
LIBERTY OF BORN AND LIFE OF THE UNBORN

Mudra Singh

Research Scholar, School of Legal studies, Babu Banarasi Das University, Lucknow, U.P.

Durgesh Kumar Shukla

B.A.,LLB (Hons) - 10th Semester, Amity Law school, Amity University, Uttar Pradesh, (Lucknow Campus)

Abstract: A child is not aware as to what are his rights, may be, in the form of human rights or any other right. It is for the elders to protect the rights of a child. Violation of right starts from the date when a child is conceived. The anxiety on the part of the parents to know the sex of the child and to satisfy their concealed desire of having male child prompts them to have the sex determination. The paper shall discuss whether unborn foetuses or a child in the mother's womb are legal persons or not? The ambit of this research paper is confined to an analysis of various landmark judicial pronouncements.

Keywords: Unborn, Child, Human Right, Foetus.

Introduction:

"I am the child. All the world waits for my coming. All the earth watches with interest to see what I shall become. Civilization hangs in the balance. For what I am, the world of tomorrow will be, I am the child. You hold in your hand my destiny. You determine, largely, whether I shall succeed or fail. Give me, I pray you, these things that make for happiness. Train me, I beg you, that I may be a blessing to the world".¹

-Manie Gene Cole

What ultimately justifies the claim that there are human rights? What is the basis of central claim that such rights belong to human beings or persons as such simply in virtue of their humanity? It is in fact true that human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex etc. simply because he or she is a human being. Children are the supreme asset of any nation and nurturing them is our upper most duty. The greater dimension of human development lies in the working for the welfare of children. In particular the human right of unborn persons i.e. embryos, foetuses as against the rest of the people are more delicate, more essential, which requires special care and protection. . It has rightly been said that there cannot be worst violation of human rights of a child than not allowing him to born. Declining number of girls in the population is a matter of great concern to us.

Aristotle's Potentiality Principle² states that, "embryos and foetuses 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 foetus) which will come to have that property if it develops normally".

The Necessity of Protecting Unborn Child: It is important that privacy as a basic human right be protected against unreasonable governmental intrusion. However, the right to privacy is not an absolute right and at some point the state's interest in regulating abortion becomes sufficiently compelling in order to preserve the life of the unborn child and the integrity of family life by giving the pregnant woman an ultimate power to terminate her pregnancy against her husband's desire and interest in procreation.

Universally, the family has long been regarded as the basic foundation of a civilized society. In fact, a number of the U.S. Supreme Court dictums about the nature of constitutional privacy may be traced to the concern with protecting family life and the sanctity of marriage relationships. In *Skinner V. Oklahoma*³, the court held that: 'marriage and procreation are fundamental to the very existence of

survival of the race'. Marriage is not two couples finding pleasure in one another a value which exists in common life task. This life task is accomplished in the begetting and rearing of children.

The U.S. Supreme Court in **Roe v. Wade**⁴ considered that only after viability did the state acquire an interest in protecting the life of unborn child. Holding that, the unborn have never been recognized in the law as persons in the whole sense. The Court said: 'We need not resolve the difficult respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer viability as the Court observed, is somewhere between the twenty four and twenty eighth week of pregnancy. But, with regard to why the Court is not important and legitimate, the opinion of the Court is not satisfactory. To argue that the foetus before viability indicates that the court based the value of the life of the foetus on a false assumption, as there is no doubt that the foetus is a living being from a much earlier stage in pregnancy. As Harpwood has pointed out, 'there is clear visual evidence from ultrasound scans that the foetus is a fully formed baby with the potential for a long life before the end of the first trimester, and it has been confirmed that the genetic code of the individual is in place at conception⁵. The potential for life exists at the moment of conception, and it is now regular practice in most of the developed countries to allow the mother to see her foetus by means of ultrasound scan before 12 weeks gestation. This provides convincing evidence that the foetus is a living and moving being long before the time of quickening or viability. The United Nations Convention on the Right of the Child stated in 1989 that 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 the world Medical Association in the Declaration of Geneva also lays down the position of the unborn child: 'We will recognize the utmost respect for human life from the time of conception'⁶.

It follows that any justification for abortion should be based on arguments other than those attempting to determine the movement at which life begins. Hence, it is appropriate in order to resolve the abortion issue to struck a balance between the competing interests of the pregnant woman, the foetus, the father and the state. But, in any event, the argument that foetuses lack constitutional rights and are not recognized as persons is simply irrelevant. With the vast expansion of the concept of personal liberty, the right to privacy has also been accepted to be comprised therein and that such right of privacy would include the right to or not to bear or beget a child, the right to be or not to be a parent, the right to or not to use contraceptives, the right to or not to sterilize oneself, the right to have sex without the nuisance of a child, or to have child without the nuisance of sex by artificial insemination. The right has accordingly been held to include the right to stoppage of parenthood or motherhood in transit, i.e. the right to terminate pregnancy prematurely by aborting the foetus. But granting that the right to personal liberty to a women includes her right to terminate pregnancy. Now, the question is whether or not the exercise of such right would affect the right to life of the unborn child. The answer to this question would obviously depend on the answer to the two questions. (1) Whether or not an unborn child is a person within the meaning of the life, liberty clause in Article 21 and (2) Whether or not it has life. There is no doubt that a foetus or a child in mother's womb is not a natural person. But, there should be equally no doubt that it is a Juristic or Judicial person. In all jurisprudential jurisdictions, a child en ventre sa mere is recognized as a legal person capable of inheriting or otherwise acquiring and holding property and also other legal rights. Natural or juristic, is capable of acquiring those rights.

