

## A LIBERETERIAN'S DEBATE ON THE RIGHT TO ABORTION AND RIGHT TO LIFE OF FETUS IN INDIA

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### ABSTRACT

*Right to life is fundamental to all other rights. This right has been recognized by many national and international institutions, including India under Article 21 of the Indian constitution. But have failed to provide protection to the life of a fetus. Judicial pronouncements are also not convincing regarding this matter, as they vary in different jurisdiction. But the important question is does the fetus should also be considered as a human being and given a status of legal personality? Whether the fetus in the mother's womb is a living human being? Whether life begins only post birth, and the fetus suffers all assaults without any respite in his mother's womb? If the fetus also enjoys the right to life, then will it affect the right of a pregnant woman to abort? Is the fetus to be recognized as separate entity or a part of its mother? A fundamental concern is whether the right of the unborn child is protected by the Charter of the United Nation? These questions are mystifying the court word wide. The researcher tries to explain that Right to life is the fundamental of all other rights, but at the same time the same is not absolute as the state can interfere. The woman's health is part of that concern as is the life of the fetus after quickening.*

**Keywords:** *Right to life, right of fetus, United Nation Charter, state interference, right of a pregnant woman, legal personality.*

## INTRODUCTION

*“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process...The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned.”<sup>i</sup>*

-Betty Friedan.

The right to life is a very broad concept and has been recognized under Indian Constitution.<sup>ii</sup> A person's life begins at birth and extinguishes with death with the result the pre-birth and post-death these two stages are devoid of any existence. There are various aspects such as religious, ethics, moral and legal values that rule over the aspect of right to life. It is a well-established right and is recognized by various national and international instruments. Globally, different Constitutions recognize the sanctity and importance of life; but they have completely failed to provide adequate protection to the life of fetus. Judicial pronouncements are also not conclusive, and vary in different jurisdictions. The problem is complicated by other disciplines like theology and medicine maintaining that the unborn is having life. But the question always arises whether an unborn child should be considered as a human being and be given the status of person or not. A girl is forced to undergo multiple pregnancies/abortions, until she fulfils her lifelong goal of being a breeding machine that produces male offspring as per the needs of the family. In this context we should all remember that men cannot do without women.

Abortion often invites exuberant debates amongst intelligentsia. The general question around which the discourse revolves is of morality, women's right, life of fetus and state's authoritative role in regulating the women's reproductive right. The sacrosanct notion of family is prevalent in our society from time immemorial. In such institution women distinctly play a contributory role. The evolution of human life takes place in the womb of mother. A fact which is disputed by many feminists i.e. – when women become pregnant the strong essence of being women is over – powered by the fragile emotive entity of being mother. Once a woman becomes a mother her identity is dispersed into the intricate complexities. In such peculiar scenario she sees herself being subdued by those who are either directly or even remotely attached to the fetus of the womb. The hidden or latent forces conspicuously make their sudden abrupt appearance. Prominent force among these are father of 'to be born', 'society' in which he or she will take

birth, 'state' imposes itself the custodian and protector of the right of to be born. Amidst all these deliberative developments, the inherent right of women over her body unwantedly seems to languish in shrouds of obscurity.

There have been several critical issues which underlie the problem of right of unborn child. These issues need to be addressed carefully so as to evolve a strategy to combat the problem. Whether unborn fetuses or a child in the mother's womb is a living human being or not? If life begins only post birth would be an exaggeration to say that an unborn is worse off in his mother's womb and susceptible and doomed to suffer all assaults without any respite. If we say that a fetus enjoys right to life, then will it affect the right of a pregnant woman to abort? Is a fetus to be recognized as a separate entity or a part of its mother? These questions are baffling the courts worldwide. An attempt is made to study critically the life of unborn child/fetus in the womb then examine the various rights of the unborn child/fetus and verification of different laws and its constitutional provisions in the context of female feticide.

