

UNBORN RIGHT TO LIFE VIS-A-VIS WOMEN RIGHT TO ABORTION: LEGAL REFLECTION

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Introduction and methodology

Almighty has created this *brahmand* (universe) for the people to live. One taking birth in this world possesses an inherent right to live his life with dignity. It is a universal truth and almost every nation has entrenched rights for their citizens which are fundamental for their survival. It is *right in rem* i.e. a right against the whole world. Even the Bible³⁴⁸ teaches that human life is different from other types of life, because human beings are made in the very image of God:

God created man in his image; in the divine image he created him; male and female he created them!(Genesis 1:27).

Judicial observations are also not far from acknowledging this right to life. J. Field in the case of **Munn v. Illinois**³⁴⁹ observed:

“By the term life.....it meant something more than the animal existence.....The deprivation not only of life but of whatever God has given to everyone with life or its growth and enjoyment is prohibited...”

However, the right to life of an unborn child is somehow paradoxical. The variance between the mother's rights to a healthy life and the unborn child's right to take birth has shoved the author to put in writing this editorial stating the relation between the right to life and the right to abortion from the point of view of a mother. The article is based on the doctrinal research, wherein the opinions of eminent jurists/authors, the observations of the higher authorities and the writings in various statutes are being clubbed together.

Defining the concept

The Constitution of India in its Article 21³⁵⁰ guarantees to protect the will of the people to live their life with dignity and liberty. It states as follows:

‘No person shall be deprived of his life and personal liberty except according to procedure established by law.’

The Supreme Court of India, which is considered as the guardian to the fundamental rights enshrined in Part III of the Constitution of India, has taken every possible step towards protecting the citizens and their rights. The

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³⁴⁸ Holy Text of Christian Religion.

³⁴⁹ 94 US 133 (1877)

³⁵⁰ Part III ‘Fundamental Rights’, Constitution of India.

Supreme Court has given very wide interpretation to the expression 'Right to Life'. This right include every other right which is essential to live a human life, including right to move freely, right to eat, right to sleep, right to privacy...etc.,.

According to the author, every act or omission which takes away or abridges someone's right to live his life should be prohibited unless it is justified by law; for example, awarding death penalty to an accused. Considering the importance of this right, even the Supreme Court of India has upheld the constitutionality of Sec. 309 of Indian Penal Code³⁵¹ in the case of **Gyan Kaur vs. State of Punjab**³⁵² by holding that 'right to die' is not a part and parcel of Article 21 of Constitution of India. However, it is very perplexing that whether the right to life includes the right to abortion or not.

What is 'Abortion'?

The Black's law dictionary³⁵³ defines the term abortion as:

'The artificial or spontaneous termination of a pregnancy before the embryo or foetus can survive on its own outside a women's uterus'

In a simple language it may mean that 'the child in the womb of mother is not being allowed to come out in the world'.

Rights are concerned with interests and indeed have been defined as interests protected by rules of right. **Allen**³⁵⁴ defines right as 'the will power of man applied to a utility or interest recognized and protected by a legal system'. As per **W. N. Hohfeld**³⁵⁵, every right has a correlative duty. The duty is that 'you must not interfere in others' freely enjoyment of right'. In a similar understanding, one's right to life means others duty of not interfering in that right. However, in case of mother and unborn child's right, they contradict with each other as mother's right to abortion elicit the unborn child's right to life. Here the dilemma which strikes in our mind are; first, whether an unborn child possess the 'right to life'; secondly, even if the child possess the right, whether his/her right is more important than the mother's right? We will deal with these in coming paragraphs.

³⁵¹ Section 309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year [or with fine, or with both].

³⁵² 1996 AIR 946, 1996 SCC (2) 648

³⁵³ 2nd Edition.

³⁵⁴ An American Jurist.

³⁵⁵ American Jurist (1879-1918).

Women's right to abortion

Women's are blessed by the God; they have been given the dispensation to bring out a life in this world. Although somewhere, they are considered as a 'child producing machine' or some other want them to give birth only to a male child. But still rest of the world respect women, as they are the only ones' who can bring a new life. Since right to life includes right to enjoy life with all the limbs and faculties, it implies therefore that right to procreation and right to have control over reproductive organs are included in the broader concept of right to life.

Right to procreate a child also gives right to abortion. To give birth to a child requires the good health of the mother also. A woman cannot be force to procure or reproduce a child on account of her own life. There are several laws in India which allows women to terminate her pregnancy on some conditions. Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred as 'MTP Act') provides that a registered medical practitioner³⁵⁶ can terminate a pregnancy in good faith where the length of the pregnancy does not exceed twelve weeks or if it exceeds twelve weeks but does not exceed twenty weeks provided:

- the continuation of pregnancy would involve a risk to the life of the pregnant women or of grave injury to her physical or mental health; or
- 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

Further, Sub-section (1) of Section 5 of the MTP Act provides that the length of the pregnancy or the opinion of at least two registered medical practitioner shall not be considered as necessary where the registered medical practitioner in good faith form an opinion that the '*immediate termination of pregnancy is necessary to save the life of the pregnant women*'.

However, the 'right to abortion' cannot be termed as an absolute right as a woman cannot opt for abortion until or unless her situation is covered under Section 3 sub-section (2) of the MTP Act. Thus, it is important to note that MTP Act does not permit induced abortion on demand.

Article 21 in itself guarantees the right to life and personal liberty but it also provides a full-fledged exception to the right i.e. procedure established by law. J. Chandrachud³⁵⁷ had observed that:

³⁵⁶ Section 2(d) of the MTP Act, 1971 defines 'registered medical practitioner': a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

³⁵⁷ A. K. Roy, Etc. v. Union of India and another [1982 AIR SC 710]

“The power to judge the fairness and justness of procedure established by a law for the purposes of Article 21 is one thing: that power can be spelt out from the language of that article. Procedural safeguards are the handmaids of equal justice and since, the power of the government is colossal as compared with the power of an individual, and the freedom of the individual can be safe only if he has a guarantee that he will be treated fairly. The power to decide upon the justness of the law itself is quite another thing: that power springs from a ‘due process’ provision.”

