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Unravelling India's Legal Grey Zone: Can A Brain-Dead Pregnant Mother be Legally Sustained to Save her Unborn Child?

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From time immemorial, a woman's reproductive autonomy has been overlooked. Little regard was given to her consent in matters affecting their bodies. But times have changed now, and several times, a woman's reproductive autonomy has been upheld by the Apex Court of India. Recently, a pre-existing legal vacuum has come into the limelight in India because of a situation that arose in Georgia, where a brain-dead pregnant mother was being kept alive on a somatic support system to save her unborn child. This case has raised serious questions relating to a woman's bodily autonomy and dignity. Presently, India has no specific laws or provisions dealing with such a situation. That is why this article's main focus is on analysing the present Indian legal scenario by considering that if such a situation were to arise in India, then whose interest would be given precedence - the brain-dead pregnant mother or the unborn child? The article intends to provide a comprehensive study of the situation by exploring the extent to which Indian laws address this dilemma. It examines various statutes, laws, provisions, judgments, etc, to highlight the existing legal vacuum. The concluding part of this article stresses the need to carefully analyse and balance the interests of a brain-dead pregnant mother and the unborn child, and then frame a well-detailed law that can address such a situation. Although India is far ahead of other countries when it comes to the reproductive rights of women but still, a legal vacuum persists in Indian laws, which is unable to provide any answer to the question of whether a brain-dead pregnant mother can be legally sustained to save her unborn child.

Keywords: *brain-dead pregnant mother, somatic system, foetal personhood, medical jurisprudence, reproductive autonomy.*

INTRODUCTION

Amid growing legal dilemmas, India's jurisprudence finds itself at a critical crossroads because of a recent case which has emerged in the United States, where a brain-dead Georgian woman named Adriana Smith was kept alive on life support by a hospital so that her foetus could survive. This case has raised serious concerns. A conflict emerged between bioethics and the state's anti-abortion laws. According to the Living Infants Fairness and Equality (LIFE) Act, which is part of the Official Code of Georgia Annotated (O.C.G.A.), abortion is banned after a foetal heartbeat is detected, which is typically about six weeks of pregnancy. This act recognises an unborn child's personhood, or foetal personhood. Foetal personhood can be defined as an aspect of legal personhood that designates human fetuses as entities that have rights and protections in the legal system.¹

On one hand, Georgia's attorney general, Chris Carr, took the stance that Georgia's six-week law does not mandate medical professionals to keep a woman alive on life support after being declared brain-dead, but on the other hand, some anti-abortion advocates took a contrary viewpoint, thereby supporting the hospital's decision to save the unborn child.²

Coming towards India's legal landscape, the question of whether a brain-dead mother can be legally sustained to save her unborn child remains largely in a legal grey zone. This gives rise to a legal vacuum marked by the intersection of constitutional rights, bodily autonomy, rights of the unborn child, bioethics and the role of advance directives in such exceptional circumstances.

Lack of a clear and comprehensive statutory provision in India's scenario can give rise to a serious situation where the rights of a brain-dead pregnant mother can be hindered. In the landmark case of *Aruna Ramchandra Shanbaug v Union of the victim*, who was in a vegetative state, was kept alive for 42 years. Although she was not brain-dead, her situation sparked serious concerns about the rights of such vulnerable people who can't make decisions about their own lives.

¹ Tara Ramanathan, 'Fetal Personhood' (*Encyclopaedia Britannica*) <<https://www.britannica.com/topic/fetal-personhood>> accessed 04 June 2025

² *Ibid*

Due to the absence of any codified law about brain-dead mothers, the rights of such mothers can be sabotaged in India as well.

UNITED STATES LAWS

It would be highly relevant to mention that, according to some experts who gave their opinion when Adriana was kept on life support, they opined that giving life support to Adriana Smith is not mandatory because there are a few states which have laws that specifically limit removing treatment from a pregnant woman who is alive, but incapacitated, or brain dead.³, but Georgia is not one of them.