In recent years the children's rights movement has gathered considerable strength and the adoption of international legal standards has been viewed by many to entrench the national law. A fundamental issue is whether the rights of the unborn child are protected by the Charter of the United Nations? The International Covenant on Civil and Political Rights<sup>iii</sup> declares that 'every human being' has the inherent right to life, while in respect of other rights. The expressions used are 'everyone', 'every person, every child' - or 'every citizen.'" The use of different terminology has raised the question whether 'every human being' has a more expansive meaning than usually attributed to 'every person'; in particular, whether it also includes the unborn child should be discussed in detail. Some of the important international instruments that must be mentioned while dealing with the rights of the unborn child have been discussed briefly.

***The Universal Declaration of Human Rights 1948*** the first piece of International law that should be cited while investigating whether a fetus has been given any status. It speaks in its Preamble 'equal and inalienable rights of all members of the human family, and it states that 'everyone has the right to life'<sup>iv</sup>and 'everyone has the right to recognition everywhere as a person before the law.'<sup>v</sup> and adds the notion of equality: 'All are equal before the law and are entitled without any discrimination to every protection of the law'<sup>vi</sup> The formulators of the declaration deliberately kept the issue of the fetus at bay but opted for broader interpretation

and affirmed that fetus is having human life, even deserves the legal protection at an early state. 'Everyone' is understood to mean 'every member of the human family' the provision would have little meaning and it is beyond debate that an unborn is a human being.

***The International Covenant on Civil and Political Rights 1966*** declares that 'Every human being has the inherent right to life'. This right shall be protected by law. No one shall be arbitrarily deprived of his life.<sup>vii</sup> Again, the meaning of the term 'every human being' is not defined but neither is it limited, and hence one can easily maintain that it includes the unborn life. Further, in the next sentence, 'no one' must mean 'no human being' or the expression itself would be rendered meaningless. Paragraph 5 of the same article provides in part that 'Sentence of death shall not be carried out on pregnant women.' The statement not only underscores the right to life, but also expresses a shared understanding that the unborn child is a human being. In other words, the unborn also has an independent protection. The author maintains that there can be no explicit recognition than this in international law that human rights enjoyed by every member of the human family include the unborn.

***Convention on the Rights of the Child 1989*** asserts that 'States Parties shall ensure to the maximum extent possible the survival and development of the child. Does it necessarily follow from this that the right to life of the unborn is protected? It is a contentious issue no international consensus has evolved over it yet. Consequently, the child's rights before birth are a question to be determined by individual states parties. While some states believe that it offers protection to the unborn child, there are others that do not. The latter group is of the opinion that an unborn child is not literally a person whose rights could already be protected, and that the main thrust of the Convention was to protect the rights and freedoms of every human being after his birth till the age of 18 years. The Convention defines a child as 'every human being below the age of eighteen years unless under the laws applicable to the child, majority is attained earlier.'<sup>viii</sup> Though the article does not state 'every human being from the moment of conception', it could be interpreted that the words do not exclude the unborn. The crux of the matter is that The World Health Organization recognizes 'reproductive rights' which are available to all women but the unborn child has not been authoritatively rejected or overwhelmingly acknowledged by international law, but the framers has been to remain silent or obscure about it so that the matter is left to the discretion of the member states, under respective municipal laws.

Initially, the right to abortion was not available because of the moral principles and ethics existing in the society. The termination of pregnancy was equated with murder of the fetus and was considered 'a sin'.

Abortion is derived from the Latin word 'aborir' which means, "To get detached from the proper site<sup>ix</sup>. An abortion is the removal or expulsion of an embryo or fetus from the uterus, resulting in or caused by its death. It can also be referred as miscarriage or induced termination of pregnancy within twenty weeks of gestation. This can occur spontaneously as a miscarriage, or can be artificially induced through chemical, surgical or other means. Mother's health conditions, legal sanctions and morality are to be kept in mind while carrying out abortion.

