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Right of Mother to Abort vs. Right to Life of the Unborn

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ABSTRACT

In India, the phenomenon of sex-selective abortion persists, perpetuating discrimination against female fetuses. While the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (1994) bans sex-selective abortion, it still holds women liable for the act. This study argues that the right to life of an unborn child, as enshrined in Article 21 of the Indian Constitution, should prevail over the right to abort claimed by a mother. The research adopts a doctrinal methodology, analyzing statutes, case laws, and secondary sources to establish that an unborn child is a person with inherent rights. Judicial pronouncements, including the landmark case of Shahishtha and Others V. The State (2022), have recognized the unborn child's right to life and personal liberty. This paper contends that the state has a duty to protect the life and health of both the pregnant woman and the unborn child, and that the rights of the unborn child should be recognized and protected from conception until birth. The study concludes that the judiciary has played a crucial role in protecting the rights of the unborn and that a constitutional imperative exists to grant them the right to life.

I. INTRODUCTION

In India, sex-selective abortion is an established phenomenon that cuts across rural/urban, educational and socioeconomic status divides. However, in understanding this complex and deeply contextualized issue, kinship patterns, dowry and the low social value accorded to women are often mobilized to serve as overarching explanations. While these factors are important in explaining sex-selection, in an effort to expand beyond the generalizing discourse that exercises a single point focus on patriarchal cultural practices.

The premature elimination of female fetuses is a widespread phenomenon in Asian countries. In fact, Amartya Sen (2003) has uncovered that in the last century, “100 million women have been missing in South Asia due to 'discrimination leading to death' experienced by them from womb to tomb in their life cycles”.² Historically, in India the elimination of girls was tied to

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² Sex-selective abortion in India: Exploring institutional dynamics and responses (2013) McGill Sociological Review (MSR). Available at: <https://www.mcgill.ca/msr/volume3/article2> (Accessed: 23 September 2024).

female infanticide. This practice was limited to upper-class warrior castes, who devalued women due to the economically draining custom of hypergamy (marriage of a woman with a man from a highersocial group). Contemporarily, the advent and easy accessibility of sex determination technology (henceforth referred to as SD) has coincided with the preponderance of sex-selective abortions. In fact, sex-selection has largely come to replace female infanticide as a method of eliminating females.

On average each missing girl is an outcome of at least two foetal SDs and one sex-selective abortion. In fact, the foetal stage has become the riskiest time in an Indian woman's life, as one in seven girls are eliminated before birth because of their sex.

In extrapolating on the root causes of sex-selective abortion most studies have identified the economic and social devaluation of women as core factors.

As early as 1988, in response to FASDSP's effective advocacy the Maharashtra government introduced a legislative breakthrough, the Maharashtra Regulation of the Use of Prenatal Diagnostic Techniques Act. This law was aimed at the misuse of SD tests and was somewhat able to restrict the availability of the tests. In 1994, in extending the state level initiative, the Indian Parliament passed the first national law banning sex-selective abortion, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (henceforth referred to as PNDT Act). The PNDT Act (1994) limits the use of prenatal tests for the diagnosis of genetic conditions in foetuses and bans the application of this technology for SD.

Evidently, the PNDT Act (1994) states that, "the court shall presume, unless the contrary is proved that the pregnant woman has been compelled by her husband or relative to have the sex-selective abortion". Significantly, while the law recognizes that women are compelled through social pressure or family members to undergo sex-selective abortion, it still holds women liable.³

(A) Object of the Study

The object of this paper is to study the importance of Life of an Unborn over the Right to Abort claimed by a Mother under the Right to Life.

(B) Research Methodology

The researcher has adopted doctrinal research method for present research. The doctrinal research involves the analysis of the statutes, case laws, existing secondary information

³ Sex-selective abortion in India: Exploring institutional dynamics and responses (2013b) McGill Sociological Review (MSR). Available at: <https://www.mcgill.ca/msr/volume3/article2> (Accessed: 23 September 2024).

accessed from various sources, e.g. books, articles, journals, websites etc.

(C) Statement of Research Problem

Right to Life of a Women would not prevail over the Right to life of an Unborn.

Unborn: child *en ventresae mere* ("in its mother's womb"): It is necessary to criminalize all conducts which injures or causes death of an unborn child, so that the unborn is protected from conception until birth. From the very moment of conception, the foetus is regarded as human being and should be protected by the right to live as a human being. Each unborn children is to be considered as a 'person', only then, can any tortuous act committed against him/her, it will be recognized and made punishable. The rights of an unborn child are recognized in various different legal contexts. The problem is whether unborn foetus or a child in the mothers' womb are legal persons or not?⁴

In order to be ranked as a person in law, a natural person must be a living human being, i.e., must not be a monster and must be born alive, an infant *en ventresae mere* (child in womb), who is supposed to be born for many purposes is an exception. A child in its mother's womb can acquire certain rights and inherit property, but the rights granted are contingent on his being born alive. He/she is counted as a person when it comes to the matters of partition. Such a child can claim for any damages of injury sustained while in its mother's womb.

The question highlighted is whether the infant is a distinct person from the mother and whether the mother or unborn has right to sue. Whenever a child is born at an advanced pre-natal age, the child will always have chances to live separate from its mother, such a child has a right of action for any injuries wantonly or negligently inflicted while in its mother's womb. Any time before this stage, the child is clearly only a part of its mother.⁵

II. JUDICIAL PRONOUNCEMENTS

In *Occleston v Fullalove (1873–74) L.R. 9 Ch. App. 147*, a case heard in the Court of Appeal in Chancery it was argued for the Appellant that although the child in question was "en ventresamère" at the date of the will subject to the litigation, there was neither principle nor authority against such a child having a reputation of paternity. The Court allowed the after-born child to share with her sisters under the will.

