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MANGALURU - 575 003.

(NAAC Re-accredited B++ CGPA 2.9)

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Shri Dharmasthala Manjunatheshwara Educational Society (R.), Ujire, D.K.

Legal Opus

Issue No. 12
July 2019



LEGALPERSON UNDER TRANSFER OF PROPERTY ACT- A LEGAL DIMENSION

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Right is concept which automatically resembles when person suits into this world of properties which is enjoyable only who vests it. But for the unborn persons, the issue is between human hood and thing hood. An unborn child is not a person in the eye of law, hence not capable of having fundamental and human rights and therefore devoid of effective legal protection². The right of the unborn to live and to In-born, many a time conflicts with the right of a woman to control her body, to make a choice about her life and her right to privacy. The woman who carries this tiny being is not its only rival; there are more issues of settling third part liabilities, both civil and criminal as against the unborn victims of injury and violence. The issue is one of identifying and recognizing the "trump card"³ in the pack of rights.

The Legal concept of Person

A person is any being whom law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man⁴. The fact that human beings alone are considered to be natural persons is based on certain notions⁵. This can be illustrated in the form of a logical inference as follows:

Analyse - a) Rights and duties in here in those beings that have the ability to choose

Analyse - b) Human beings alone have the ability to make a choice

Inference: Human beings alone have rights and duties

Correction to the inference: Only those human beings who have the ability to make a choice have rights and duties.

This jurisprudence of personhood is of utility when man's power to make a choice, that is rationality, is a condition precedent to assume obligations and rights arising out of agreements. In this context personhood denotes legal capacity and not the

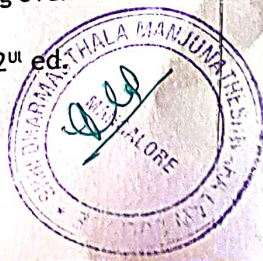
¹ Assistant Professor, SDM Law College, Mangaluru.

² See Durga Das Basu, Human Rights in Constitutional Law (Wadhwa & Co., Nagpur, 2nd ed. 2003) 74

³ See generally Ronald Dworkin, Taking Rights Seriously (Universal Law Publishing Co. Pvt Ltd., Delhi, 2nd Indian Reprint 1999). Prof. Dworkin draws the analogy of right being a trump card prevailing over all other lesser rights.

⁴ P. J. Fitzgerald, Salmond on Jurisprudence (Universal Law Publishing Co. Pvt Ltd., Delhi, 12th ed. Indian Reprint 2004) 299

⁵ See Ibid 298



personality inherent in a human being. No legal system founded on the principles of justice and liberty will mandate such a pre requisite to citizens' entitlement to fundamental and human rights. However when it comes to the legal status of an unborn child, it is submitted that, the legal systems have adopted a fluid perspective.

The Legal objects of Status of the Unborn Child: A Legal research

Anomaly and inconsistency prevail in the various aspects and branches of law, wherever the legal status of the unborn is dealt with.

Property Law

For property matters, the child in the mother's womb (and even the child yet to be conceive is given personhood to a great extent ensuring the legal capacity to own/inherit property. The Transfer of Property Act, 1882 makes it permissible subject to conditions, the creation of an interest for the benefit of a person not in existence at the date of transfer.⁶ Also, the Indian Succession Act, 1925 allows a bequeathal to be made in favour of a person not in existence at the time of testator's death⁷. The Hindu Succession Act, 1956 has conferred a right to succeed to the father's estate on a child who was in the mother's womb when the father died intestate.⁸

Section 20, Hindu Succession Act, 1956

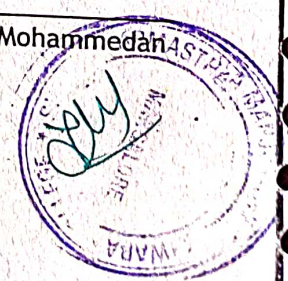
Under the Hindu Law, a child in the mother's womb is treated as a coparcener and a share is kept reserved if the pregnancy is known at the time of partition. In case when a share is not so reserved or when the pregnancy was not known, the unborn son after birth is entitled to demand re-opening of partition.