According to a JAMA review, 19 states of the U.S. imposed restrictions only when, in the physician's opinion, the fetus could survive with the help of continued life-sustaining support. Whereas 12 states required that such support continued to be provided to a decisionally incapacitated pregnant woman until her foetus could be safely delivered. It also found that restrictions about withholding or withdrawing life-sustaining support from pregnant women appeared in 29 state statutes. The review also stated that 26 specifically invalidated a woman's advance directive during pregnancy.⁴

INDIAN LAWS

Presently, India does not have any law or provision to deal with a situation such as that of Adriana Smith. However, still, certain existing laws and provisions can be used for understanding and analysing the present Indian legal scenario effectively. These are:

Transplantation of Human Organs and Tissues Act 1994 (THOTA): The Transplantation of Human Organs and Tissues Act, 1994, primarily governs organ and tissue donation and transplantation. It is the only Indian legislation where there is a reference to brain death. It defines brain stem death as a stage at which all functions of the brain stem have permanently and irretrievably ceased, and is so certified under sub-section (6) of section 3 of the Act.⁵ It is pertinent to mention that this definition is limited to the organ and tissue donation domain

³ Jeff Amy et al., 'Hospital tells family brain-dead Georgia woman must carry fetus to birth because of abortion ban' *AP News* (16 May 2025) <<https://apnews.com/article/pregnant-woman-brain-dead-abortion-ban-georgia-a85a5906e5b2c4889525f2300c441745>> accessed 04 June 2025

⁴ Erin S. DeMartino et al., 'US State Regulation of Decisions for Pregnant Women Without Decisional Capacity' (2019) 321(16) *JAMA* <<https://doi.org/10.1001/jama.2019.2587>> accessed 04 June 2025

⁵ Transplantation of Human Organs and Tissues Act 1994, s 2(d)

only, and it can't be applied uniformly for all legal death situations, especially where the rights of an unborn child are also associated with the mother's existence.

Medical Termination of Pregnancy (MTP) Act 1971 (as amended in 2021): The Medical Termination of Pregnancy Act regulates laws relating to abortion in India. It has brought progressive changes with its 2021 amendment. But it still fails to touch on some of the important bioethical issues which have arisen recently, such as foetal personhood.

Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 is one of the important provision which states that pregnancy may be terminated where length of pregnancy exceeds 20 weeks, but not exceeded 24 weeks, if not less than two registered medical practitioners, formed an opinion in good faith that either the continuance of pregnancy involves risk to life of pregnant woman or grave injury to her physical or mental health, or there is substantial risk that if child is born, then it would suffer from such physical or mental abnormalities as to be seriously handicapped.⁶

Now, if a situation arises in India, like that of Georgia, then certainly, the first condition will not be applicable, i.e. continuance of pregnancy will involve risk to the life of the pregnant woman or grave injury to her physical or mental health, because the pregnant woman is already brain dead.

Now, considering the second condition, according to which pregnancy will be terminated if there is substantial risk that if child is born, then it would suffer from such physical or mental abnormalities as to be seriously handicapped, then it would be highly relevant to mention that before the birth of Adriana Smith's child the family members said that doctors found that the fetus has fluid on the brain and that they're concerned about his health.⁷ Therefore, if a similar case arises in India, then on account of a substantial risk of a child being born to suffer from such physical or mental abnormalities as to be seriously handicapped, it will fulfil the second condition of this section. Hence, if there is some credible medical information supported by evidence, suggesting that the child born would be unhealthy, then this section could potentially be used as a strong legal ground for not providing life support to a brain-dead pregnant woman.

⁶ Medical Termination of Pregnancy Act 1971, s 3(2)(b)

⁷ Amy (n 3)

Also, Section 3(2B) states that the length of pregnancy shall not apply to the termination of pregnancy by the medical practitioner, if such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.⁸ Hence, the condition mentioned in Section 3(2)(b) about the length of pregnancy can be done away with if Section 3(2B) is applicable.

But again, it has to be kept in mind that the Medical Termination of Pregnancy Act do not directly deal with brain-dead pregnant mother cases specifically. The Sections that have been taken into account are merely to analyse that if such a situation arises in India, then what potential legal recourse can be taken.