## **THE RIGHT OF FETUS UNDER DIFFERENT LAWS IN INDIA**

Abortion as a legal right was unknown since ancient times in India. It was severely condemned by Vedic, Upanishads, the later pauranic and smriti literature. Arguments on morality and legality tend to collide with each other in this regard. Before the passing of the Medical Termination of Pregnancy Act 1971, abortion was considered to be illegal. The government, through this statute has tried to balance the state's legitimate interests with the individual's constitutional rights. The rights of unborn child/fetus are well recognized in various different legal contexts which are as under:

**Limitation Act<sup>x</sup>** provides that where a person entitled to institute a suit or make an application for the execution of the decree is, at the time from which the prescribed period is to be reckoned a minor, he may institute the suit or make the application within the same period after the disability has ceased. Explanation to Sec. 6 reads thus: Explanation: - for the purpose of this section minor includes a child in the womb.

**Hindu Succession Act<sup>xi</sup>** recognizes the rights of a child in the womb. It says that 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. In the case of *M S Subbukrishna v. Parvathi*,<sup>xii</sup>, the father had been given a meager share during the joint family partition. The son was born right

after the partition. The court ruled that this child cannot claim a share of coparcenary but he can claim his father's share as well as his self-acquired property to the exclusion of the divided sons.

***Indian Succession Act***<sup>xiii</sup> minor means any person subject to the Indian Majority Act 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years, and minority means the status of any such person. Indian Succession Act provides that the domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled and in the case of a posthumous child, in the country in which his father was domiciled at the time of the father's death<sup>xiv</sup> and also recognizes the rights of a person coming into existence after the death of a testator<sup>xv</sup>.

***The Transfer of Property Act***<sup>xvi</sup> deals Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

***The Indian Penal Code***<sup>xvii</sup> provide for punishment for the offence of miscarriage for doing any act with intent to prevent child being born alive, for causing death of quick unborn child by act amounting to culpable homicide. Section 312 of the IPC provides punishment of imprisonment of either description for a term may extend to seven years, and shall be liable to fine to the woman causing miscarriage to a child. By treating the act of procuring an abortion as an offence, an implicit protection has been provided to the fetal right.

***The code of Criminal Procedure***<sup>xviii</sup> mandates that the High Court shall order of execution of capital sentences on a pregnant woman be postponed or it may commute the sentence to imprisonment for life, thereby indirectly recognizing the right to life of fetus. It is only escapist view to deny the right to life to a fetus saying it is not a person. The state is evading the crucial issue of right to life of a fetus such frivolous reasons, although it indirectly recognizes this right through criminal statutes and also recognizes that an unborn can enjoy certain interest in property.

**Medical termination of Pregnancy Act** also allowed Abortion under certain circumstances for example continuance of pregnancy would risk life of pregnant woman or there is substantial risk of physical or mental abnormalities in the unborn child,<sup>xix</sup> when pregnancy arises from sex crime like rape (marital rape not included) or intercourse with a lunatic woman, etc., women whose physical or mental health would be endangered by the pregnancy, pregnancies that are a result of failure of any contraceptive device used by husband or wife to limit the number of children, pregnancies in unmarried girls under the age of eighteen; with the consent of a guardian. In the case *Dr. Nisha Malviya and Anr. v. State of M.P.*,<sup>xx</sup> three accused initially committed rape on 12 years girl and later got her pregnancy terminated without the consent of her or her mother therefore was held guilty. In another case *Shri Bhagwan Katariya and Others v. State of M.P.*,<sup>xxi</sup> the pregnancy was terminated without women's consent. Court was of the view that in the present case, a permanent scar has been carved on the heart and soul of the woman by depriving her of her child. Therefore, the doctor was held liable. Maximum time limit for terminating the pregnancy under above stated grounds is twenty weeks. This time limit is considered suitable because lower limit of viability is approximately five months of gestational period. It is during 20-21st week that the fetus starts showing movements. Therefore, till that period, the fetus is considered non-viable.

**Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994** this Act, came into force on January 1, 1996, was enacted primarily to check sex-selective feticide. In the beginning, the Central government and most State governments hardly took any steps to implement the provisions of the Act. Following a petition filed in the Supreme Court, the State governments and Union Territories were directed by the court to supply quarterly reports to a central supervisory board regarding action taken towards the implementation of the Act. The act was renamed in 2002 as Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act. It prohibited use of any technology for determining the sex of fetus before its birth. Punishment for any person who is violating the said act would be punished with imprisonment or fine or with both. Once again, several States either dragged their feet in furnishing the reports or failed to initiate prompt action as per the guidelines.

## THE STATUS OF LIFE OF FETUS UNDER INDIAN CONSTITUTION

The Indian constitution states that the right to life is a very broad concept and it is the most fundamental of all. It says that “No person shall be deprived of his life and personal liberty except according to procedure established by law”<sup>xxii</sup> among various rights which are available to women, the right to abortion is also believed to be one of the most essential and fundamental right. Right to life is a well-established right and is recognized by various international instruments. Now the question is does a fetus really enjoy these rights? We do not have definite answer. Globally, each constitution recognized the sanctity of life, yet has failed to adequately protect the life of fetus. Judicial pronouncements are also not conclusive and vary in different jurisdictions. There is a desperate need for the courts to come clear on this vital issue and recognize the rights of the fetus. Even though, In India Article 21 of the constitution guarantees the life and liberty of every person, but it is doubtful if this would include the life off fetus as the meaning is restricted by the use of the word person. The Indian Constitution has recognized the right to life of fetus under Article 21 as also recognized in several cases.

***Kharak Singh v. State of Uttar Pradesh***<sup>xxiii</sup> The Supreme Court quoted and held that by the term “life” as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an armor leg or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

***Sunil Batra v. Delhi Administration***<sup>xxiv</sup> the Supreme Court reiterated with the approval the above observations and held that the “right to life” included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even include the right to protection of a person’s tradition, culture, heritage and all that gives meaning to a man’s life. It includes the right to live in peace, to sleep in peace and the right to repose and health.

***Bandhua Mukthi Morcha v. Union of India***<sup>xxv</sup> the honorable Supreme Court held that is fundamental right of a every person in this country assured under the interpretation of Article 21 to live with human dignity.... It must include the tender age of children to develop in a healthy manner and in conditions of freedom and dignity. Further some states in India have made special legislations to confer special protection to the life of fetus. The Nuclear

Installations Act, 1965 recognizes liability for compensation in respect of injury or damage caused to an unborn child by the occurrence involving nuclear matter or the emission of ionizing radiation. In the light of the above discussion in various cases it is agreed that fetus should enjoy the right to life in the mother's womb.

## **DOES A FOETUS HAVE A RIGHT TO LIFE?**

When does life begin is a key question to be addressed. The literature reveals that life sciences have not offered any well laid guidelines to determine this crucial question. Some non- medical men and women have made bold assumptions on the subject, which have come to represent the layman's view. One view states that life begins at the moment of conception and to suggest otherwise seems to be casuistry conception is the magic moment. Another view believes that a fertilized ovum is human life in the common sense i.e. life begins at birth. Or more technically, when fetus is sufficiently developed to be capable of living if removed from the mother's womb, from that moment the human life begins. Conception is a religious test that makes no claim whatsoever to scientific truth. Each of these two views standing at the extreme is creating dilemma to the lawmakers. If one were to go by the first view that life begins at the moment of conception then interference with the fetus at any stage of its fetal existence could be seen as unethical unless one could take the stand that the rules of the ethics do not recognize a right to life. Even the unborn child is entitled to protection by the law from the moment of its conception. This is logically perfect, but pragmatically impracticable. On the other hand, at the other end of the scale is the second view, the other extreme stand namely, life begins only on birth. This creates a dilemma of a different type. One may then argue that if there was not life before birth, and then all sorts of legal restrictions and sanctions dealing with the inference of the fetus become unnecessary except to the limited extent of preventing such interference in the interest of the mother's health. On this logic whether or not a mother should be free to abort belongs almost entirely to the category of the individual therapeutic question. It ceases to have any ethical or legal relevance. No country gives absolute choice to the women throughout the period of pregnancy. The fact that during the second or third trimester, almost all countries restrict interference with the fetus except on medical grounds implies that they regard interference with the fetus as deserving of legal condemnation. In *Davis v. Davis*<sup>xxvi</sup> where a divorced wife and husband disputed on claiming the right on the Frozen Pre- embryos for