It is submitted that these provisions are incorporated to avoid confusions relating to property and has very less to do with the right to be born of the child in the womb. The rights of an unborn person, whether proprietary or personal, are all contingent on his being born alive. The legal personality attributed to him by way of anticipation falls away *ab initio* if he never takes his place among the living⁹

Criminal Law

The Indian Penal Code addresses offences relating to miscarriage, subject to the overriding effect of Medical Termination of Pregnancy Act, 1971. Special reference is made to Section 312 of the Indian Penal Code¹⁰ which makes causing miscarriage an offence punishable under the code. The Explanation to the same section specifies that a woman, who causes herself to miscarry, is within the meaning of the section. The maximum punishment varies in case the woman be quick with the child and otherwise.

⁶ Section 13, Transfer of Property Act, 1882. This section does not apply to Muslims as Mohammedan law strictly prohibits any gift to an unborn person.
⁷ Section 11, Indian Succession Act, 1925
⁸ Section 20, Hindu Succession Act, 1956
⁹ Supra n. 3 at 298
¹⁰ Sections 312-316, Indian Penal Code, 1860

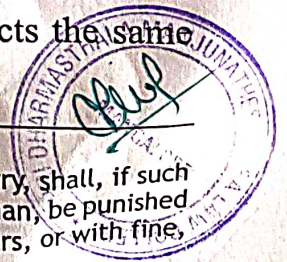


It is evident that the law is attempting to give a greater weightage here to the foetus during the later months of gestation as compared to the first months. It is also to be noticed that all these provisions dealing with miscarriage uses the word "child" instead of words like 'fetus' or 'embryo' which all tend to denote a formative stage of the human being, something less than .1 human. However it is regrettable that no minimum punishment was prescribed for these offences, and thereby reduced child destruction to a crime, but not equivalent to murder or manslaughter. However by virtue of the Medical Termination of Pregnancy Act 1971, as amended in 2002, a minimum punishment of two years rigorous imprisonment is prescribed, thereby modifying Section 312 of Indian Penal Code as well.

It is pertinent to point out Section 416 of the Criminal Procedure Code which states that "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if thinks fit commute the sentence to imprisonment for life." ¹¹ It is submitted that this provision is directly aimed at protecting the life of the unborn child, irrespective of the gestation period and affords full-fledged recognition of the unborn child, the fetus, the embryo or whatever cellular stage it may be in, as a human being who cannot be deprived of his right to life. The principle embodied in this provision is obvious; carrying out the execution would take two human lives, including one convicted of no crime. Here the law considers the unborn child as an independent personality and not as a limb of the mother. However if the mother (prisoner- convict) decides to end her pregnancy subject to the Medical Termination of Pregnancy Act, law will step aside and allow the unborn child to be killed and thereby pregnancy be put to an end. If at all any claim of independent human existence of the unborn is raised by someone ('The Petitioner', let us assume is an NGO bearing the name Society for the Protection of the Unborn Child), law will shy away from the petitioner and will oblige by the wishes of the prisoner woman, her privacy rights, her human right to make a choice and decide about her body and her liberty.

When law decides to protect the interests of the woman in the above illustration, it is appreciable that even a prisoner's liberty is safeguarded under our democracy. What one fails to decipher here is the legal reasoning, the logic in considering the rights of the woman without facing the question of right to life of the unborn child. To uphold the mother's right over and above that of the fetus is not in fact the point in dispute, as priorities can be rightly set by law. The issue is one of considering the unborn as invisible with respect to medical termination of pregnancy and protects the same being from execution under S.416 of the Criminal Procedure Code.