ARTICLE 21 RIGHT TO LIFE AND LIBERTY

Article 21 of the Indian Constitution states, No person shall be deprived of his life or personal liberty except according to procedure established by law.⁹ This article has been expansively interpreted by the Supreme Court to include bodily autonomy, reproductive choice and the right to refuse medical treatment. For example, the Supreme Court in *Meera Santosh Pal v Union of India*¹⁰ held that women's right to make a reproductive choice is also a dimension of personal liberty as understood under Article 21 of the Constitution.¹¹

It is pertinent to mention that an individual also has the right to refuse medical treatment; the right to privacy is a domain into which nobody can intercede. The right to refuse medical treatment stems from the patient's right to privacy.... In a catena of cases, the Supreme Court has interpreted the right to privacy to be an essential component of the Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution.¹² Therefore, it can be stated that the right to refuse medical treatment is intricately connected with Article 21 of the Constitution.

But debate starts when an individual is brain-dead and can't exercise the right to refuse medical treatment. In such cases, an advance directive by the woman could be used to know

⁸ Medical Termination of Pregnancy Act 1971, s 3(2B)

⁹ Constitution of India 1950, art 21

¹⁰ *Meera Santosh Pal v Union of India* (2017) 3 SCC 462

¹¹ Ganesh Makam, 'Article 21 & Abortion' (2023) SSRN <<http://dx.doi.org/10.2139/ssrn.4338917>> accessed 04 June 2025

¹² Nishant Kumar Singh, 'Does a Patient Have the Right to Refuse Medical Treatment' (2022) 12(1) National Law School of India Review <<https://repository.nls.ac.in/nlsir/vol12/iss1/4>> accessed 04 June 2025

what she would have wanted, but in the absence of any such advance directive, one can argue that such support should be continued only if it is medically viable to save the unborn child. It would be relevant to mention that although advance directives are allowed in India, the question of whether the woman can give any advance directive for such a situation, i.e. where her rights conflict with her unborn child, is debatable and comes again under a legal grey area.

In the landmark judgement of *Common Cause versus Union of India*¹³ Supreme Court established that the Right to Life under Article 21 includes the Right to Die with Dignity as well. So, providing somatic support to a brain-dead pregnant woman in the absence of any advance directive by the woman may benefit the foetus, but at the same time may adversely violate her bodily dignity, integrity, and autonomy.

Hence, it can be stated that if a similar situation like that of the Georgia case were to arise in India, where the rights of a brain-dead pregnant mother conflict with foetal personhood, then it is likely that due to immense importance given to the 'Right to Die with Dignity', the mother's right would certainly be given precedence so that she can have a dignified death. Although an unborn child's interests are also morally relevant, and it is in the state's interest to protect any potential life but such interests can't automatically override a mother's constitutional right to have a dignified death, especially in the absence of any clear legal framework.

RIGHTS OF THE UNBORN CHILD

The rights of the unborn child have not been defined specifically in any legislation in India, but still, an unborn child's rights have been indirectly recognised.

Medical Termination of Pregnancy Act 1971 (as amended in 2021): Under the Medical Termination of Pregnancy Act, abortion cannot be done after 24 weeks of pregnancy. But after the 2021 Amendment to this Act, abortion can be done even after 24 weeks of gestation, under special circumstances.¹⁴ This signifies that an unborn but viable fetus also has certain rights. It would be relevant to mention that the law does not confer any legal personality on

¹³ *Common Cause (A Regd. Society) v Union Of India* (2018) 5 SCC 1

¹⁴ Medical Termination of Pregnancy Act 1971, s 3(2B)

the foetus and prioritises the autonomy and well-being of the mother over the life of the fetus, particularly in the early stages of pregnancy.¹⁵

Bharatiya Nyaya Sanhita 2023: Under Bharatiya Nyaya Sanhita, sections 88-92 contain provisions relating to miscarriage. Although these provisions are from a pregnant woman's perspective but still, they provisions highlight and reflect limited recognition of an unborn child's right to life.

The Hindu Succession Act 1956: The Hindu Succession Act recognises the rights of a child in the womb. Section 20 of the Hindu Succession Act states that a child who is in the womb at the time of death of an intestate shall have the same right to inherit as if the child had been born before the death of the intestate, provided that the child is subsequently born alive.¹⁶ A legal fiction is created under which the unborn child is treated as being born before the death of the intestate. In such circumstances, notional partition takes place. Under the Indian Succession Act 1925, as well as an unborn child can inherit property if the child is subsequently born alive.

