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Right of Abortion viz-a-viz Right to Life of Unborn

Abhishek Mantri¹

Abstract

The universe was built by God so that mankind may dwell there. One who has accepted the right to life that comes with being born in this cosmos. It is an inevitable truth which is accepted almost by all the countries and international organizations. It is an in rem right, which means it is a right against the entire world. Even the Bible asserts that since people were made in the image of God, they are unique among all other forms of life:

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

The right to life is the most crucial right for a human being. The cornerstone of freedom is recognition of the inherent dignity and equal and inalienable rights of all members of the human family. On the other hand, the phrase abortion is seen as a major taboo in society. Abortion is commonly used to refer to any induced procedure at any stage during a pregnancy; however, it is technically defined as a miscarriage or induced termination before twenty weeks gestation, which is deemed nonviable. In this paper, we shall contrast the right to abortion with the right to life of the unborn.

Keywords - *Abortion, right to life, Human Beings, God.*

I. Defining the Concept

Article 21² of the Indian Constitution protects the right of the people to live their lives with dignity and liberty. It is written as follows:

“No person shall be deprived of his life and personal liberty except according to procedure established by law”

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² The Indian Constitution, Article 21.

The Supreme Court of India, as the custodian of the basic rights established in Part III of the Indian Constitution, has taken every feasible action to defend citizens and their rights. The Supreme Court has given the phrase "*Right to Life*" a very broad application. This right includes every other right necessary for living a human existence, such as the freedom to move freely, the right to eat, the right to sleep, the right to privacy, and so on. Every act or conduct that denies or restricts someone's right to live should be outlawed unless justified by law, such as imposing the death sentence on an accused. Recognizing the importance of this right, the Supreme Court of India determined that Article 21 of the Indian Constitution does not include the "right to die," affirming the validity of Section 309 of the Indian Penal Code³ in the case of *Gyan Kaur v. State of Punjab*³. As a result, it is uncertain whether the right to abortion falls within the umbrella of the right to life.

II. What Exactly is Abortion?

The term abortion is defined by Black's Law Dictionary as follows:

*"The artificial or spontaneous termination of a pregnancy before the embryo or fetus can survive on its own outside a women's uterus"*⁴

In layman's terms, it may suggest that "*the kid in the mother's womb is not being permitted to come out into the world.*"

III. Human Rights and Abortion

Induced abortions have long been a source of debate and contention. The personal perspective of an individual on complex ethical, moral, and legal issues is directly tied to the individual's value system. A person's abortion view may be characterized as a combination of their own beliefs on the morality of induced abortion and the ethical limit of the government's legal jurisdiction.

³ *Gyan Kaur v. State of Punjab*, (1996) 2 SCC 648.

⁴ Black Law Dictionary, 2nd Edition.

Personal liberties such as the right to life, liberty, and the pursuit of happiness support a woman's right to have an abortion. The sexual and reproductive health of a woman influences her reproductive decisions. Reproductive rights are widely acknowledged to be critical to furthering women's human rights and encouraging development. Governments from all across the world have recognized and committed to greatly expand reproductive rights in recent years. Formal laws and regulations are important markers of how seriously the government considers reproductive rights progress. Every woman has an unalienable right to manage her body, sometimes known as "*bodily rights*".

IV. Case Related to Abortion as a Human Right

1. D. Rajeswari v. State of Tamil Nadu And Others⁵:

In this case, an unmarried 18-year-old girl is pleading with a judge to issue a directive ordering the termination of the child's pregnancy in her womb because carrying the unintended child for three months made her mentally ill, and that continuing the pregnancy has caused her great mental anguish and would seriously harm her mental health because the pregnancy was the result of rape. The court granted the plea to terminate the pregnancy.

2. Dr. Nisha Malviya and Anr. v. State of M.P.⁶:

The accused raped a juvenile girl around 12 and got her pregnant. According to the claims, two additional co-accused abducted this girl and aborted her pregnancy. Thus, the case against them is, first and foremost, inducing a miscarriage without the girl's permission. The Court found all three defendants guilty of terminating a pregnancy without the mother's or the girl's permission.

3. Murari Mohan Koley v. The State 2003⁷:

⁵ *D. Rajeswari v. State Of Tamil Nadu And Others*, Cri LJ 3795, 1996.

⁶ *Dr. Nisha Malviya and Anr. v. State of M.P.*, Cri LJ 671, 2000.

