

INEQUITABLE RIGHT CLAIMS OF UNEQUALS? THE ABORTION CONUNDRUM

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Abstract

The present venture tries to bring out the moral contours of the abortion conundrums. It is a controversy that requires the efforts of scientists, legal luminaries, religious leaders and moral experts. In this paper, the author tries to show that at the core of the debate lies specific ethical concerns which pose formidable challenges before legal connoisseurs and others. It indicates that undue rights claim of either side are fraught with difficulties. Hence, utmost caution should be exercised while dealing with such an extremely sensitive issue. Citing many lawsuits and their verdicts, the author shows that though pro-choicers put forward many convincing arguments in favour of their stand, the pro-lifers' ideas work like a safety valve. Thus, we need to create a balance as, with time, the debate is assuming new character due to the ever-increasing sharpness in our analytical approach and tremendous medical advancement. The author adopts a positivistic tenor by holding that intense discussion by all stakeholders can help us to arrive at a stand which will, on the one hand, address the concern of pregnant women who want to abort the foetus for various reasons and also manage our disquiet about an unborn foetus.

Keywords: *abortion, pro-life, pro-choice, viability, CNS, Ensoulment, moral status*

Among many issues of practical ethics, the controversy concerning abortion is a very complicated one and seems to defy any solution. Customarily, abortion means the termination of a foetus through active intervention to forestall its further growth, which amounts to killing it. It is ordinarily admitted that a foetus is an organism that has the potential to develop into a person if nurtured and given the fitting ambience, though it currently lacks some properties of personhood. A scrutiny of the arguments advanced by different sides in this high-profile controversy makes us think that it is the unique status of a pregnant woman (and some concomitant problem inevitably related to this) and the exceptional character of a foetus that are mainly responsible for the confounding nature of this debate. Let us explain this point briefly. Usually, laws, e.g., of rights, duties, interests, restrictions and so on, are framed for a person. But a pregnant woman bears within her body another organism/potential life that entirely depends on

the woman for its growth, well-being, or, to say, for every vital physical and mental process. It is this phenomenon that imparts *sui genre* status to a pregnant woman and a foetus. Women mostly bear all the accompanying problems relating to carrying a potential life within their bodies with utmost care. However, for some reason or other, if they want to discontinue the pregnancy and abort the foetus, several questions come to the foreground which are predominantly ethical. These questions, with time, are swelling as analysis is taking the issue to a deeper level, and our understanding of moral strands, the mechanism of a foetus's growth, and insight from other sources are increasing significantly, bringing forth newer facets in the discourse. Some such questions are: Is this potential life or foetus is life equal to the status of whom we ordinarily call a *person*? Does a pregnant woman have an absolute right to decide about her body, e.g., aborting a viable foetus from her womb only for the reason that it is her body? Does a foetus have a moral status? No short or categorical answers to these questions are possible, as in the debate, we find opposing sides (usually called pro-choicers and pro-lifers) supporting their stands with sufficiently convincing arguments. A study of these arguments gives us the impression that both sides are credible. Thus, we need to ponder their opinions, critically test them using ethical tools, and arrive at a conclusion that we find passes the test of vital moral values such as dignity, privacy, autonomy, justice, accountability and so on, which a society holds in high esteem.

The controversy is age-old but has rekindled in the last few decades due to multifarious factors. In the recent past, the Supreme Court of India (henceforth SC) and several state High Courts delivered their judgements on lawsuits filed by several women who sought permission for abortion for various reasons. A study of some of these judgements makes it clear that the crux of the issue lies in deep, and a resolution of these issues calls for more research by biologists, philosophers, social researchers and cognitive scientists. Their combined efforts, on the one hand, may help us to make some headway on such a vexing issue, and on the other, it may pave the way for a confluence of law, life, value, and literature. I say so as the disputation is predominantly moral, religious and legal.

There are many finer issues jumbled up in the discourse, and disentanglement of these issues will be instrumental to an enhanced understanding of many nuances, which may help to make some headway on the debate. It will be convenient to explain the intricacies of the issue if we refer to some recent cases that the SC and some High Courts heard. No two lawsuits are indeed the same. However, the cases we shall refer to in the present context have family resemblances. Hence, I intend to start the discussion with a litigation that came up for hearing recently (October 2023) in the Supreme Court of India.

