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Rights of an Unborn vis-a-vis Rights of Women

ANSHU SHARMA¹ AND SARTHAK SANGWAI²

ABSTRACT

The discussion over the women's right to privacy and abortion rights has gained prominence since the decision of Roe vs. Wade was passed by the Supreme Court of the USA as it was in direct contrast with the Right of life of an unborn and their status as legal personality. There is different moral, scientific and religious opinions and claims about when life begins and at what stage will be an unborn considered person. The issue over a fetus's legal rights while still in the womb has sparked controversy at both a national and international level. The topic that has to be considered is whether the fetus can be given legal status from the moment of conceiving, or not. This paper attempts to compare and contrast the status of the fetus and women's rights, with the goal of determining which right should take precedence.

Keywords - Unborn, Legal Personality, Right to Privacy, Abortion.

I. INTRODUCTION

The Almighty created this Brahmand (universe) for persons to survive in, where the word "person," which refers to a mask worn by actors during a performance and is derived from the latin word "persona." They are legally recognized as possessing legal rights and being bound by legal duties. The periodic evolution of history reveals that not all persons have been recognized as persons since the beginning of civilized society. Slaves, for example, were not considered individuals in ancient Rome and were forbidden the same rights as normal citizens. It is due to the enhanced exigencies in the today's world that corporations, deities, ships, companies, animals, rivers and a variety of other objects have been ascribed as personality over time.³ According to the most relevant concept found in disputes, legal personality is the ability to form legal connections. Salmond defined legal person as "A Person is any being whom the law treats as deserving of rights and duties."⁴

¹ Author is a student at Hidayatullah National Law University, Raipur, India.

² Author is a student at Hidayatullah National Law University, Raipur, India.

³ Akshita Jha & Adrija Ghosh, "Is being a 'person' essential for the environment to hold rights? assessing the legitimacy of environmental personhood and alternative approaches," 11 NUJS L. REV. 3 (2018)

⁴ JOHN W. SALMOND, JURISPRUDENCE, 334 (Stevens and Haynes, 1st ed. 1907).

In this paper *firstly*, the personhood of “Unborn” is demonstrated. *Secondly*, different opinions of jurists and different branches of sciences and various conventions on unborn is dealt with. *Thirdly*, the legal status of an unborn in other countries and India is discussed. And *lastly*, the rights of women pertaining to abortion rights along with the ambiguity surrounding an unborn fetus’s legal personhood which creates major concerns about the legality of abortion is also discussed.

(A) Objectives

1. To understand and analyze the legal status of an unborn in India and other countries.
2. To understand the rights of women with respect to abortion.
3. To understand and compare the contradictory nature of rights of an unborn and a woman.

(B) Research Methodology

The author's research is based on qualitative as well as doctrinal research. As a result of the qualitative research, a number of books, articles, research papers, and journals were read and analyzed as part of the current study. Several national and international legislations, case laws, commentaries, as well as theories were taken into account and further analyzed as part of the doctrinal research process in order to discover relevance in the current study.

II. LEGAL PERSONALITY OF AN UNBORN

A child who is still in the womb of its mother is not officially a person. An unborn baby, on the other hand, is considered to be born under legal fiction. To put it another way, he/she is granted legal personhood. That child will have legal standing once he/she is born alive. However, the philosophers and jurists have given different opinion as to when the unborn will be considered a person. Hippocrates, was of the opinion that life begins at fertilization while Aristotle, discusses three distinct sorts of human souls: the nutritive soul, also known as vegetative soul which is infused from the beginning; the sensitive soul, which is imbued later; and in the end comes the intellectual soul.⁵ It is at the intellectual soul period that human can reason and think and is thus considered to be a person which distinguishes it from animals.