Another contention, except the procedure established by law, against the ‘right to abortion’ can be the orthodox mentality of the people. If the right to abortion becomes the absolute right without any interference then it will surely lead to raise the cases of female foeticide. Families, in India, gave priority to the male child rather than a female one. As per the latest Census in the year 2011, the total female sex ratio in India is 940 per 1000 males and the female child sex ratio is 944 girl children per every 1000 boy children of the same age group³⁵⁸. Although, the overall female sex ratio has increased by 0.75 % in the Census 2011 as compared to the previous Census of 2001³⁵⁹, but the increasing percentage shows that even in the span of 10 years the orthodox mentality has been reduced only 0.75 %.

Unborn child’s right to life

Aristotle’s Potentiality Principle³⁶⁰ states that:

“embryos and fetuses should not be killed because they possess all the attributes that they will have as full persons later in life. The potentiality principle is encapsulated in the words of one author who writes about “abortion and the golden rule”: “If it would be wrong to kill an adult human being because he has a certain property, it is wrong to kill an organism (e.g., a fetus) which will come to have that property if it develops normally”

However, Indian Constitution in its Article 21 guarantees ‘right to life’ only to persons, as it says “No person shall be denied.....” An unborn child can have this fundamental right only when it is considered as a ‘person’ otherwise not.

Michael Meslin³⁶¹ states that 'the concept of person is one of the most difficult concepts to define - even though it is always burdened with hopes and rededications. It is neither a simple fact, nor evident throughout history’.

³⁵⁸ <http://www.mapsofindia.com/census2011/female-sex-ratio.html>

³⁵⁹ 933 females per 1000 males

³⁶⁰ Morgan, Lynn M., *The Potentiality Principle from Aristotle to Abortion*, Published by ‘The University of Chicago Press’

³⁶¹ An emeritus professor and former president of the ‘Université de Paris-Sorbonne’ (1926-2010)

In a mother's womb the unborn child's status is of 'foetus'. The term 'foetus' is defined under Section 2(bc) of the PCPNDT Act³⁶² as:

"a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation (excluding any time in which its development has been suspended) and ending at the birth".

The definition clearly indicates that an unborn child is a foetus and the status remains till the birth takes place. Further, the definition starts from the expression 'human organism'. It means that a foetus is a human organism. However, in the famous case on 'Right of abortion' decided by the United States Supreme Court³⁶³ it had been observed:

"The word person does not include the unborn child and the question when does the life begin cannot be speculated by it"

Some other laws in India have given some importance to the child in womb also. Like Transfer of Property Act, 1882 which defines an unborn child as a legal person by fiction. An unborn child acquires rights only after being born alive. The statute legally allows transfer of property for the benefit of a child in the womb. However, that child can have a legal interest or right on the property only after taking birth. In case of Hindu Undivided Family (HUF) also, the unborn child has given rights over the property of the HUF and if in any case his/her right is violated or being hindered in any manner then, that violation can be challenged on its behalf.

In the United States of America, the concept of 'due process of law' has acknowledged the women's right to abortion and has also given it priority over the unborn child's right to life. But in India, there is no concept of 'due process of law', indeed there is 'procedure established by law' which does not give the absolute right of abortion to a woman. Although, the Court has considered the women's right of abortion as a part of right to privacy under Article 21 of the Indian Constitution, but with the passing of laws it prevents the misuse of this right also.

Hence, the law does not recognize a full-fledged existence of a child in the womb until it comes out. Obviously, from the point of view of interest, the mother's interest to her life has a priority over the unborn child's interest on his life.

Conclusion

A tree can bestow tasty and healthy fruits only if its own roots are healthy, once the roots capture uninvited external organisms like fungus, then its internal strength gets reduced and it becomes weak enough and fails to bestow

³⁶² The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

³⁶³ Roe v. Wade, 410 US 113 (1973).

eatable fruits. Similar is the situation of a women, if the body of a women is not healthy or indeed it is weak then giving birth to a healthy child becomes difficult for her. A child when develop in women's womb is only an organism inside the women's body, it becomes a living organism only when it comes out from the body. According to Ronald Dworkin, a foetus has no interest before the third trimester. A foetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before³⁶⁴. But a woman can feel everything while keeping a child in her womb. The decision of aborting a child shall only be of the woman carrying it.

Indian law has given every possible right which it can accrue to the woman, the right to her healthy life with dignity. Her decision of having or not having a child should be final. The law has given priority to the interest of women over the interest of an unborn child. In 2008, there was a very famous case where a women whose pregnancy period exceeds twenty four weeks and then she came to know that her child has some abnormalities which cannot be cured and then the woman decide not to have that child. But the Supreme Court of India did not allow the women to abort the child and as a result due to over depression of giving birth to an abnormal child results in miscarriage of that woman.³⁶⁵

Nevertheless, the MTP Act allows the women to abort the child if her pregnancy period has exceed the twenty four weeks provided the medical superintendent is of the opinion that if the abortion would not done then that will cause a serious threat to he life of the mother.

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³⁶⁴ Ronald Dworkin, *Freedom's Law: The moral reading of the American constitution*, 90 (Oxford University Press ed., 1999)

³⁶⁵ Kanojia, Ravi, *Rights of an unborn baby versus the social and legal constraints of parents: Birth of a new debate*; J Indian Assoc Pediatr Surg. 2008 Jul-Sep; 13(3): 92-93.