

Locus Standi of an Unborn Child

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ABSTRACT

This study demonstrates the locus standi of an unborn child in three different countries from the Judiciary point of view along with its developmental endeavor. How preciseness judiciary interpret the term ‘unborn child’ and brings under the shades of natural person. What was his position in the past and what is his position in present. What are the laws that protect him and refrain the offenders to cause harm to an absolute innocent person in the US.

Keywords: Child in utero, Embryos, Foetus, Person, Quickening, Viability

INTRODUCTION

A Child is considered to be a gift of God, as well as another forms of God. His presence can be seen and felt since ancient period of Mahabharata to Indian Constitution and from Holy Bible to US Constitution. Anunborn child has a different significance for all of us because it lies on the threshold of life which positions it in ambiguous situation that gives way to various interpretations and questions, which is different from one another. Being a member of homo sapiens, to claim any legal rights one should possess certain legal stand i.e., he or she must be a natural person in the eyes of law. No doubt unborn child is by fiction attributes as legal person, and not natural in India, therefore if any crime had happened against an unborn child, can he claim any rights. What is his locus standi, upon incorporating various books, articles and online sources this study demonstrating the legal stand of unborn child from the judiciary’s perception existed in three different countries.

DEFINITION OF AN UNBORN CHILD

- I. According to Merriam Webster Dictionary “unborn “means „existing without birth“ or „not born“. Thus, it can be drawn that an unborn child simply means „child existing without birth“ or „not born yet.[1]
- II. According to Health & Safety Code 1963, Sec 171-7 defines “Unborn Child” as a human foetus or embryo in any stage of gestation from fertilization until birth.[2]
- III. According to The Unborn Victim of Violence Act 2004, Sec 1841 2D(d) defines as, the term “unborn child” means a child in utero and the term “child in utero” or “child, who is in utero means a member of species of homo sapiens, at any stage of development, who is carried in the womb.[3]

FINDING & DISCUSSION

USA

In the early 1970’s, when arguing abortion matters before the US Supreme Court in Roe vs Wade[4] case, the lawyers representing the State of Texas, placed their arguments, that a fetus is a Person. They told the Justices a fetus is entitled to all the protection guaranteed under Section 1 of the Fourteenth Amendment[5] including a right to “life”.

In 1973, Justice Harry Blackmun opines that „State of Texas was wrong. “The word „Person“ as used in the Section 1 of Fourteenth Amendment, does not include the unborn child“.[6]The US Supreme Court held that personhood could not granted to a fetus before “viability” [7] and established a constitutional right to abortion access. [8]

Quite similar judgment can also be seen in the case of, Planned Parenthood vs Casey,[9] where the United States Supreme Court has upheld the constitutional right to abortion, and together they prohibited states from banning abortion before 24 weeks, when a foetus is viable outside the womb.[10]

Nearly after half a century, the US Supreme Court has overturned the decision given in Roe vs Wade. In Dobbs vs Jackson Women’s Health Organization,[11]Justice Samuel Alito „declared in the Supreme Court’s majority opinion that Roe was “egregiously wrong from the start.” Now, laws that establish fetal personhood-meaning they extend the legal

rights of people to a fetus or embryo before viability-could be the next frontier in the legal battle over reproductive rights in the United States.[12]