I

In October 2023, the SC delivered three judgements (in quick succession on the 9th, 11th, and 16th of October) in one case relating to abortion. The case in question was of a mother of two children who wanted to terminate her third pregnancy, which she asserted she was not aware of before 20 weeks as she considered her condition to be short-term postnatal infertility (called ‘lactational amenorrhea’). Since the woman did not want a further child after her two children and she was experiencing postpartum depression, she wanted to terminate her pregnancy, which was almost 26 weeks long. We intend to discuss the issue in question with the instance of this particular case to bring out subtle ethical filaments of the debate that are of great importance. Let us briefly state the Indian abortion rule. Currently, abortion rules usually invoked in the Court are the 1971 MTP (Medical Termination of Pregnancy) Act and the MTP Amendment Act 2021. The former Act allows safe abortion, irrespective of marital status, in certain specified cases till 24 weeks of gestation. In contrast, the amended Act of 2021 will enable abortions even after 24 weeks, with the opinion of a state-level medical board, if it finds some foetal malformation or severe threat to the mother’s life.

The case, initially heard by two judges (Justice Him a Kohli and Justice B. V. Nagarathana), allowed the woman in question to go for an abortion and directed the AIIMS, New Delhi, to carry out the process. However, a query by one of the doctors on the medical board (which I intend to refer to later as it will shed light on our discussion) prompted the judges to recall the first judgment and reconsider the case. The new information provided a new landscape for further analysis. It caused a rupture in their second verdict, where one judge reversed her stand, and another judge emphatically reasserted her former stand backed by elaborate reasons. Consequently, the case had to be referred to a larger bench. The letter mentioned above of a doctor and subsequent submissions of the counsels and learned judges' viewpoints tried to capture predominantly ethical subtleties. The decision hinges on looking closely at these issues, as the 1971 law or subsequent amendment did not address many problems precisely. At the current juncture, due to a lack of complete knowledge of the process of growth of a foetus, the legislature is not in a position to articulate and bring out a comprehensive bill so that it can address all the future probable predicaments. Hence, we need to fall back on ethical musings.

Incidentally, during the hearing, it was reiterated by the larger bench that the Indian abortion law is flexible, pro-choice, progressive, respects the autonomy of women's choice, and accords reproductive justice but is not, of course, oblivious of foetal rights. While doing this, they gave a new explanation of equality and the notion of dignity. These are highly value-loaded terms. Many books and articles were scripted

to fathom each of these concepts. However, I do not intend to discuss them in detail in the current essay. Nevertheless, I shall touch on some points wherever required.

In the split verdict, the Court (one judge) asserted that it could not disregard the *rights* of a foetus. The rights of the foetus, if recognised, come in direct conflict with the rights of a woman seeking abortion as it makes inroads into the rights of the person carrying it in her womb. Whose rights, in such a claim, should get priority or override the other side's assertion is a moot question.

Interestingly, since *Roe v Wade* (1973), there has largely been a trend (barring a handful of countries) towards easing abortion laws worldwide, thereby giving comparatively trouble-free access to abortion services to pregnant women. This trend is based on the argument of pro-choice stand defenders. One such landmark judgment is the *Mcfall v. Shimp* case (delivered six years after *Roe's* doctrine). In that case, the judge emphatically asserted the primacy of the pregnant woman's rights by way of maintaining bodily autonomy, right to privacy and other privileges to a pregnant woman. An individual (i.e., mother) is not supposed to be in the service of the whole society, asserted Justice P. Flaherty in that pronouncement.

In the aforesaid two-judge bench's first judgement of the SC, we find that they had unanimously allowed the petitioner to terminate her pregnancy, and their judgement is an attestation of the pro-choice stance. However, a medical inquiry where it has been stated that to perform the procedure of terminating, doctors first need to stop the heartbeat of the foetus, and it insisted on an order to this effect from the Court. And herein lies the fault line as Justice Kohli renounced her previous stand.

