

Rights of the Unborn : A Human Right Agenda

Prof.(Dr.) Binayak Patnaik¹

I. Concept of Human Rights:

“The future of humanity depends on winning respect for human rights.”

The achievement of democracy & development must be based on universal respect for human rights. Human rights are those basic rights which every human being is entitled to enjoy. The earlier expressions “natural rights” and “rights of man” are replaced by the present concept “Human Rights”. The Universal Declaration of Human Rights, 1948 is the international statement of Human Rights. This document contains two sets of rights namely 1. Civil & Political 2. Economic, Social & Cultural. These two sets of rights give all people “freedom from fear and want” and form the “foundation of freedom, justice and peace in the world” and therefore should be protected by all groups. The full range of human rights, which all cross-sections of humanity including vulnerable sections need, must be respected as equal and inalienable birth right of the people without discrimination. The most vulnerable section is the “unborn”.

So the new agenda today is the “Human rights of the Unborn” which should be recognised and demarcated in the International as well as national legal instruments.

II. Concept of Unborn :

According to World Medical Association- “The life of an individual human being begins with conception and ends with death.”

It is clear from medical evidence that a pre-born is a human being from the time of conception. The little heart beats in between 18th to 24th day. All organs are present from 8th week. Vigorous activity starts from 12th week. So the unborn child is not a part of his or her mother but a unique human being- distinct from the mother / parents, genetically, physically, organically. So to deny personhood to the foetus is arbitrary and against the evidence of moderns genetics and embryology and against ethics and law as well. To deny personhood to foetus is dangerous not only to foetus but to all of us.

In USA, in various court decisions the foetus has been considered as living person.²

¹ Director, Shri Vaishnav Institute of Law, Indore

In an important judgment³ US Supreme Court modified the stand taken in Roe case⁴ and held that life begins from the time of conception and not viability.

In USA the court held that foetus is not a person.⁵

English court recognized that unborn child has a separate personality if the child has a separate circulation of blood.⁶

In India the word 'Person' in Article 21 of the Constitution can be interpreted to apply to all human beings including unborn person. According to Hinduism foetus is as good as human being and killing of the foetus is a sin. The law of succession treats the child in the womb equal to a person. A Maharashtra State Consumer Court (Life site News. Com) held that an unborn baby is a living human being entitled to personhood. An unborn is a person provided he or she should be born alive.

III. Rights of the Unborn :

Once it is established that the foetus is a person he or she is having all the rights commensurate with personhood. As the international instruments are silent on the issues of foetus and its rights there is still a debate on the rights of the foetus.

The first right of the unborn is to be born alive and healthy. But this right is taken away by abortion and lack of due care of the foetus. The debate is on the Right to abortion by pregnant woman Vs. Right to be born of the unborn. The whole world is insensitive to female foeticide, illegal abortion and abuse of an unborn.

The philosophers are of the opinion that attributing personhood and rights to the unborn shall create number of problems for parents, state and for all. The Articles of UN Convention on the Rights of the Child are silent on the rights of the unborn. Further the definition of the "child" in the Article 1 of the Convention excludes the unborn child. However, the preamble of the Convention on the Rights of the child, 1989 and Universal Declaration of Human Rights, 1948 speak that "the child needs special safe guards and care including legal protection before as well as after birth". This provision is undoubtedly in exhaustive and unclear as to the rights of the unborn.

Some countries including an International Covenant, however have recognized the rights of unborn.

² Todd vs. Sarridge, Baldwin vs. Butcher.

³ Webster vs. reproduction health Services (106 L Ed z 410).

⁴ Roe vs. Wade.

⁵ Paton vs. BPAS ([1979] IQB 276).

⁶ R.V. Enoch (172 ER 1089).