Tort: There is no provision dealing with the rights of an unborn child in India under tort law. There is no codified statute governing the Law of torts in India. But, many times, the courts, while dealing with cases of tort, have treated an unborn child as one with certain limited rights and interests. The rights of the unborn child have been recognised in cases of negligence or harm. Although these cases are relatively rare, courts have still awarded compensation to families for injuries caused to the fetus resulting from medical negligence. These judicial decisions are based on the principle that although a fetus is not a legal person, it possesses the potential for life. In fact, under certain circumstances, the unborn child is also entitled to receive compensation.¹⁷

The Transfer of Property Act 1882: The Transfer of Property Act 1882 also extends some protections to the unborn child. Section 13 of the Act allows for the transfer of property to an

¹⁵ Anupriya Srivastava, 'Rights Of The Unborn Child In India: Legal Protections And Ethical Considerations' (2024) 4(3) Indian Journal of Legal Review <<https://ijlr.iledu.in/rights-of-the-unborn-child-in-india-legal-protections-and-ethical-considerations/>> accessed 04 June 2025

¹⁶ Hindu Succession Act 1956, s 20

¹⁷ Srivastava (n 15)

unborn person.¹⁸ But again, it is important to mention that this property vests in the child only if the child is born alive.

Motor Vehicles Act 1988: Under the Motor Vehicles Act, Indian courts have recognised an unborn child as a legal entity in several cases. Compensation is also awarded in case of the death of an unborn child. Sometimes, an unborn child is granted compensation under the act for the loss of a parent or a prospective breadwinner as well. In a very recent case,¹⁹ before the Punjab and Haryana High Court, relating to the Motor Vehicle Act, a single judge bench of Justice Suvir Sehgal held, Rakesh Kumar's widow was pregnant at the time of the accident. A male child was born on 18.11.2015, almost two months after the death of Rakesh Kumar. Even though the child was in the mother's womb on the day of the unfortunate accident, he will also be entitled to compensation under the MV Act.²⁰

MEDICAL HISTORY

It would be relevant to mention that Georgia's case is not a new one because cases involving a brain-dead pregnant woman being kept alive with the help of somatic support systems have been witnessed earlier as well. According to a study published in the International Journal of Critical Illness & Injury Science²¹, 30 cases between 1982 and 2010 of brain-dead pregnant women have been reported where the body functions were maintained to allow the baby to develop in the womb. However, only 12 viable infants were born and survived the neonatal period as per the study.²²

But it does not mean that infants born under such circumstances always have low chances of being born healthy, because there are certain medical precedents where such children have been successfully delivered from brain-dead mothers.

¹⁸ *Ibid*

¹⁹ *Krishna & Anr v Rameshwar & Ors* (2025) PHHC 031708

²⁰ Riya Rathore, 'Unborn Child of Deceased Motor Accident Victim Entitled to Compensation: Punjab & Haryana High Court' (*Verdictum*, 02 April 2025) <<https://www.verdictum.in/court-updates/high-courts/punjab-and-haryana-high-court/unborn-child-motor-accident-motor-vehicles-act-compensation-2025-phhc-031708-krishna-v-rameshwar-1573103>> accessed 04 June 2025

²¹ Abuhasna Said et al., 'A brain-dead pregnant woman with prolonged somatic support and successful neonatal outcome: A grand rounds case with a detailed review of literature and ethical considerations' (2013) 3(3) International Journal of Critical Illness and Injury Science <<https://doi.org/10.4103/2229-5151.119205>> accessed 04 June 2025

²² 'Can a brain-dead woman give birth? What happens to the baby? What science says' *Times of India* (15 May 2025) <<https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/can-a-brain-dead-woman-give-birth-what-happens-to-the-baby-what-science-says/articleshow/121193880.cms>> accessed 04 June 2025

One such case is detailed in the journal *Cureus*, where a successful birth of a live infant was done from a brain-dead mother, whose body was kept functioning with the help of somatic support.²³

Similarly, a systematic review in the *American Journal of Obstetrics and Gynaecology* after analysing multiple cases, found that with the help of appropriate medical management, the majority of infants born to such mothers had favourable outcomes to survive.²⁴

CONCLUSION

The grave moral dilemma between individual autonomy and beneficence towards the unborn child is not easy to sort out, given the present medical jurisprudence in the Indian context. It is because even if the state exercises *parens patriae* over the unborn child, the rights of the brain-dead pregnant mother also have to be taken into account.