¹¹ Section 312 states that: "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with the child, shall be punished with



Medical Termination of Pregnancy Act, 1971

It appears from the Statement of Objects of the Act that this law aims at liberalizing the provisions of Indian Penal Code relating to miscarriage, to extend efficient medical facilities to a woman in need of abortion and thereby prevent "avoidable wastage of mother's health, strength and sometimes life" which happens when their pregnant uteri are tampered with by inefficient hands. The Statement of Objects justifies this liberalized stand by stating that "Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy".

The MTP Act allows medical termination of pregnancy, notwithstanding the Indian Penal Code¹². Medical termination of pregnancy can be lawfully done only by a registered medical practitioner¹³ at a place approved for this purpose by the government or at a government hospital¹⁴. The consent of the woman is compulsory, and if the woman has not attained the age of 18 years and where the woman is a mentally ill person, the written consent of the guardian is necessary¹⁵.

The Act seeks to liberalize medical termination of pregnancy in three cases. Firstly, as a health measure when there is danger to the life or risk to physical or mental health of the woman¹⁶; Secondly, on humanitarian grounds such as when pregnancy arises from a sex crime like rape¹⁷, and Thirdly, on eugenic grounds where there is substantial risk that the child, if born, would suffer from physical or mental abnormalities to be seriously handicapped¹⁸. The assessment of these grounds is left to the opinion formed in good faith of one registered medical practitioner if the pregnancy is less than 12 weeks¹⁹ and of two registered medical practitioners if the pregnancy is more than 12 weeks but does not exceed 20 weeks²⁰. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.²¹ Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such *unwanted pregnancy* may be presumed to constitute a grave injury to the mental health of the pregnant woman²².

¹² See Article 6 of International Covenant on Civil and Political Rights, 1966. Similar provision was contained in Sentence of Death (Expectant Mothers) Act, 1931 (repealed in 1998 following the abolishing of death penalty in UK) and in Innocent Child Protection Act, 2000 of U.S.A.

¹³ S.3(l), Medical Termination of Pregnancy Act, 1971

¹⁴ S.4, Medical Termination of Pregnancy Act, 1971

¹⁵ Section 3(4), Medical Termination of Pregnancy Act, 1971

¹⁶ Section 3(2)(i), Medical Termination of Pregnancy Act, 1971

¹⁷ Explanation 1 to Section 3(2), Medical Termination of Pregnancy Act, 1971

¹⁸ Section 3(2)(ii), Medical Termination of Pregnancy Act, 1971

¹⁹ Section 3(2)(a), Medical Termination of Pregnancy Act, 1971

²⁰ Section 3(2)(b), Medical Termination of Pregnancy Act, 1971

²¹ Explanation I to Section 3 of Medical termination of Pregnancy Act, 1971

²² Explanation II to Section 3 of Medical termination of Pregnancy Act, 1971. (emphasis supplied)



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If the pregnancy exceeds 20 weeks, it could be terminated only when the registered medical practitioner is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman²³. Here again, the consent of the woman or guardian, as the case may be is necessary.

The MTP Act vis a vis the Legal Status of the Unborn

It is strange that in a country where right to life is a guaranteed fundamental right under the Constitution and where the higher judiciary has expanded this right to include all rights that go to make life meaningful, such wide and unguided discretionary power is granted to one or two registered medical practitioners to form an opinion in good faith and thereby put an end to a growing life in the womb. Whenever a woman alleges rape, it shall be presumed that the pregnancy results in grave injury to her mental health. In all cases of unwed pregnancy, this will be the projected ground for medical termination of pregnancy. Where the pregnancy is posed as the result of the failure of family planning scheme adopted by the married couple, grave injury to the mental health of the woman may be presumed.