Imposition of Fetal homicide statutes

More than two-thirds (33) of the States in USA, have enacted statutes that define the killing of an unborn child (outside the purview of abortion) as a form of homicide. Some States have included gestational requirements, such as viability, “quickening” or some other stage of pregnancy.[13]But the most common approach, the one that has been adopted in more than one-half (25) of the States, has been to make the killing of an unborn child a crime without regard to any arbitrary gestational age. Although fetal homicide statutes have been repeatedly challenged on a variety of federal (and, in a few cases, state) constitutional grounds, no fetal homicide statute has ever been struck down. The courts considering these challenges have uniformly held that nothing in *Roe vs Wade* prevents the states from treating the killing of an unborn child outside the purview of abortion as a form of homicide, the fetal homicide [14]statutes are not unconstitutionally vague in defining the elements of the offences in violation of the Due Process Clause of the Fourteenth Amendment,[15] that such statutes, in determining when life before birth shall be protected, do not constitute an “establishment of religion” within the meaning of the Establishment Clause of the First Amendment, that in distinguishing between the conduct of a pregnant woman in consenting to an abortion and the violent acts of third parties, fetal homicide statutes do not deny the Equal Protection Clause of the Fourteenth Amendment, and that they do not constitute “cruel and unusual punishment” in contravention of the Eight Amendment.[16]

Imposition of Death Penalty:

Thirty-Three states have retained the death penalty for certain criminal offences, at least six of them provide that the killing of a pregnant woman is an aggravating factor that may justify imposition of a death sentence.[17]

Laws that Protect Unborn Child-

The Unborn Victim of Violence Act, 2004- is a United States Law that recognizes an embryo or fetus in utero as a legal victim, if they are injured or killed during the commission of any of over 60 listed federal crimes of violence. The law defines “child in utero” as “a member of the species *Homo Sapiens*, at any stage of development, who is carried in the womb.[18]

Pain Capable Unborn Child Protection Act, 2021- the bill established a new criminal offense for performing or attempting to perform an abortion if the probable post-fertilization age of the fetus is 20 weeks or more. A violation is subject to criminal penalties-a fine, a prison term of up-to 10 years or both.

The bill provides exceptions for an abortion-

- (1) that is necessary to save the life of the pregnant woman, or
- (2) when the pregnancy is the result of rape or incest. A physician who performs or attempts to perform an abortion under exception must comply with specified requirements.

A woman who undergoes a prohibited abortion may not be prosecuted for violating or conspiring to violate the provisions of this bill.[19]

The Life at Conception Act, 2023- the bill declares that the right to life guaranteed by the constitution is vested in each human being at all stages of life, including the moment of fertilization, cloning, or other moment at which an individual comes into being.

Nothing in this bill shall be construed to authorize the prosecution of any woman for the death of her unborn child.[20]

India:

It would not be wrong to say an unborn child have no legal personality merely because he or she does not have the capacity to perform his duty but one cannot ignore the various rights possessed by him provide by the constitution of India, Indian Penal Code and other Procedural laws. In 2007 the Andhra Pradesh High Court held that „to decide whether a child in mother’s womb can be called as person, it is important to understand first the various stages of a child in the mother’s womb-Technically the term developing „ovum“ is used for the first 7-10 days after conception i.e., until implantation occur. It is called an “embryo” from the first week to the end of the second month after which it is called “foetus”. A foetus becomes an infant only when it is completely born, the life may occur immediately after the conception in the forms of mushrooming cell, which manipulated gradually but movement of child can feel only after 20 weeks because “the cell” adapt the structures of human being like eyes, nose, fingers, heads etc. and touch the walls of the womb, then the actual life does take its physical form, therefore, there may be controversy as regards to exact date of life entering the foetus but there can’t be any controversy as regards to the life of an unborn child. An unborn aged 5 months onwards in the mother’s womb till its birth can be treated as equal to a child in existence. The unborn child to whom the life birth never comes can be held to be a „person“ who can be the subject of an action for damages for his death. Human foetus to whom the personhood could be attributed is a person. An unborn child aged 5 months onwards, can safely be accepted to be a child who is yet to take birth and he can therefore be regarded as individual and

if that foetus meets an end due to an accident involving a motor vehicle before it is actually born alive, a claim petition for grant of compensation can certainly be maintained by mother or father or both, because, if the accident had not taken place, it would have certainly seen the light of day as a human being and different part of the family.[21]

The inquisitive loquacious and pathological matter may be the exact time and date of life entering to the foetus but there cannot be a question as to the “life of an unborn child when pregnancy exceeds to 20 weeks. The Delhi High court in the case of *Prakash & other v. Arun Kumar Saini & another*[22] held that “an unborn child less than 5 months in the mother’s womb can be treated as equal to a child in existence. It was held that an unborn child to be a „person“ and award a compensation of Rs 2,50,000/- in respect of death of seven months old foetus.