Although this Georgia case has brought to the forefront a new legal vacuum in Indian jurisprudence, but due to the immense importance given to Article 21 'Right to Life and Personal Liberty', one can expect that if such a situation arises in India, then due to numerous precedents which have established 'Right to Die with Dignity' as part of Article 21, priority will be given to a brain-dead pregnant mother's right to have a dignified death over an unborn fetus personhood. One cannot overlook a mother's right to die with dignity, while giving precedence to a foetus's personhood.

While arriving at a specific answer to this moral dilemma, emphasis should also be laid on the fact that nutritional support for the foetus is another cause of concern.²⁵ Because if a decision is taken to put the brain-dead pregnant mother on a somatic support system and save the child, then also providing adequate nutritional support can pose a serious challenge for medical professionals. One of the major reasons for this is that a brain-dead patient has no brainstem activity, and because of this, the body does not function in the usual way. So,

²³ Natalia Moguillansky et al., 'Brain Dead and Pregnant' (2023) 15(8) *Cureus* <<https://doi.org/10.7759/cureus.44172>> accessed 04 June 2025

²⁴ Maria Gaia Dodaro et al., 'Brain Death in Pregnancy: A Systematic Review Focusing on Perinatal Outcomes' (2021) 224(5) *American Journal of Obstetrics and Gynecology* <<https://doi.org/10.1016/j.ajog.2021.01.033>> accessed 04 June 2025

²⁵ 'Can an unborn baby survive if the mother is brain dead? The science behind such critical cases explained' *The Economic Times* (15 May 2025) <<https://economictimes.indiatimes.com/magazines/panache/can-an-unborn-baby-survive-if-the-mother-is-brain-dead-the-science-behind-such-critical-cases-explained/articleshow/121195171.cms>> accessed 04 June 2025

providing the required nutrition to the unborn child will mainly depend upon the technological advancements and experience of medical professionals.

Significant challenges and problems can be faced by doctors as well, because problems can arise while maintaining adequate blood pressure and oxygen levels. There can be a danger of infections, hormonal imbalances and cardiovascular instability, which can adversely affect fetal development.²⁶ Hence, whatever nutrients the foetus will get, it will mainly be because of medical advancements and not because of any regular bodily mechanism.

As noted by the former Chief Justice of India, D. Y. Chandrachud, the Rights of an unborn child must be balanced with the reproductive rights of women. India is 'far ahead of other countries' and 'liberal' when it comes to laws about the termination of pregnancy.²⁷

At last, it can be concluded that the present legal framework in India is inadequate to address such medical-legal challenges. There is an urgent need for a well-defined legal structure to deal with such complex circumstances. But any such future legal framework should have adequate provisions to ensure that the final decision-making authority in such cases decides after carefully analysing the whole situation and considering all relevant medical evidence specific to the case. A specific criterion, although difficult to lay down, can be mentioned in the framework so that the decision-making authority does not act arbitrarily or according to their whims and fancies. Only then can it be expected that if a situation as that of Georgia is to arise in India, then the interests of both the brain-dead pregnant mother as well as of the unborn child will somehow be balanced. Otherwise, the day is not far away when Indians may be compelled to fight for some of the basic constitutional rights, i.e. right to bodily autonomy and right to die with dignity.

²⁶ *Ibid*

²⁷ Raghav Ohri, 'Supreme Court Upholds Rights Of Unborn Child' *The Economic Times* (16 October 2023) <<https://economictimes.indiatimes.com/news/india/supreme-court-upholds-rights-of-unborn-child/articleshow/104477198.cms?ut>> accessed 13 June 2025