This is allowing married men and women to choose whether to want the pregnancy or stop the unwanted pregnancy after pregnancy has occurred. Whether they had in fact used any device or method or if used whether it was used to limit the number of children are all matters which are to be accepted at the face value. So the Act is in liberalizing the right of the married couple to kill the unborn child up to a gestation period of weeks. The ground on which opinion is to be formed is the same where the pregnancy is up to 1 weeks or up to 20 weeks, except that the latter requires the opinion of two registered medical practitioners. Even though the Act uses the look good title, "Medical Termination of Pregnant) Act", things don't look that good when one understands that no pregnancy can be terminated otherwise than by killing the growing fetus, or rather a child.

When the Act allows the killing of a 'wrongly' formed child in the womb on the apprehension of the child being seriously handicapped the rationale behind this provision is not very clear. The following assumptions may be drawn:

Assumption 1: For the convenience of the parents

Assumption 2: In the lines of euthanasia

Assumption 3: For the betterment of human race by eliminating bad genetic outcome.

Law should be clear on this point. Whatever be the assumption drawn, none of those have a logical standing, if the gestation period crosses 20 weeks. And for the same reason, they fail, as they cannot be a ground to medically terminate the life of a handicapped newborn baby. It is submitted that the whole rationale behind this legislative attitude is founded on the disrespect and intolerance towards handicapped humans. This law is lacking in clarity of purpose, contains no measure to prevent

²³ Section 5, Medical Termination of Pregnancy Act, 1971

abuse of the permissible scheme, disrespects human life and dignity of the human person, allows the destiny of the unborn person to be subject to the arbitrary choice of the woman and allots unguided power to registered medical practitioners. This law is founded on the basic premise that the unborn child is not a person and therefore does not deserve to be granted any legal protection at all. By calling a human fetus as an unwanted pregnancy, the viable human existence of the unborn child is conveniently forgotten.

International Human Rights Documents

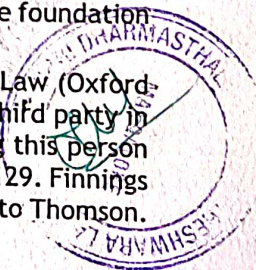
The important human rights documents mentions about "all members of the human family"²⁴. "Article 3 of the Universal Declaration of Human Rights declares that everyone has the the right to life, liberty and security of the person and Article 6 asserts that everyone has the right to recognition everywhere as a person before the law. The Declaration of the Rights of the Child & the Convention on the Rights of the Child proclaims in the Preamble 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." Principle 4 of the Declaration reads thus: "The child shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care." Article 6 of the Convention states that "States Parties recognize that every child has the inherent right to life" and calls upon the Sates Parties to ensure to the maximum extent possible the survival and development of the child and appropriate pre-natal and post-natal health care for mothers.

Why is the Unborn Invisible to Law?

Acknowledging the legal personality of the unborn child, would appear to be against the right to abortion of the woman. And taking away that right is not appropriate in a democracy recognizing the liberty of the woman over her own person. It is true that the fetus requires a woman's body to complete its development and become viable enough to be born into the world. But it is wrong to consider the child as a trespasser into one's body²⁵, because in a vast majority of cases, the woman is responsible for her pregnancy. Like how the woman has a right over her body, the child has a right over his body, which of course is not part of his mother's body. If at all law permits one right to prevail over the other, which law can rightfully do, it should be on sound lines of reasoning and of course to apply in limited contexts.

²⁴ Preambles of Universal Declaration of Human Rights, International Convention on Civil and Political Rights and Convention on the Rights of the Child states : "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

²⁵ See J.J. Thomson, "A Defence of Abortion" in R.M. Dworkin (ed.), *The Philosophy of Law* (Oxford: University Press, 1977) 112. Thomson uses a lot of rhetoric like equating a child as a third party in the mother's house, and claims that the woman should be given all liberty to unplug this person from the mother's body. But see J. Finnings, "The Rights and Wrongs of Abortion", *ibid* 129. Finnings examines the issue from a Hohfeldian analysis of rights and renders a tit for tat reply to Thomson.