There are several ambiguities on the opinions of different scientific branches as well. In Biology, it is just after conception that a human entity is considered to be a human person. Embryology considers the fetus of 14 days from conception to be a person.⁶ The branch of

⁵ *On the Generation of Animals*, by Aristotle, The Embryo Project Encyclopedia, ASU.EDU (2018), <https://embryo.asu.edu/pages/generation-animals-aristotle> (last visited May 12, 2021).

⁶ John Janez Miklavcic & Paul Flaman, “Personhood Status of the Human Zygote, Embryo, Fetus,” 84 THE LINACRE QUARTERLY 130–144 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5499222/> (last visited May 12, 2021).

neurology considers an unborn to be alive when it can be read by the EEG (Electroencephalogram) which is post 40 days from the day of conception. Whereas Ecology states that the fetus grows capacity to live outside of a pregnant woman's womb' and is able to survive then it is said to be alive.

Conventions too created vagueness in the meaning of the term "child," as it did not list the minimum age for childhood or the rights of the unborn. Several conventions acknowledge unborn. The Universal Declaration of Human Rights, 1948 contains in its preamble the "equal and inalienable rights of all human beings"⁷, and it states in Article 3 that "everyone has the right to live."⁸ and in Article 6 that "everyone has the right to recognition everywhere as an individual before the law."⁹ The declaration remains silent about the age and whether it talks about the born or the unborn individual which adds to the confusion. The Convention on the Rights of the Child, 1989 in its Preamble states that "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."¹⁰

III. LEGAL STATUS OF UNBORN CHILD IN DIFFERENT COUNTRIES

With only a few exceptions carved out to safeguard the rights and interests of born persons, the legal system in the United States has viewed the fetus as an essential part of the woman bearing it and has granted it no rights as an entity apart from her. The courts have recognized that on distinguishing the fetus' rights as being a distinct creature from the rights of the woman carrying it are obviously adverse to the interests of the pregnant mother.

It was in the landmark judgment of *Roe vs. Wade*¹¹ that the Supreme Court of USA in 1973 classified pregnancy into 3 trimesters and held that the woman had exclusive discretion over whether or not to terminate a pregnancy in the first trimester. In order to safeguard the mother's health, the government might limit, but not prohibit, abortion in the second trimester. The state may restrict abortion in the third trimester to safeguard a fetus that could survive outside the womb, unless the woman's health was in risk. This helped in recognizing the rights of the women to a very great extent and liberalized the abortion laws. However, in the year 2004 that President George Bush signed the Unborn Victims of Violence Act of 2004, the law makes it

⁷ Universal Declaration on Human Rights, adopted by the UN General Assembly, Resolution 217(III) of 10 December 1948, Preamble, Available at: <http://www.un.org/en/universal-declarationhuman-rights/>

⁸ Ibid, Article 3

⁹ Ibid, Article 6

¹⁰ Convention on the Rights of the Child, adopted by the UN General Assembly, Resolution 44/25 of 20 November 1989, Preamble.

¹¹ *Roe v. Wade*, 410 U.S. 113 (1973)

illegal to injure an unborn child while assaulting a pregnant mother. It listed 60 crimes against unborn as punishable. This Act, gave importance to the lives of the unborn.

In UK, the Abortion Act was enacted in 1967 which, at the time of introduction, had a time restriction of 20 weeks, but due to changing circumstances, the legislation was modified in 1990 and the time limit was raised to 24 weeks.¹² There is no time constraint if there is a significant risk to the woman's life or fetal abnormalities. After a 24-week waiting period, it is permissible to terminate the pregnancy, but only if it is essential to preserve the mother's life, or to avoid long-term mental or physical harm.

Abortion is a subject of criminal law in Australia and every state has its own law on abortion. In Australian capital territory, abortion is allowed if the doctor approves of it. The state of New South Wales and Queensland prohibits abortion and it is only allowed if there's a risk to mother's life. Tasmania has a limit of 16 weeks and after this period, approval of two doctors is necessary. Other states have similar law with varying time restrictions.