The similar judgment can also be seen in the case of *Kuldeep Singh & Another. Vs Parveen Kumar & Another*[23] where a lady was hit by a truck which resulted a fatal injury to her. The deceased was carrying a four months foetus in her womb and later because of grievous injuries she passed away. The Court recognizes the judgment of *Prakash & Others, V. Arun Kumar Saini & Another* and held that the Compensation awarded by the tribunal is just, fair and reasonable and no enhancement of compensation is warranted.

In *Karnataka State Road Transport Corporation V. Vidya Shinde*[24] it was held that foetus of 37 weeks, for all practical purposes, the still-born child has to be considered as child and award a compensation of Rs, 1,50,000/- on the accounts of death caused by accidents. In *Bhawaribai V New India Assurance Co. Ltd.*[25] the Claimant suffered abortion on account of the accident. The Karnataka High Court considered the death of foetus in womb at par with death of a minor. In *Shraddha V. Badresh* [26] the accident resulted in injury to a pregnant woman carrying seven months old foetus. Due to accident, the claimant delivered a dead male baby by operation. The Tribunal awarded Rs. 70,000/- towards the medical expenses and Rs. 80,000/- towards the non-pecuniary compensation. The similar judgment can also be observed in the case of Branch office, *New India Assurance Co. Ltd V. Krishnaveni* [27] where the accident caused death of a pregnant woman with a nine-month pregnancy. The Madras High Court has held that the still born baby has to be considered and pronounce a compensation of Rs.20, 0000/- as awarded for the loss of a child in mother’s womb. The Honorable Supreme Court in the case of *S. Said-Ud-Din V. Commissioner Bhopal Gas Victim*[27] awards compensation to an infant who also became the victims of Methyl Isocyanine. Several Human Rights Commissions also quoted that “an unborn child is entitled to compensation when injuries caused or death occurred due to violation of his human rights.

The Andhra Pradesh High Court in the case of *Oriental Insurance Co. Ltd. Vs Santhilal Patal*, held that an unborn child aged five months onwards in the mother’s womb till its birth can be treated as a child in existence. The unborn child to whom the live birth never comes can be held to be a “person” who can be the subject of an action for damages for his death. The accident resulted in the death of a women and ten months old foetus.

Lastly, in 1965 the Allahabad High court held that term „person“ would include an unborn child in the mother’s womb after 7 months of pregnancy. This would mean that it is capable of being spoken of as a person if its body is developed sufficiently.[28]

UNITED KINGDOM

The jurisprudence of the legal status of foetus is one of the most challenging and controversial topics in medical world and law, and invokes a „battle“ between maternal autonomy and fetal claims. Though English law is quite clear that the foetus has no legal rights, but it does not equal to nothing. It was in the case of *Paton vs British Pregnancy Advisory Service Trustees and others* [29] in which a husband sought to prevent his wife having an abortion, the Court ruled that- „the fetus can’t have any rights of its own at least until it is born and has separate existence from the mother“. A similar judgment can also be seen in the case of *C vs S*, where a 21-year-old woman who was approximately 18 weeks of pregnancy took the legal steps to obtain an abortion on the grounds that it was a “child capable of being born alive” within the meaning of the Infant Life (Preservation) Act, 1929. The Court of Appeal held that „the fetus, though having a contracting cardiac muscle and showing signs of primitive movement and circulation, would never be able to breathe naturally or artificially if delivered by hysterotomy, and therefore an abortion would not constitute an offense of child destruction under the Act“.[30] In 1988, the English Court have makes it clear, from which fetus acquires full rights and come under the shades of „human being“ according to law. The court states that “it is the moment of birth that is legally significant event at which point the foetus is granted full rights”. Therefore, to claim fetal rights, unborn must come into existence from the mother’s womb. The demarcated lines between non-consideration and consideration between „natural human being“ lies with birth of an unborn child. This means that before birth, the mother and fetus are not separate entity but biologically connected, due to the location of the fetus inside the mother.[31] Lord Mustill opines that „One of bond, not identity“. The foetus is not a legal person, but that does not mean it is nothing: „it is a unique organism“. To apply to such an organism the principles of law evolved in relation to autonomous beings is bound to mislead.[32]