implantation to have a child, the Judge concluded that as a matter of law, human life begins at conception and the legal provisions governing a human being existing as embryo in vitro to be those of child custody law, dominated by the obligation to seek, protect and advance the best interest of the child. Since time immemorial the Indian law too treated the termination of pregnancy as an offence. According to Hinduism abortion or killing of fetus was considered a sin. According to Islam after a fetus is completely formed and given soul, abortion is considered to be 'haram' (forbidden).

The same was expressed in terms of law in Section 312 of the Indian Penal Code. The American Supreme Court for the first time in *Roe v. Wad*<sup>xxvii</sup>, recognized the woman's right to terminate pregnancy. The Court found this right to be rooted in the constitutional right to privacy. In brief, the Supreme Court of America held that a woman's right to terminate her pregnancy is such that the State may not prohibit abortion until the fetus reaches viability. But in a later case in *William L. Webster et al v. Reproductive Health Services*<sup>xxviii</sup>, the Supreme Court of America reversed its earlier judgment and upheld a Missouri Statue which declared that 'the life of each human being begins at conception', and that 'unborn children have protectable interest in life, health and well-being.' The Court maintained that the State can pass any regulation of abortion on the grounds – one is to preserve and protect the health of pregnant woman, and the other is to protect the potential life embodied in the fetus. Thus, the American Supreme Court recognized the right of the fetus 'to grow and to be born'. A critical question is 'does the abortion of a fetus amount to taking life of a human being'? There is no satisfactory answer to the question 'when does life come into being'. The recent judgments in the West which deals with legal protection of human life before birth disclosed that abortion of fetus is illegal and criminal because it amounts to taking life of an unborn child. Thus, it restrains the woman's right to an abortion. A child in the womb of the mother is for most purposes under English law regarded as already born but in Hindu law a child in his mother's womb is equal in many respects to a child actually in existence. The American Supreme Court has introduced the test of "viability" according to the period of pregnancy, during the first three months of pregnancy, the potentiality of life in the embryo is not viable and abortion at this stage is less risky or fatal to the mother. Hence, the state may refrain from exercising its right of regulation of the mother's right to abortion, leaving it to be the decision of the mother and her physician. After expiry of three months, however, the fetus then presumably has the capability of meaningful life starts recognizable movement in the uterus. At this stage, therefore, the state

acquires compelling interest to protect potential. In *Roe V. Wade* the constitutional validity of state criminal abortion legislation was considered which prohibited abortion except by medical advice for the purpose of saving the mother, it was contended that woman's right to terminate the pregnancy is absolute and that she is entitled to terminate the pregnancy for whatever reason she chooses. The court upheld the right to privacy, but at the same time held that the same is not absolute and the state can interfere and regulate the freedom for "compelling state interests". The woman's health is part of that concern as is the life of the foetus after quickening. These concerns justify the state in treating the procedure as medical one. In *Webster v. Reproductive Health Services et al*<sup>xxx</sup> the Court was asked to decide the constitutionality of Missouri Statute regulating the performance of abortion. In the preamble of the Statute it was provided "that life of each human being begins at conception" and that "Unborn children have protectable interests in life, health, and wellbeing" and required that all state laws be interpreted to provide unborn children with the same rights enjoyed by the persons subject to the federal constitution. In the case *Moore v. Wingfield*<sup>xxx</sup>, it is stated that in contemplation of law life begins as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child or otherwise kills it in her womb or if any one beat with child whereby the child death in her body and is, she is delivered of a dead child, though not murder was by the ancient law homicide or manslaughter. In the case of *Aswini Kumar pan v. Primal Debi*<sup>xxxi</sup> stated that a child in the mother's womb is deemed to be in existence for the purpose of inheritance and thus has a right to challenge any transaction and has a right of action and entitled to institute a suit as a child.