Citing the relevant clause (article 21), the petitioner's counsel maintained that it is a matter of the petitioner's rights. Let us see what Article 21 says: "No person shall be deprived of his life and personal liberty except according to procedure established by law."¹ Here, two crucial terms are 'life' and 'liberty'. The petitioner's counsel claims that the rights to life and liberty enshrined in the constitution should tilt towards the mother. Put it differently, it should override the foetus's rights (to life and liberty). This assertion takes us back to the question of a foetus's status. We have stated at the beginning that a foetus has a unique position. It resides within the mother's womb and depends on the mother for its sustenance and survival. Consequently, it cannot register its claims. In such a situation, it seems unequal on many counts with the mother. That is why whether a foetus is a living being or not has been debated for a long, but our current knowledge level cannot conclusively decide about this and abortion laws are also silent on this issue. This puts us in a tangled situation that, *prima facie*, seems to

¹ <https://static.mygov.in/indiancc/2021/08/mygov-9999999991694106170.pdf>.

have no solution. Hence, the interest or right claims of the foetus seem to be ill-matched with the mother's declaration of interests and rights. Our society usually adopts a stand that is pro-mother, or we can say pro-choice, as this group can lodge their views about rights, interests, etc. Their perspective ostensibly seems to be cogent. However, philosophy gives a cue for contrary thinking. To my mind, the maturity of a society is confirmed by how it takes care of tenders and invalid ones. That is why we often show our concerns about the affliction of children, elderly people and infirm. If this is the case, taking the side of the mother without giving due consideration to the other side (i.e., the foetus's side) is bound to raise one's eyebrows. Despite their observation that Indian abortion law is pro-choice and liberal, the three-judge-bench, while delivering judgment, seems to have veered off their pronounced stand (i.e., Indian abortion laws are pro-choice). As Sreeparna Chakraborty writes, the Court spared no effort to balance the rights of the unborn child with the autonomy of women.² It is also evident from the statement of Justice Kholi, who held that "judicial conscience" does not permit her to allow termination of the pregnancy. The stand of the government also seemingly drifts towards the pro-life group as it wanted the petitioner to carry the foetus for some time more so that the baby is born and the government will take care of the baby and pitch in for adoption.

However, Justice Nagarathna's stand on putting a premium on the 'decisional autonomy' of the reproductive choice of an expecting woman is in direct conflict with the philosophy mentioned above. She held that the mother's choice is the crucial factor in decision-making and not the viability of the foetus. This is the *raison d'être* for her assertion that as the woman in question expressly stated that she does not want to continue the pregnancy, the other issues, such as viability or health issues of the child to be born, are nugatory. In holding such a view, she propped her opinion on the dependence of the foetus on the mother. On account of its reliance, the foetus "cannot be recognised as an *individual personality* from that of the mother as its very existence is owed to the mother."³ Hence, she is averse to the claim that "the foetus has a separate entity from the mother." She also finds the converse view repugnant to Articles 21 and 15(3) of our Constitution, ensuring the right to life and liberty. While stating this, to buttress her stand, she added that the reproductive capacity is unique to women. Therefore, reproductive health is part of women's human rights. This human right "also includes the right to an abortion." Not giving recognition to this right may affect women adversely in countless ways. In addition to her health condition, her choice also

² Chakraborty, S. *The Hindu*(Delhi), Oct. 15, 2023, p. 12.

³ Miscellaneous Application no. 2157 of 2023 in Writ Petition (Civil) No. 1137 of 2023, p. 6. (Source: <https://main.sci.gov.in/>)

includes the socio-economic situation to which she has been thrown, as Martin Heidegger would prefer to say. She talked of 'free will' and 'choice' taken without influence. By setting aside the viability of the foetus issue, she clearly sent the message that it is only the mother's choice that is the sole concern. To bolster her stand, she quoted from a previous judgement delivered in 2022 where the bench extensively explained the 'ambit of reproductive rights.'

The new contour of the debate is Justice Nagarathna's observation that a foetus has no distinct "identity from the mother". Giving complete freedom to a woman to choose to continue or not to continue her pregnancy is to "recognise the right to life and liberty" of a pregnant woman. She further holds "right to reproductive health being a woman's human right would also include the right to an abortion."⁴ Thus, it becomes clear that, in her view, what is required is zeroing in our attention on the decision of the expecting mother. As the petitioner stated, her decision is 'a wilful and conscious'; not recognising her affidavit amounts to intrusion on her autonomous choice.

Before we proceed, I want to call attention to some specific points that will be in order and pertinent to our discussion. The use of the term 'reproduction' in the judgement looks pretty commonplace. It can be seen from a different angle, too. In the present case, it has been used in the sense of biological reproduction, which usually means conception. However, the term can mean, or we can say also contain within it, another extended meaning that we need to note. 'Reproduction' is undoubtedly biological. We are usually familiar with this aspect of the term. However, it has some other dimensions, too, which have been spotted in recent literature. It is social as well as ethical reproduction also. In this sense, it also entails nurturing and socialising the foetus after birth. This meaning of 'reproduction' ensures a child's health, where parent and non-parental aides play crucial roles. As this meaning of reproduction is more comprehensive and indeed a difficult task to secure, some scholars, e.g. Ammy Mullian, mooted the capability approach whereby he advocates a right to reasonable care for the incoming child.⁵ We can trace this approach to the views of the other two judges of the SC.