Basically, the United Kingdom Court have instead of deciding and defining what foetus is, focused on determining what it is not, though clarity exist with. Lord Mustill demonstrates the legal difference between an internal organ and a fetus in relation to its potential. For instance, the appendix cannot have an independent future or separate existence from the woman, whereas for foetus “life lies in the future not in the past”.[33]

In 2004, the European Court of Human Rights had to decide if the medical negligence that resulted in the termination of the wrong pregnancy afforded the foetus protection under Article 2 of the European Convention of Human Rights, 1950? The Court ruled that: „if Article 2[34] were held to cover the foetus and its protection under the Article were, seen as absolute, an abortion would have to be considered as prohibited even where there the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the „unborn life“ of the fetus would be regarded as being of a higher value that the life of the pregnant woman“.[35] Justice Nigel Lowe opines that „the question of when the right to life starts came into the „margin of appreciation“ for each individual country. Although some people would except courts to protect the foetus by granting it legal protection, this restricts the pregnant woman’s self-determination and bodily integrity“. Also quoting that “wardship will not be extended to protect fetuses since it would necessarily involve controlling the mother”.

There is no locus standi by which the courts can protect the fetus from maternal activities that are contrary to the interests of the fetus, such as smoking or substance misuse. Even deprivation of liberty cannot be used to such an effect. However, if the law were to change and allow fetal wardship to exist, it would then give the fetus legal rights which would have to be weighed in the balance against those of the pregnant woman.[36]

CONCLUSION

The law attributes unborn child as a legal person for some purpose in India, however, the judiciary’s perception and interpretation are something different as „upon attaining certain stages called viability“ unborn child come under shades of natural person. However, this attribution is not direct, but by quoting as „equivalent to child in existence“. Upon falls under the purview of „legal person“ the law has given certain rights distinct from her mother but scattered in nature. The Indian legal system is silent on exactly from which period does life exist in womb? A similar position in the United States of America, before 1992, unborn child is not considered as person “neither legal nor natural”. But in the year 2022overturned the decision placed in 1973and 1992the United Supreme Court upheld that “unborn child comes in the purview of “natural person” and entitled to avail the Constitutional right to life envisages under the fourteenth Amendment.

The only difference in locus standi of unborn child in India and USA is that- the USA has a specific legislation on an Unborn child and India does not have. Secondly, in India ab initio a concept exists called “legal person” which law granted to an unborn child but in USA there is no such conception or perception exists. Apart from USA and India, in United Kingdom there is no such concept exist called an unborn child. Unborn child is nothing but a part and portion of pregnant mother and has afforded no right distinct from her mother. Unborn Child can claim his right to life only after birth, completely separated from her mother’s biological cord.

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REFERENCES

- [1]. www.merriamwebsterdictionary.com
- [2]. <https://statutes.capitol.texas> Health and Safety code 1963, chapter 171.
- [3]. <https://definition.US> legal.com
- [4]. Roe vs Wade, 410 U.S.113, (1973)
- [5]. Section 1 of the Fourteenth Amendment “NoState shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. <https://contitution.congress.gov/browse/amendment-14/section-1>
- [6]. Supra note 1
- [7]. “viability” the point around 24 weeks of pregnancy when a fetus can survive outside the womb.
- [8]. <https://time.com/6191886/fetal-personhood-laws-roe-abortion/>
- [9]. Planned parenthood vs Casey, 505 U.S.833, 1992
- [10]. <https://time.com/abortion-trigger-laws-bans-roe-vs-wade/>.