## THE LEGAL PERSONALITY OF UNBORN CHILD

Before advocating for right to life of fetus, it is important to prove that fetus has legal personality. To be a legal person is to be the subject of rights and duties. It is generally considered that only human beings can have rights and are necessarily the natural persons. The confusion with regard to legal personality of unborn child persists because of the doubt that whether unborn child can be considered as an alive human being or only a piece of property of mother who have the right to abort it according to her own wish. The need to provide legal personality to fetus is that as it is a form of human life and have potential personhood, its right to life should not be violated so easily only on the basis of mere choice to abort. The legal

understanding of the concept of ‘person’ or ‘personality’ revolves around possession of rights and capacity to discharge legal duties. Hence, natural persons, that is, human beings are the prime claimants of legal personality. The concept of legal personality of unborn child has been puzzling and uncertain since inception; hence, the case-law regarding the same has also been inconsistent. The concept of legal personality of the unborn is discussed in Salmond Jurisprudence, a child in its mother’s womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, *Nasciturus pro jam nato habetur*. In the words of Coke “The law in many cases hath consideration of him in respect of the apparent expectation of his birth”. There is a need to confer limited legal personality to fetus to protect its right to life and accordingly laws should be made which promote healthy birth and allow abortion only in exceptional circumstances.

## **CONCLUSION AND SUGGESTIONS**

In India, though the laws recognize the existence of an unborn as a legal person, they don’t grant rights until the birth of the child and the state can interfere only after the unborn attains viability but the problem that remains is that the law refrains from being clear on the idea of how the law will protect the unborn and what is the duty owed to him/her. There are crimes committed against unborn child that are not recognized as such and hence make punishment impossible. The constitution of India has recognized the Right to life vide Article 21 has also recognized in several cases from *Menaka Gandhi* to *Francis Corelli*. There is no express fundamental right to be born though we can interpret it under Article 21.

Thus, Article 21 can be interpreted in broader sense as:

- (1) Right to be born and not to be aborted only because she is a girl.
- (2) Right to remain alive after birth and to be killed at any moment after birth
- (3) Right of the girl child to her mind, her body, right to childhood and right to healthy family environment, which she is not in a position to withstand.
- (4) In addition to the right to birth, again it is reiterated that simultaneously the unborn child has the right to healthy growth in unpolluted environment.

At last, this research would like to be concluded with a saying which was aptly remarked by Manusmriti, the great sacred, the very first Smriti writer of Hindus<sup>xxxii</sup>, where ever women are worshipped and woman hood is honored, respected there the God resides, settles perpetually; and where the women are insulted, dishonored, degraded, battered and beaten cruelly, or harassed God does not come, and saintly moves away. Men cannot do without women. They need a mother to feed them, a sister to play with, in their youth seek a ladylove for romance, a wife to have a family with.... But they don't want a daughter born to them. These double standards and ingrained hypocrisy have made the girl child more vulnerable demographically and culturally as well.

Abortion includes various social, ethical and financial issues. Thus, it can be concluded that mother's right is limited to have a termination of pregnancy. It is on the shoulders of the law to take care of the independence and freedom of the mother as well as the life of unborn. The medical community and society need to offer love and support to women with unplanned pregnancies and to assist them in finding empathetic alternatives to abortion.

Very few countries refer to reproductive rights on equal footing with constitutional rights even though they are vital to women as an individual as well as group. Countries across the world today are witnessing plethora of cases with reproductive issue as abortion, but are not specifically denominated. These are preferably categorized as criminal offence a bracketed under any strict regulatory measures, in such circumstances the 'women' resort to more generalized right to challenge their constitutionality. In the absence of abortion rights, women are forced to turn to a broad and diverse range of rights to sustain women's entitlement to control their own bodies including security of person, liberty, equality, privacy, free development of one's personality, physical integrity, human dignity and freedom of thought and belief.

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