The consequence of denying legal personality to the unborn with the sole objective of addressing the superior rights of the woman is far reaching, abominable and devoid of respect for human dignity. This will deny to the fetus even a right to burial which every human being is entitled to, thereby making its mortal remains treated like any other biological waste. If a pregnant woman is murdered, the offender fetches punishment only for the murder of the woman, and not of the child. If a child in the womb dies as a result of violence inflicted upon the woman, the offender cannot be punished for the death of the unborn, as far as the offender is ignorant about the fact of pregnancy.

It is worthwhile to mention the Unborn Victims of Violence Act, 2004²⁶, of the United States which recognizes that when a criminal attacks a pregnant woman, and injures or kills both her and her unborn child, he has claimed two human victims. The law covers the "child in uterus," defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." However, the law explicitly provides that it does not apply to any abortion to which a woman has consented, to any act of the mother herself (legal or illegal), or to any form of medical treatment.

In the area of civil liability the age old dictum was that a child is entitled to compensation for injury caused to it while it was in the mother's womb, provided the child is born alive.²⁷ However a change is discerned in the decision of the Maharashtra State Consumer Reddressal Commission²⁸ where a fetus was held to be a consumer. In an insurance claim made by the mother for the loss of her unborn child of seven months gestation, the Commission took note of the American law²⁹ and ruled that the unborn child in the womb is living and entitled to personhood and thereby held that the claim in respect of the unborn child was maintainable.

Lastly, the denial of legal personality to the unborn will bring in a lot of uncertainty over its legal status. If the unborn child is not granted personhood, does the status amount to thinghood? If so, can the unborn be the subject matter of ownership? Or is the status a *suigeneris*, a unique class of its own. Law should not shy away from answering this crucial question which alone can put to rest the rights controversy.

Conclusion

To compromise the concept of person and unborn person ,Various principles and norms denying personhood to an unborn child prevail even in this era of resonance of human rights. Law needs to be changed to acknowledge the legal existence of the unborn child. The fact that the unborn child is physically dependent on its mother

²⁶ Enacted by the Senate and the House of Representatives of the United States of America on 20th January 2004, this Act is also known as "Laci & Conner's Law". See http://www.nrlc.org/Unborn_victims/index.html

²⁷ See Supra n. 3 at 304

²⁸ KantaMohanlalKotecha v. Branch Manager, United India Insurance Co. Ltd. The pronouncement was made on Nov. 6, 2006 from Justice B.B. Vagyani. See Times News Network March 5th and 6th 2007

²⁹ Unborn Victims of Violence Act, 2004



prior to birth need not lead to the assumption that it has no relevant separate existence or to the assumption that it has no moral or legal significance.³⁰ The child in the mother's womb, being very much a member of the human family ought to be granted entitlement to basic human rights. As between the unborn child and a third party, absolute personhood is to be granted to the unborn child. It is submitted that such a measure would ensure a duty of care towards the unborn child imposing tortious liability, not only on the mother but also on third parties in all cases of negligence including environmental pollution by industries.³¹ As between the woman and the child in her uterus, law has to fix clear standards as to when the rights and liberties of the woman as a person may prevail over the right to be born of the unborn child. Any law which permits medical termination of pregnancy has to have due regard to the gestational development of the unborn child and allow termination of pregnancy as an exception to the right to be born of the unborn child. Whenever choice is to prevail over life, law has to make sure that the choice is not an arbitrary choice.

* * * * *

³⁰ Jane E.S. Fortin, "Legal Protection for the Unborn Child", 51 Mod. L. Rev. (1988) 54 at 82. Fortin suggests that a distinction should be drawn between the early human embryo and a foetus of more than 10 weeks gestational development only the latter meriting recognition as a human being.

³¹ It may be noted that in *Union Carbide Corporation v. Union of India* AIR 1992 SC 248, damages was a wan led to children born with abnormalities after inhaling the highly toxic gases.

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ISBN 9789353355616
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