution of India before the Rajasthan High Court. Section 3 may be quoted as follows:

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<sup>288</sup> Suchita Srivastava and Anr. v. Chandigarh Administration, (2009) 9 SCC 1.

<sup>289</sup> Transfer of property Act, 1882, s. 13, Transfer for benefit of unborn person- 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.

<sup>290</sup> Right of child in womb- A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

<sup>291</sup> Suchita (n. 57).

<sup>292</sup> AIR 2006 Raj. 166.

3. *When pregnancies may be terminated by registered medical practitioners:*

(1) *Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.*

(2) *Subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner, -*

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

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

(i) *the continuance of the 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, it would suffer from such physical or mental abnormalities as to be seriously handicapped.*

*Explanation I- 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.*

*Explanation II- Where any 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.*

(3) *In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in Sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.*

(4)(a) *No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.*

(b) *Save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.*

The Court observed that the main object of these provisions, as stated in the Objects and Reasons clause was to liberalize the provisions relating to the termination of pregnancy on grounds of health, human rights and eugenic grounds. Hence, the object of the Act being to prevent the life of a woman and to prevent

her from suffering from any physical or mental injury seems to be consistent with the Rights under Article 21 than to be in violation of such rights.<sup>293</sup>

The Court also observed that even the IPC seeks to protect the termination of pregnancy by criminalizing it under Section 312 and 315 of the IPC which deals with the protection offered to termination of pregnancy under the marginal note “causing miscarriage”, if done in good faith to protect the life of a woman and protects any act done with intent to prevent child from being born alive or causing it to die after its birth “if such act has been done in good faith for the purpose of saving the life of the mother” respectively. It took recourse to the Object and reasons clause wherein it was stated that abortion is a crime which seeks to punish the mother as well as the abortionist with an exception carved out to this penal offence in situations seeking to protect the life of a woman.

This strict law provided for a large number of cases wherein this law was observed in breach. Therefore, it was the intention of the legislature to provide for a guidelines and procedure for the medical termination of pregnancy to make the law relating to termination of pregnancy more stringent and effective as the provisions of the Indian Penal Code failed to provide any such procedure. Therefore, in the opinion of the Court, the Act was held to be devoid of any Constitutional Infirmity.

However, with regards to the right of life available to a fetus, the observations of the Hon’ble Supreme Court<sup>294</sup> relied on the decision of the United States’ Supreme Court in *Roe v. Wade*, by recognizing the ‘compelling state interest’ in protecting the life of the prospective child as well as the health of the pregnant woman after a certain point in the gestation period which approximately begins at the end of first trimester. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.<sup>295</sup>

In an another case before the Hon’ble Bombay High Court, while testing the Constitutional validity of Sections 2, 3A, 4(5) and 6(c) of the Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 as amended by The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, the Court observed, “efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A (e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution.”<sup>296</sup>

It is therefore, evident that the Supreme Court has implicitly recognized the rights to life of a fetus under the Constitution of India but precedence being given to the fundamental right of a woman in a limited and not absolute sense. This can further

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<sup>293</sup> Nand Kishore (n. 61).

<sup>294</sup> Suchita Srivastava and Anr. v. Chandigarh Administration, (2009) 9 SCC 1.

<sup>295</sup> *Roe v. Wade*, (1973) 410 U.S. 113.

<sup>296</sup> *Mr. Vijay Sharma and Mrs. Kirti Sharma v Union of India (UOI)*, AIR 2008 Bom 29.

be elaborated upon by the recent decision of the Bombay High Court in *Nikhil Datar v. Union of India*,<sup>297</sup> wherein the Bombay High Court denied abortion to a woman, into the 24th week of the pregnancy and was bearing a child confirmed substantial abnormalities in the fetus' heart that posed a risk to its survival. Doctors predicted that even if a child were born from the pregnancy, the child would require a lifetime of surgeries and could possibly suffer sudden death.

The High Court denied the abortion on the ground Under the MTP Act, 1971 abortion is only legal for fetal impairment or in select cases of "grave injury" to mental health until the 20th week of pregnancy; after 20 weeks, and abortion is restricted to when the pregnant woman's life is at risk. Thus, after a period of 20 weeks, a woman will be forced to carry a pregnancy to term even when medical experts had testified could end in fetal demise or, result in the birth of a child with a seriously compromised quality of life. Hence, it may reasonably be inferred that the Courts in India have recognized a fetus for the purposes of Article 21, so long as it doesn't violate a woman's fundamental right to reproductive autonomy which is further subject to reasonable restrictions.

#### **4. Conclusion**

It may be inferred that the definition of the term "child" right of the unborn under the Convention on the Rights of the Child remains ambiguous. However, recourse could be made to the Preambular Paragraph to the Convention in case of ambiguity but the request on the inclusion the following statement in the *Travaux Preparatoires*, that in adopting the Preambular Paragraph, the working group doesn't intend to prejudice the interpretation of Article 1 or any other provision of the convention by the State parties"<sup>298</sup> shows that if an issue as to the interpretation of the Convention arises, then inclusion of such a statement would clearly reveal the intention of the drafters. Such an ambiguity to the definition of the term "child" in the convention allowed and opened way for widespread ratification of the Treaty without altering the laws and views of the State Parties on the particular subject.

With regards to granting of fetal rights under the Constitution of the United States, the decision of the United States Supreme Court in *Roe v. Wade* make it clear that the Fourteenth Amendment rights do not extend to a fetus but recognized the concept of "compelling state interest" in protecting the life of the prospective child as well as the health of the pregnant woman after a certain point in the gestation period. Furthermore, the law must be narrowly tailored so that it is least burdensome and intrusive on the restricted right.

However, the law in India stands on a different footing from the law as prevailing in the United States of America in the view that the rights under Article 21 are extended to the unborn fetus, subject to the rights of the pregnant woman. The law also seems to be in sharp contrast as the law in USA allows state intervention only after the point of 'compelling interest'. Until then, the woman's right to decision making in matters related to childbearing is absolute. However, the right of woman to terminate the pregnancy is restricted by the Medical Termination of Pregnancy Act, 1971 and Preconception and Prenatal Diagnostic Techniques (Prohibition of

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<sup>297</sup> W.P. No. 1422/2009.

<sup>298</sup> U.N.C.H.R., Considerations 1989 Working Group U.N. Doc. E/CN.4/1989/48 (1989).

Sex Selection) Act of 1994. In finality, we submit that the laws in India relating to creation of fetal rights are more restrictive to the one prevailing in USA. To deprive the women of their right to control their actions during pregnancy is to deprive women of their personhood.

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