

## **Hot Topic:**

### ***Legal Rights of the fetus***

**Alka Kuthe\*, Divyangee Kuthe \*\***

*\*Practicing Obstetrician, Amravati, Zonal Chairman IMLEA, \*\*Resident, Dept of Surgery Bombay Port Trust Hospital.*

**Corresponding Author::** Alka Kuthe, Practicing Obstetrician, Amravati, Zonal Chairman IMLEA, Amravati, Maharashtra. E-mail: [alkakuthe@yahoo.com](mailto:alkakuthe@yahoo.com)

**Received:** 11, March, 2019; **Reviewed:** 3 May 2019; **Accepted:** 9, May, 2019.

**Citation of article:** Alka Kuthe, Divyangee Kuthe .*Legal Rights of the fetus* ; New Indian Journal of Pediatrics, 2019;8.3.

**Key words:** *Fetal Rights, Human Rights, Legal Rights, MTP Act*

**Introduction:**The rights of the fetus are one of the most fascinating interfaces between medical science, morality and law. New issues and grey areas will always be there since till we are not able to define what really ‘**life**’ means and when does it really start? We may come across the questions: Who is ‘**fetus**’? Is it same as the ‘**unborn**’? Who is ‘unborn’?

- a) The already conceived entity within its mother’s womb, or
- b) The yet to be conceived hypothetical entity.

**Definition of fetus:**

“ A living entity that comes into being as the result of the fertilization(in vivo or in vitro) of a human egg by a sperm and that develops in the uterus of a woman or that is physically separated from a woman’s body, but is capable of surviving outside the uterus to some extent.” (1)

**The Rights of Unborn:**

*The right of any unborn human fetus, which is generally a developing human from roughly eight weeks after conception to birth includes;* like other categories such as **Civil Rights** and **Human Rights**, fetal rights embraces a complex variety of topics and issues involving; a number of areas of the law, including criminal, health care, employment and Family Law. (2)

**Medico-legally what can be rights of the fetus?**

- 1)Right of being born alive?
- 2)Right of being born with healthy life (mentally & physically)?
- 3) Right not to be born?

If fetus is considered for legal rights then a question arises whether the fetus has legal status? To have legal status the living entity has to be a person or a human being or a potential human being. Then the question arises, whether the fetus a legal person?

The fetus can have following possible legal status.

- A) Full legal subject on par with persons, already born, with full legal rights.
- B) Limited legal subject, the criminalization of feticide without allowing tortuous cause of action.
- C) Treatment of the fetus as a legal subject conditional upon birth or viability.
- D) Deserving of special protection under the law.
- E) Treatment of the fetus as a mere object. Countries differ in status of fetus under different laws.

### **Indian Scenario:**

Before M.T.P. Act, I.P.C. Section 312 defined miscarriage as termination:

- A) Before or after quickening.
- B) With or without mother's knowledge.
- C) By accident or negligence.
- D) With intent.

(I.P.C. Section 313, 315, 316, 304-A) & this was criminally punishable.

After the M.T.P. Act this situation was changed. Now the medical termination of pregnancy is allowed only if it is necessary & only under certain conditions. **(3)** It is interesting to note that rights of unborn under the Law of Tort are recognized in India too.

### **International Scenario:**

Historically, under both English Common Law and U.S. law, the fetus has not been recognized as a person with full rights. Instead, legal rights have centered on the mother, with the fetus treated as a part of her. Nevertheless, U.S. law has in certain instances granted the fetus limited rights, particularly as medical science has made it increasingly possible to directly view, monitor, diagnose, and treat the fetus as a patient.

The Supreme Court in the landmark 1973 Abortion case *ROE V. WADE*, **410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147** ruled that a woman has a constitutionally guaranteed unqualified right to abortion in the first trimester of her pregnancy. She

also has a right to terminate a pregnancy in the second trimester, although the state may limit that right when the procedure poses a health risk to the mother that is greater than the risk of carrying the fetus to term. In making its decision, the Court ruled that a fetus is not a person under the terms of the Fourteenth Amendment to the U.S. Constitution. However, the Court also maintained that the state has an interest in protecting the life of a fetus after period of viability- that is, after the point at which the fetus is capable of living outside the womb. As a result, states were permitted to outlaw abortion in the third trimester of pregnancy except when the procedure is necessary to preserve the life of the mother.

### **Forced Cesarean Sections:**

Because of improvements in fetal monitoring and surgical techniques, physicians increasingly recommend that women give birth by cesarean section. A number of legal questions, such as should a woman be forced to undergo a cesarean section or other surgery in the interest of the health of the fetus? To what extent is a woman obligated to follow the advice of her physician regarding the medical care of her fetus? **From 1981 to 1986, thirteen of fifteen cases, courts decided to require cesarean section. In one such land mark judgment(S *Jefferson v. Griffin Spalding County Hospital Authority*, 1981 the Georgia) Supreme Court held that an expectant mother in her last weeks of pregnancy did not have the right to refuse surgery or other medical treatment if the life of the unborn child was at stake.** Later court decisions, however, increasingly recognized a pregnant woman's right to refuse medical treatment. The American Medical Association has reminded physicians that their duty is to enable pregnant woman to make an informed decision about her fetus and they should not attempt to influence her decision or force a recommended procedure upon her.