⁷ *Murari Mohan Koley v. The State*, C.R.R. Appeal No. 8, 2003.

In this case, a mother desired an abortion since she had a 6-month-old daughter. She requested an abortion from the petitioner. And the petitioner consented to it in exchange for anything. But, the woman's condition deteriorated at the hospital, and she was transferred to another facility. Yet, it ended in her death. The abortion was not carried out. In order to be exempt from criminal prosecution under Section 3 of the MTP Act, 1971, the petitioner, a licenced medical professional, had to show that his actions (including omissions) were taken in good faith.

4. Shri Bhagwan Katariya And Others v. State of M.P⁸:

Abortion without the permission of the mother 2000. Navneet was the woman's husband. Applicants are Navneet's younger brothers, whereas Bhagwan Katariya is Navneet's father. When the complainant became pregnant, her husband and other family members took offence, brought her for an abortion, and had the abortion performed without her permission. Section 3 of the Medical Termination of Pregnancy Act, 1971 says that, "*a doctor is entitled to terminate the pregnancy under certain circumstances, and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that it could not be done without the woman's consent*". In this scenario, the woman's heart and soul have been permanently scarred by the loss of her kid. And the Doctor will be held responsible. Hence, the case laws demonstrate that a woman has an absolute right to abortion, which no one may deny her. The judiciary has played a critical role in ensuring women's rights. Abortion is a fundamental right to privacy.

V. Unborn Child's Right to Life

'Aristotle's Potentiality' Principle⁹ states that:

⁸ *Shri Bhagwan Katariya and Others v. State of M.P.*, (4) MPHT 20 CG, 2001.

⁹ O. Morgan, M. Lynn, *The Potentiality Principle from Aristotle to Abortion*, Published by 'The University of Chicago Press'.

“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 Meslin¹⁰ 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’.

In a mother’s womb the unborn child’s status is of ‘fetuses. The term ‘fetus’ is define under Section 2(bc) of the PCPNDT Act¹¹ 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 fetus and the status remains till the birth take place. Further, the definition starts from the expression ‘human organism’. It means that a fetus is a human organism.

¹⁰ An emeritus professor and former president of the ‘Université de Paris-Sorbonne’ (1926-2010).

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

However, in the famous case on 'Right of abortion' decided by the United States Supreme Court¹² it had been observed:

“The word person does not include the unborn child and the question when does the life begins 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 define an unborn child as legal person by fiction. An unborn acquires right 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 right 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 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.

VI. Right to Abortion of the Mother v. Right to Life of the Unborn

Religious, moral, and cultural sensibilities continue to influence abortion laws throughout the world. The right to life, the right to liberty, and the

¹² *Roe v. Wade*, 410 US 113, 1973.

right to security of person are major issues of human rights that are sometimes used as justification for the existence or the absence of laws controlling abortion. Many countries in which abortion is legal require that certain criteria be met in order for an abortion to be obtained, often, but not always, using a trimester-based system to regulate the window in which abortion is still legal to perform. In this debate, arguments presented in favor of or against abortion focus on either the moral permissibility of an induced abortion, or justification of laws permitting or restricting abortion. Arguments on morality and legality tend to collide and combine, complicating the issue at hand. Abortion debates, especially pertaining to abortion laws, are often spearheaded by advocacy groups belonging to one of two camps. Most often those in favor of legal prohibition of abortion describe themselves as pro-life while those against legal restrictions on abortion describe themselves as pro-choice. Both are used to indicate the central principles in arguments for and against abortion: "Is the fetus a human being with a fundamental right to life" for pro-life advocates, and, for those who are pro-choice, "*Does a woman have the right to choose whether or not to have an abortion*".

VII. 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 get reduce and it becomes weak enough and fail to bestow 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 fetus has no interest before the third trimester. A fetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed

before¹³. 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 a 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 woman whose pregnancy period exceeded twenty-four weeks and then she came to know that her child has some abnormalities which cannot be cured and then the woman decided not to have that child. Nevertheless, the Supreme Court of India forbade the ladies from having an abortion, which led to the lady miscarrying due to her extreme despair at having an abnormal kid. Nevertheless, the MTP Act permits a woman to have an abortion if her pregnancy has lasted longer than 24 weeks as long as the medical superintendent is of the view that failing to have the abortion would pose a substantial threat to the mother's life.

¹³ Ronald Dworkin, *Freedom's Law: The moral reading of the American constitution*, 90 (Oxford University Press Ed., 1999).