Germany allows abortion only in case of request with a limit of 14 weeks which is calculated from the last menstrual period. Brazil prohibits abortion and the woman can face charges up to three years in prison. Woman with risk of life and rape victims are only allowed to terminate their pregnancy. France and Canada also permit abortion in case of request. France has a time restriction of 12 weeks and Canada has varying time restrictions because of very strict regulatory mechanisms.

IV. LEGAL STATUS OF AN UNBORN IN INDIA

It is a sin to abort an embryo at any stage, according to Hindu scriptures and religion. This signifies that the fetus is recognized as soon as it is conceived. While Indian courts have recognized reproductive autonomy as a fundamental right guaranteed to women under Article 21 of the Constitution, the legislature has imposed reasonable restrictions on these rights through the "Medical Termination of Pregnancy Act of 1971" and the "Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994," both of which have been upheld by myriads of cases by the courts.

Furthermore, certain Indian laws recognize the unborn child as a legal person, the Transfer of Property Act is one such legislation. Section 315 of the Indian Penal Code, 1860, recognizes the unborn has the legal defense of right to life¹³. Unborn children are likewise given legal

¹² Ravi Kanojia, *Rights of an unborn baby versus the social and legal constraints of parents: Birth of a new debate*. J.I.A.P.S., 13(3), (2008) 92–93.

¹³ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), §. 315

status and rights under Section 20 of the Hindu Succession Act of 1956. As a result, an unborn child's proprietary rights are recognized under the legislation, and a fetus in the womb is regarded a person.¹⁴ All of those rights, however, are contingent on the birth of an unborn child and possession of contingent rights is necessary to preserve legal personality. The word "person" is not defined under the Indian Constitution, although it includes an unborn child under section 304A of the Indian Penal Code.¹⁵ In the womb, a child might be regarded a living entity with its own life. These laws have resulted in inducing a miscarriage as a punishable crime, and it can be deduced that a fetus in the mother's womb has civil rights and legal personality.

Thus, pregnancy termination is only permitted in the circumstances specified in the "Medical Termination of Pregnancy Act of 1971". These statutory restrictions must be viewed as reasonable constraints on a woman's fundamental rights under Article 21 of the Constitution. In this context, the legality of state restrictions on certain protected rights, as well as the extent to which they limit such rights, must be considered.

It is also evident that the Supreme Court implicitly recognized a fetus' right to life under the Indian Constitution, while giving priority to a woman's basic right in a limited and not absolute sense. This is supported by the Bombay High Court's recent ruling of *Nikhil Datar vs. UOI*, in which the court denied abortion to a woman who was in her 24th week of pregnancy and carrying a child, despite major abnormalities in the fetus' heart posing a life-threatening risk to the life. The abortion was denied despite the fact that it was indicated by the doctor, if a child was born as a consequence of the pregnancy, it would require a lifetime of treatments and may die unexpectedly.¹⁶

The unborn fetus has been acknowledged as a legitimate individual in India under different laws for the purposes of the live birth requirement, this includes Transfer of Property Act¹⁷ and Hindu Succession Act.¹⁸ According to these statutes, unborn do have 'rights and capacity of ownership'. Section 13 of Transfer of Property Act provides that "Transfer for benefit of unborn person- 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

¹⁴ Hindu Succession Act of 1956, Act 30 of 1956, (India), §. 20

¹⁵ *Supra* at 11 § 304 sb. cl. A

¹⁶ *Nikhil Datar v. Union of India*, W.P. No. 1422/2009.

¹⁷ Section 13, Transfer of property Act, 1882.

¹⁸ *Supra* at 12.

extends to the whole of the remaining interest of the transferor in the property.”¹⁹ Section 20 of Hindu Succession Act provides 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.”²⁰

In *Suchita Srivastava and Anr. v. Chandigarh Administration*,²¹ the Apex Court on Right to life available to fetus, placed reliance on *Roe v. Wade*²², which acknowledges the “compelling state interest” in ensuring the survival of the fetus as well as the welfare of the pregnant woman at a certain stage in the pregnancy, which roughly starts at the end of the first trimester.