In India under the Hindu law a son is entitled to have reopened the partition of the ancestral property taking place while he was in the mother's womb without keeping any share reserved for him. In the law of wills, both in India and in England, a child in mother's womb is considered to be in existence and section 99 (i) of the Indian Succession Act, 1925 clearly provides that "all words expressive of relationship apply to a child in the womb who is afterwards born alive". The distinction made in the Indian Penal Code (Sections 312-316) between a woman with child, and a woman quick with child, and between the unborn child and quick unborn child goes to show that a woman is with child during the entire period of her pregnancy, and lexically as logically a child, is a person having life. This was pointed out by the Madras High Court in **Queen Empress V. Ademma**⁷.

A child in the womb is not a natural person but only a legal or juristic person. But it is not the law that only a natural person is entitled to the protection of the liberty & property clauses, and that a non-natural but legal person, like a statutory corporation or a company, has all along been treated as person within the meaning and protection of the equality clauses of the American and the Indian Constitution guaranteeing to every person equality before law and equal protection of the laws.

If a foetus or a child in the mother's womb, even though a non-natural person, is nevertheless a person within the meaning of the Vth or the XIV Amendment of the American constitution or Art.21 of the Indian Constitution then it obviously cannot be deprived of its life, if it has any, without due, that is, reasonable, right, just and fair process. This then brings us to second question, which is, does a child have life before birth while in the mother's womb or, to put it in other words, when does life begin?

Life beyond death may still be an enigma, philosophical or otherwise. But life before birth in the mother's womb is a physiological phenomenon.

It is true that at one time it was thought that fertilization process being a long one; it could not be ascertained with reasonable certainty as to when and at what particular moment the life commences. But it has now been accepted that life in a foetus does not commence from the stage viability only, but that it comes into existence even when it is in rudimentary or embryonic stage and from the time of, or at any rate, within seven to fourteen days of, fertilization. It has now been accepted by the medical and physiological scientists that the foetus starts to have spontaneous growth and development from the very beginning which are the surest and universally accepted criteria of life⁸.

If a foetus or the unborn child is a person in law, even if non-natural and if it has life, then its expulsion and consequential destruction by termination of pregnancy would involve violation of Fundamental Right to non-deprivation of life of any person, except according to due, just, right fair and reasonable process of law. And, therefore, at no stage of the pregnancy, a mother or a parent can be allowed to terminate pregnancy for the mere asking, unless Article 21 of the Constitution of India is suitably amended to provide clearly that "person" does not include an unborn child in the mother's womb.

Rights of Father in Relation to Abortions:

The U.S. Supreme Court in *Roe V Wade*⁹ and *Doe V. Bolton*¹⁰ expressly declined to decide whether there exists and right on the part of the father to participate in the abortion decision. The Court explicitly said:

"Neither in this opinion nor in Doe V. Bolton, past, do we discuss the father's right, if any exist in the constitutional context in the abortion decision. We are aware that some statutes recognize the father under certain circumstances... we need not to decide whether provision of this kind are constitutional".

Indeed, the father of the unborn has the right to protect the life of that child. This right is a fundamental human and natural right. The father's interest in his unborn child is a relational interest that derives value from the relationship of the parties as father and child. Richard Gilbert has pointed out that the law treats this relationship, as if, it were an entity unto itself¹¹. Therefore, on the ground of this relational interest some American Courts have interpreted wrongful death statutes to allow a parent to recover for the negligently caused death of the foetus.

However, the Supreme Court of the United States in *Planned Parenthood V. Danforth*¹², recognized the deep and proper concern and interest that a devoted husband has in his wife's pregnancy and in the growth and development of the foetus she is carrying. Nevertheless, the court further held that in as much as it is the woman who physically bears child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favour.

However, a father's consent in the abortion decision should not be required at the expense of woman's life or health. In such exigency a woman's physician must procure the abortion without seeking the father's consent. On the other hand, if according to a physician's judgment, a woman's life or health

would not be threatened by seeking a father's consent before procuring an abortion, then in such non-enignt circumstances it is necessary to allow the father to participate in the abortion decision in order to preserve harmony and stability in family life.

Conclusion: Every child has the right to be born in a socially safe environment and have a mother and a father. To avoid unwanted pregnancies young people should early enough be taught a responsible attitude in the establishment of a family and in getting own children. They have to be taught the basis of reproduction and be informed about family planning and contraception. Counselling ought to be accessible to all. It is recommended that those parents who so want can get relevant information about the health of their expected child. Expert counselling has always to be part of releasing information of the sickness or heritage of the unborn child.

References:

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