⁴Sex-selective abortion in India: Exploring institutional dynamics and responses (2013a) McGill Sociological Review (MSR). Available at: <https://www.mcgill.ca/msr/volume3/article2> (Accessed: 23 September 2024).

⁵ Dalton v. St. Luke's Catholic Church, 27 N.J. 22: N.J., judgment, law, Casemine.com (no date) <https://www.casemine.com>. Available at: <https://www.casemine.com/judgement/us/59149e4dadd7b04934659bea> (Accessed: 23 September 2024).

The concept is used in common law jurisdictions and has been extended beyond the law of wills and succession so that claims in the law of torts are also recognised. In the Australian case *Watt v. Rama* [1972] VR 353 it was deemed that a fetus is a person entitled, once born, to compensation as a plaintiff for injury caused while *en ventresamère*.

Some U.S. cases have removed the requirement that the fetus actually be born. In *Amadio v. Levin*, 509 Pa. 199 (1985), the Supreme Court of Pennsylvania held that "it makes no difference in liability under the wrongful death and survival statutes whether the child dies of the injuries just prior to or just after birth." In *Farley v. Sartin Trucking*, 195 W.Va. 671, the Supreme Court of Appeals of West Virginia did away with a requirement that a tortiously killed fetus be viable outside the womb at the time the tort was committed. The deceased unborn child's personal representative may maintain an action pursuant to the state's wrongful death statute, the court held, cautioning that the cause of action does not extend against a woman who has a legal abortion.⁶

The legal position in India regarding the right of an unborn child can be traced back to the case of *Kharak Singh v. State of U.P* (1963), where the Supreme Court held that the right to life under Article 21 includes the right to live with human dignity, which includes the right to health. Subsequently, in the case of *Unnikrishnan v. State of Andhra Pradesh* (1993), the Supreme Court held that the right to life includes the right to medical care, which extends to both the mother and the unborn child.

In the case of *Suchita Srivastava v. Chandigarh Administration* (2009), the Supreme Court held that the right of an unborn child to life and personal liberty is protected under Article 21 of the Indian Constitution. The Court held that the State has a duty to protect the life and health of a pregnant woman and her unborn child. The Court further held that the right of an unborn child is not absolute and must be balanced with the right of the mother. The concept of the "right of the unborn child" has evolved over time, particularly with regards to legal protection and recognition. In the past, an unborn child was not considered a legal person with rights. However, with advancements in medical technology and changing attitudes towards the fetus, many countries have enacted laws granting various forms of protection to the unborn. For example, in the United States, the landmark case of *Roe v. Wade in 1973* established a constitutional right to abortion, but also recognized that the state has a legitimate

⁶ Network, L.L.N. (2021) Rights of an unborn child with reference to Article 21 of the Indian Constitution, LexForti. Available at: <https://lexforti.com/legal-news/rights-of-an-unborn-child-with-reference-to-article-21-of-the-indian-constitution/#:~:text=As%20per%20E%80%9C%20Article%2021%20of,to%20a%20normal%20person%20because> (Accessed: 23 September 2024).

interest in protecting the life of a fetus, particularly as it approaches viability.

More recently, several states have passed laws restricting abortion, often based on the argument that the fetus has a right to life. In other countries, such as Ireland, the right to life of the unborn is explicitly protected by the constitution. This has led to debates and court cases over the balancing of the right to life of the fetus against the right to bodily autonomy and reproductive rights of the pregnant person. In international human rights law, the right to life is considered a fundamental right, and some treaties, such as the Convention on the Rights of the Child, extend this protection to the unborn. However, the extent to which this protection applies in practice and how it is balanced against other rights remains a subject of ongoing debate and legal interpretation.

In *Shahishtha and Others V. The State, 2022 SCC OnLineKar 1596*⁷ The Karnataka High Court stated that “It is shocking that an agreement is entered into between the parties in respect of an “unborn child”. It is for the District Child Protection Unit to take the responsibility of all such cases. It is well settled that ‘an unborn child has a life of its own and rights of its own and the rights of unborn are recognised by law. No doubt, only if the unborn can be treated as a person, the right to life of the unborn can be equated with the fundamental right of the mother guaranteed under Article 21 of the Constitution. True, an unborn is not a natural person, but it is well known that after six weeks, life is infused into the embryo, thus converting embryo into foetus and once an embryo evolves into a foetus, the heartbeat starts. In other words, the unborn has life from the stage it transforms into foetus. If the unborn has life, though it is not a natural person, it can certainly be considered as a person within the meaning of Article 21 of the Constitution, for there is absolutely no reason to treat an unborn child differently from a born child. In other words, the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution of India’.”

III. CONCLUSION

In India, though the laws do recognize the unborn child as a legal person, rights are not conferred on the unborn child until it takes birth. In other words, the state can intervene only when the unborn child takes viability and not before. The position in the Indian scenario remains unclear as to how the law will protect the rights of an unborn child and what is the degree of liability that is owed to such an unborn child.

Judiciary has, thus, played a crucial role in development and evolution of society in general and

⁷2022 SCC OnLineKar 1596

in ensuring good governance by those holding reigns of power in particular. I believe that judiciary has played its role well in protecting the Rights of Unborn.