V. RIGHT OF A WOMAN TO ABORT

Abortion in India was criminalized under India Penal Code, 1860 before the Medical Termination of Pregnancy Act, 1971. The framers of IPC in Section 312 used the word ‘miscarriage’ instead of ‘abortion’.²³ According to the provision, right of a woman to terminate the pregnancy was only allowed when it was done under good faith to save the mother’s life in extreme situations. The laws regarding abortion have been adopted by all countries differently. Some have adopted with a liberal approach and some have adopted with a stringent or conservative approach. India has taken the liberal route by approving the Medical Termination of Pregnant Act in 1971 and enacting in 1972. Before the 2020 amendment, the termination of pregnancy was only allowed through medical professionals up to 12 weeks and by the recommendation of 2 medical professionals between 12 to 20 weeks.

In 2008, a petition was filed by Haresh Mehta and Niketa Mehta to struck down Section 3(2)b of MTP Act. Niketa Mehta, the mother, had a 24-week pregnancy and the baby was diagnosed with a fatal heart defect. The case was highly debated and many people criticized the present law. The division bench of High Court of Mumbai dismissed the petition on the basis of the views of medical experts. Finally, she was not granted and had a miscarriage on 27th week.²⁴ The main point of contention in respect to these rules is that no pregnancy can be terminated after 20 weeks unless there is a life-threatening medical emergency for the mother, such as in a situation where an abortion is threatened. Hence, regardless of whether a mother

¹⁹ *Supra* note 15.

²⁰ *Supra* note 12, §. 20.

²¹ *Suchita Srivastava and Anr. v. Chandigarh Administration*, (2009) 9 SCC 1.

²² *Supra* at 9.

²³ *Supra* at 11, §. 312.

²⁴ Indo-Asian News Service, *Gynecologists support Niketa Mehta on Abortion*, INDIA TODAY, August 7, 2008, <https://www.indiatoday.in/latest-headlines/story/gynaecologists-support-niketa-mehta-on-abortion-28070-2008-08-07> (last visited 20th May, 2021).

is determined to have a child with anencephaly or various deformities contradictory to life after birth, she will be compelled to keep the child once the time of pregnancy exceeds 20 weeks.

An exception to this rule came in 2015 when a 14-year-old rape survivor who was raped by her doctor. She got pregnant after the incident and approached the court for termination of pregnancy. The Supreme Court bench consisting of Justices A R Dave and Kurian Joseph laid down that the survivor can get operated if the panel of gynecologists and psychologist are satisfied after examining the survivor.²⁵ This case was an exception to the abortions laws and also recognized the trauma of that girl by giving a judgment different to the established rule.

Right to life is recognized in many human rights instruments. The Constitution of India under Article 21 recognizes the right to life encompasses both the right to health and the right to live in dignity. Both of these rights are violated by the MTP Act's 20-week restriction when women are forced to carry a pregnancy to term that jeopardizes their health. The right to have an abortion is an aspect of the right to privacy protected by Article 21 of the Constitution, according to the Supreme Court's historic *Puttaswamy* decision on the right to privacy.²⁶ This would include the right to self-determination in terms of one's health and body, as well as sexual and reproductive liberty.