### **Drug Use by the Mother**

The use of illegal drugs such as cocaine and heroin can have a devastating effect on the health of a fetus. By the early 1990s, it was estimated that 375,000 children were born annually in the United States suffering from the effects of illegal drugs taken by their mother. As a result, some states have held women criminally liable for any use of illegal drugs that harms their fetus. Cocaine for example is especially harmful to a fetus, often causing premature birth, significant deformities and ailments, and even death. Critics argued that such prosecutions deter at-risk

women from seeking prenatal care, increasing the likelihood of harm to the fetus. Despite many arguments, the Fifth District Court of Appeals, in Florida, upheld one such conviction. States will continue to struggle with this issue as they seek to achieve the best balance between maternal and fetal rights. States will also have to consider whether or not to hold criminally liable women whose use of legal substances such as alcohol or tobacco harms the fetus.

### **Thalidomide Disaster:**

Thalidomide was synthesized in West Germany in 1954 by Chemie Grünenthal as an Anticonvulsant drug. It was hailed as a "**wonder drug**" that provided a "safe, sound sleep". It was used as a sedative that was found to be effective when given to pregnant women to combat many of the symptoms associated with morning sickness. It was not realized that thalidomide molecules could cross the placental wall affecting the fetus until it was too late. When thalidomide was taken during pregnancy (particularly during a specific window of time in the first trimester) it caused startling birth malformations, and death in babies. (4) Any part of the fetus that was in development at the time of ingestion could be affected. For those babies who survived, birth defects included: deafness, blindness, disfigurement, cleft palate, many other internal disabilities, and of course the disabilities most associated with thalidomide: phocomelia. Increasing number of well documented cases in which the mother had definitely taken thalidomide in early pregnancy was found. Thus from the above tragic consequences which attracted attention of so many NGOs & medical experts one can come to a conclusion that merely prescribing drugs to pregnant woman for alleviating her symptoms is not sufficient. Care has to be taken about the safety of the drug both for the mother & the unborn. Similar consequences occurred after Bhopal Gas Leakage tragedy.

### **The M.T.P. Act & the rights of mother v rights of unborn fetus:**

Before discussing the debatable issue, let us study the case law. **Dr. Datar, Mr. X and Mrs. X v. Union of India (AIR 2008)**, in this particular case a 24 weeks pregnant patient was forced to carry a pregnancy to term that medical experts had testified that could end in fetal demise or result in the birth of a child with a seriously compromised quality of life. Since the pregnancy was beyond the legal limit, as per the Medical Termination of Pregnancy Act, 1971 the Bombay High

Court denied the request made by patient, her husband, and Dr. Datar, failing to recognize the severe mental anguish suffered by patient.

### **Why this case is important?**

- 1) It addresses the physical and mental trauma that may be experienced by women who are diagnosed with severe fetal abnormalities but are denied the choice to continue or terminate the pregnancy.
- 2) It also reveals the ethical dilemma faced by doctors who are unable to act in the best interest of their patients because their hands are tied by the law.

The International Federation of Gynecology and Obstetrics (FIGO) emphasize that, “the decision to terminate a pregnancy should rest primarily with the parents.”(5)

### **What are the issues that need to be discussed?**

- 1) Under the Indian Constitution the right to life includes both the right to health and the right to have a dignified existence. With 20-week restriction in the MTP Act both of these rights are violated when women are compelled to carry a pregnancy to term that compromise their health. Denial of access would lead to grave injury to mental health of a woman who is forced to carry disabled pregnancy and would constitute violations of the right to freedom from cruel, inhuman, and degrading treatment, as well as the rights to life, health, and non-discrimination.
- 2) The right to safe and legal abortion is a human right. In 2005, the Human Rights Committee held that denial of abortion in severely malformed fetus violates a pregnant woman’s reproductive right by causing foreseeable & preventable mental distress.
- 3) An abortion law that lacks a health exception throughout pregnancy interferes with providers’ ability to ethically provide the best quality of care for their patients, including care needed to prevent foreseeable harm to pregnant women’s lives and health.
- 4) If the fetus has legal status & thereby has a legal right of being born alive then giving permission for its termination at any stage of pregnancy would cause violation of this right.

5) The fetal right of being born alive has to be matched with right of being born with mentally & physically healthy life. If the permission to terminate the pregnancy is not granted as in the above case then it would result in the birth of a malformed child who will lead miserable life throughout his existence. Then can it be called as quality dignified life as per Article 21 of our Constitution? Mere existence has got no value. The child not only would lead compromised dependant life but after giving birth, the upbringing of the severely malformed child would increase economical burden on the family & would be a cause of mental anguish & against the societal goal of family harmony & unity.

6) Right not to be born can also be legal right if the suffering itself is violation of Article 21; courts till now are unable to decide whether defective life is worse than non-existence?

This discussion is open for all. There is a need of humanitarian approach & balanced decision.

### **Current Status:**

The Supreme Court is examining the petition including a compilation of 20 different countries. The Indian Ministry of Health is reviewing the MTP Act.

### **Recent Judgment by the House of Lords:**

Protection of frozen or pre-embryo: Supreme Court of Tennessee: Embryos were not persons under the law but neither were they property, rather they were something in between, deserving of special respect. Now pre-fertilization agreements are a necessity by law. (1)

### **Fetal Protection Policies:**

Fetal protection policies bar fertile women from specific jobs out of fear that those jobs may cause harm to any embryos or fetuses the women might be carrying. These policies came into widespread use by many companies during the 1970s and 1980s, before a 1991 U.S. Supreme Court decision that declared them a form of sexual discrimination that causes violation of Civil Rights Act of 1964. As far as India is concerned, the policies are found to be applied in the industrial set up so as to avoid women working in the dangerous occupations but for that they have to compromise in terms of salary. They need special recognition so that unborn fetus will receive equal attention.

Thus rights of the fetus though remains ignored area till now should receive consideration in present era of limited family norm & quality life as enshrined in Article 21.

### **Declaration:**

**Contribution of authors:** All authors participated in the analysis of the presented case report.

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