- Paragraph 5 of Article 6 of the International Covenant on Civil and Political Right, 1966 stipulates that Capital punishment cannot be carried on, on a pregnant woman.
- The American convention on Human Rights in para 1 of Article 4 states that every person has the right to have life respected. This right shall be protected by law and in general, from the moment of conception.
- Under English Fatal Accidents Act, 1881 damages may be recovered for the benefit of a posthumous child.
- Under British Death (Expectant mothers) Act 1931 a pregnant murderess mother is not to be executed but is given life imprisonment to protect the unborn child.
- A South African court held that “a child can succeed in torts after it is born on account of a deformity caused by prenatal injury to its mother.”⁷
- Article 906 of the French Civil Code permits the unborn child as the recipient of the property.
- The word person in Article 21 of Constitution of India may be interpreted to mean all human beings including unborn person at every stage of gestation and any discrimination to unborn shall be contrary to Article 14.
- Section –13 of the Transfer of Property Act stipulates that property can be transferred for the benefit of the unborn person by way of trust.
- Sec. 14 of the Indian Succession Act. 1925 provides for the creation of prior interest for the unborn person over the property.
- The Disposition of Property Act, 1916 validates the gifts to unborn person.

All those provisions made for the ‘unborn’ are piecemeal, indirect and in exhaustive. However, In India A Maharashtra State Consumer court in an unprecedented ruling held that the unborn baby is a living human being entitled to personhood and required the insurance company to pay the claim. Both the mother and the unborn child died in an automobile accident.

This Indian Court ruling gave the unborn child rights commensurate with personhood as a separate identity from the mother under the law. The great majority of international instruments recognise the right to life. But when does life begin? The question remains unanswered. These instruments

⁷ Pinchin, N.O. vs. Santam Insurance Co. Ltd. (1963).

are also silent on the issue of whether some provisions or all provisions accorded to children should also be accorded to unborn. So, in this perspective an agenda at the International level on the rights of the unborn is awaited. For all purposes the pregnant mother should take all care to protect the unborn and she should be educated and supported accordingly. Sometimes, the injury is caused by the pregnant mother by smoking, drug and alcohol addiction. In a Canadian case, the Queen's bench ruled that a pregnant woman is to be confined in a treatment centre until the baby is born, because of the bad habits of woman. The rights of the woman should be weighed against the welfare of the foetus. No right is absolute, particularly when its exercise may take the life of some helpless being.

IV. Conclusions and Suggestions :

All Human beings are entitled for Human Rights., but the vulnerable sections need more attention and the more vulnerable – the unborn needs particular attention. The Human Rights Agenda should be carried to the door steps of all. Human right is an interdisciplinary concept par excellence. Success of any concept of human rights can induce complacency and dogmatism.

HRE itself is a human right. HRE is for all and it is inevitable for vulnerable groups which includes pregnant woman.

It is a fundamental right and should be included in fundamental rights chapter in the Constitution. It should be included in the curricula at all levels. It should be the endeavor of all groups not only to make the HRE an intellectual exercise but also translate it into practically utility. Foetus is a person and possesses the rights.

However, the right to abortion of the pregnant mother and right to birth of the unborn must be decided on the merits of each case, which is a human rights issue of the hour. A new agenda on the rights of the unborn is essential for each nation.

The word person in Article 21 of the Constitution of India should be interpreted to include all human beings including unborn. The Provisions of the UN Convention on the Rights of the Child are not clear whether or not an unborn child is accorded any right. So, a new Convention and Declaration on Rights of the Unborn Child are needed at this juncture.

In India for the protection of the rights of the unborn the new forthcoming agenda, the Article 21 of the Constitution of India, the MTP Act, 1971.⁸, PNMT Act, 1994.⁹, PNMT Act, 2002.¹⁰, the Provisions of Indian Penal Code (Sec. 312-315) should be read together.

⁸ The Medical Termination of Pregnancy Act, 1971.

The fact that the human foetus is invisible and cannot deliver tangible utility, inconspicuous and vulnerable there is no reason to ignore or overt his or her right. So, foeticide including female foeticide and all sorts of abuses should be stopped for the unborn. However, the right to abortion of the pregnant mother and right to birth of the unborn must be decided on the merit of each case, which is a human rights issues of the hour. A new agenda on the right of unborn is essential for each nation.

⁹ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

¹⁰ The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2002.