1. Recent changes in the MTP Act

The Union Cabinet amended the 1971 Medical Termination of Pregnancy (MTP) Act in January 2020, enabling women to access abortions as part of their reproductive right. The change also elevates India to the top of the list of countries that support women who want to make their own decisions based on their own experiences and circumstances. The major change in the Act is the increase of time period to legally terminate the pregnancy. Earlier, the provision stated the upper limit to be 20 weeks, after the amendment the upper limit has been increased to 24 weeks. This amendment clearly increased the access to abortion but there still remains a flaw that a woman does not have the right to terminate pregnancy without the approval of medical expert or medical boards. Abortion still remains as a privilege given by the state because there is no clarity whether these medical boards will be established by the state government in each district or whether there will be only one medical board for the entire state. This raises further issues about women's access to these boards, especially in remote regions. These boards were not a component of the first MTP, and seems to have been presented

²⁵ *Landmark Judgement: 14-year-old rape survivor allowed to abort by Supreme Court*, Zee News, July 31, 2015, https://zeenews.india.com/news/india/landmark-judgement-14-year-old-rape-survivor-allowed-to-abort-by-supreme-court_1639133.html (last visited 21st May, 2021).

²⁶ *Justice KS Puttaswamy (Retd) & Anr. v. Union of India & Ors.*, AIR 2017 SC 4161 (2017).

because of a few Supreme Court and High Court orders where such boards were coordinated to be comprised as the courts lacked medical expertise.

It is fair to say that Indian courts have acknowledged a fetus for the purposes of Article 21, so far as it does not infringe on a woman's natural right to sexual autonomy, which is often subject to reasonable limitations. This is where comes the contradictory nature of this issue as it is hard to judge whether right of a woman to abort will prevail or right of the unborn to live. The Supreme Court of U.S. decided that a fetus isn't a person as per the Fourteenth Amendment to the U.S. Constitution. Nonetheless, the Court likewise kept up with that the state has an interest in securing the existence of a fetus after time of reasonability that is, after where the baby is fit for living external the womb. Thus, states were allowed to prohibit fetus removal in the third trimester of pregnancy with the exception of when the method is important to protect the existence of the mother. Similarly in India, the mere fact of being alive has no worth. If the parents know that there is risk in going ahead with the pregnancy then after the birth, the kid would not only have a compromised dependent life, but the rearing of the badly deformed child would increase the family's financial load, create emotional pain, and go against the cultural objective of family peace and togetherness. If the suffering itself is a breach of Article 21, the right not to be born can also be a legal right. The courts in India have so far been unable to establish if a flawed life with deformity, dependency and emotional stress is worse than non-existence.

VI. CONCLUSION

Abortion, whether socially, morally or legally, has been a topic for debate since longest of time. This issue was not region specific, every country had conflict about this issue at some point of time. India, on the lines of UK Abortion Act was relatively ahead to adopt MTP Act in 1971. However, the landmark *Roe v. Wade* judgement influenced abortion laws globally. International Conventions do recognize a woman's right to abort but there is no concrete recognition to the right of an unborn. Keeping aside the social and moral debate, there is still void regarding this in the legal spectrum. The MTP Act till 2020, approved termination only if the pregnancy was under the 20 weeks' time period. The only exception made to this rule was of the 2015 rape victim case.

In Missouri, U.S., there was a case regarding right of an unborn in which a woman accepted her use of marijuana during pregnancy and she was charged with criminal child endangerment. The state argued that her drug use directly endangered the unborn child.²⁷ These kinds of cases

²⁷ *Missouri v. Smith*, Jackson County Circuit Court, Case No. CR2000-00964 (Aug 10, 2002) at 2.

show that the unborn do have a right to life. However, in India we do not have any statute or law safeguarding the rights of an unborn. Unborn child is considered a legal person for the purposes of inheritance of property matters in some cases. The rights of the pregnant mother are extended to the unborn fetus under Article 21. The legislation also appears to be in stark contrast, since the law in the United States only authorizes governmental involvement after a point of “compelling interest.” Until then, a woman's freedom to make her own decisions about childbirth is unalienable. The MTP Act, on the other hand, restricts a woman's right to terminate a pregnancy. The recent amendment is in some way a progressive change but the ambiguity regarding medical boards still needs some clarity. There is a long way to go for the Indian judicial system to bring the necessary developments as its silence on the debate regarding mother or the unborn will keep causing new conflicts.

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