- [11]. Dobbs vs Jackson Women Health Organization, 19-1392, U.S 577 (2022)
- [12]. <https://www.supremecourt.gov/opinions/21pdf/19-1392>
- [13]. <https://time.com/6191886/fetal-personhood-laws-roe-abortions>
- [14]. Arkansas State draws the line at 12 weeks gestation. See Arkansas Code, Sec 5—103(13) (B)(I)(a), (b), 2011 Brinkley vs State, 253 Ga. 541 (1984)
- [15]. <https://law.justia.com/cases/georgia/supreme-court/1984/41272-1> State vs Bauer, 471 N.W. 2d 363 (1991)
- [16]. <https://law.justia.com/cases/minnesota/court-of-appeals/1991>
- [17]. Paul Benjamin Linton, The Legal Status of the Unborn Child Under State Law, University of St. Thomas, Journal of Law and Public Policy, Volume 6, 2011
- [18]. Alabama Code Sec 15-18-86 (1995)
- [19]. <https://www.congress.gov/bill/108th-congress/house-bill/1997/>
- [20]. <https://www.congress.gov/bill/117th-congress/senate-bill/61/>
- [21]. <https://www.congress.gov/bill/118th-congress/house-bill/431>
- [22]. Oriental Insurance Company Ltd. Vs Santhilal Patel, AIR 2007 (4) A.C.D 835 (A.P) <https://www.indiankanoon.com>
- [23]. Prakash & Other vs Arun Kumar Saini & another, AIR 2009, High Court of Delhi <https://www.indiankanoon.com>
- [24]. Kuldeep Singh & another vs Parveen Kumar & another, AIR 2017, High Cour of Delhi <https://www.indiankanoon.com>
- [25]. Karnataka State Road Transport Corporation vs Vidya Shinde, AIR 2005, High Court of Karnataka, <https://www.shoodganga.com>
- [26]. Bhawaribai vs New India Assurance Co. Ltd, AIR 2006, ACJ 2085, High Court of Karnataka, <https://www.indiankanoon.com>
- [27]. Shraddha vs Badresh, AIR 2006, ACJ 2067 <https://www.shoodhganga.com>
- [28]. New India Assurance Co. Ltd vs Krishnaveni, AIR 2009, High Court of Madras <https://www.casemine.com>
- [29]. Said -Uddin vs Commissioner Bhopal Gas Victim, AIR, 1997, SCC460 <https://www.casemine.com>
- [30]. Jabbar & others vs State of Allahabad, 1965, CriLj 1369 <https://indiankanoon.com>
- [31]. Paton vs British Advisory Services Trustees & others, 1979, QB 276 <https://www.globalhealthrights.org>
- [32]. C vs S, 1987 <https://pubmed.ncbi.nlm.nih.gov/11648562>
- [33]. Herring Oxford: Oxford University Press 2010
- [34]. <https://ora.ox.ac.uk/objects/uuid>
- [35]. St. George's Healthcare NHS Trust vs R vs Collins & others, 1998, AC 256,1998
- [36]. Article 2 of the European Convention of Human RIGHTS, 1950 READ AS "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of court following his conviction of a crime for which this penalty is provided by law.
- [37]. <https://www.echr.coe.int/documents/d/echr/convention-ENG>
- [38]. Vo vs France, 2004, 2FCR, 577 (ECtHr)
- [39]. <https://reproductiverights.org/case/Vo-v-France-european-court-of-human-rights>
- [40]. <https://www.britishjournalofmidwife-blog/the-legal-status-of-the-foetus/>