We found that in the judgements, the term 'autonomy' or even sometimes 'decisional autonomy' was used time and again. Reading these terms and context also makes it clear that they have been employed to show that a pregnant woman's decision enjoys a unique status. The term 'autonomy' has a Greek linguistic genesis, used

⁴ *Ibid.*, p. 6.

⁵ Mullin, A. "Children, Parents, and Responsibility for Children's Health" in (Ed.) Arras John D, Fenton Elizabeth, and Kukla Rebecca (2015). *The Routledge Companion to Bioethics*. Routledge, New York.

initially for state or political purposes. However, over time, its meaning has widened and become more inclusive as it has been applied to other activities. In the present context, it has been used to refer to a woman's unbridled control in decision-making in matters of practical importance, which concerns supposedly only the woman affected. When our Court used it to respect the decision of the childbearing woman, it meant the state should not impede her actions, and she should have the freedom to live her life as she chose. J S Mill will term her act is self-regarding. This libertarian attitude is admirable as it accords utmost importance to individual choice. However, this often comes into conflict with some other fundamental values. This happened in the present case also. Because of this lack of harmony between values, the judges had to hold that it was a point like crossing the Rubicon (thus renouncing the autonomy of the mother's decision). Hence, the mother has to continue to conceive despite her emotional unease. Any explanation of autonomy, therefore, needs to be considered in a particular social context. Some social contexts may be autonomy-restricting, whereas others may be autonomy-enhancing. As John D. Arras says, any discourse on autonomy as absolutely self-directed and free from any external impacts is fallacious. "We live and make decisions within a thick social context, pushed and pulled this way and that way by causes and reasons offered up by people and institutional forces within our social environment",⁶ writes Arras.

Not only that, a hair-splitting analysis of the notion of autonomy shows that within this genus fall decisional autonomy, libertarian autonomy, conscientious autonomy, relational autonomy, and maybe some more. In the present case, one judge mentioned the decisional autonomy of the pregnant women. But what is essential to draw attention to is that such autonomy consists of many components. Such a component is the competence of the agent to make informed and voluntary decisions. The first component requires an adequate understanding level of the agent, and the second element involves freedom from external influences. Some scholars talk about the matters of a degree of these two components. To make an autonomous decision, the agent must have an *adequate* understanding (as *complete* understanding is not a viable option) of the issue at hand and be free from significant controlling factors. Catriona Mackenzie thinks that in the health care context, autonomous decision-making faces several challenges, which "include patient vulnerability due to pain, illness, and fear; difficulties experienced ...in understanding diagnoses and assessing risks, benefits, and probabilities; and differences ...in social power, knowledge, levels of education and professional status, or arising from factors such as age, race, gender,

⁶ *Ibid.*, p. 276.

disability, or cultural background.”⁷ These are indeed very subtle issues, and taking them into consideration is indeed a formidable task. For Mackenzie, two crucial components of autonomy are critical reflection and authenticity. The former “condition requires that the person in question has competently and critically reflected on the beliefs, desires, values, standards, and commitments guiding her choice; the authenticity condition requires that as a result of such reflection, she regards these aspects of her cognitive and motivational structure as authentically “her own,” rather than, for example, uncritically adopted due to her upbringing and socialisation.”⁸ For Christman, a decision can be treated as autonomous “if, in the light of sustained reflection upon the decision and the historical process leading up to it, the person would accept the decision without feelings of resistance, rejection, or alienation. Acceptance, or non-alienation, indicates that the decision expresses or is consistent with the person's long-standing practical identity (her self-conception and orienting values). In contrast, emotions such as anger or depression in the wake of a decision, if sustained over time, are indicative of alienation and hence a decision that is not autonomous.”⁹ Thus, emotional pressure, coercion, and manipulation, such as social and political restrictions on personal liberty, social oppression, poverty, and limited opportunities, also stand in the way of autonomous decision-making. Moreover, in addition to the libertarian notion of autonomy (which equates it with negative liberty), there are other lines of interpretation of autonomy. One such interpretation is a Kantian notion, which is inextricably tied to adherence to rational norms. Such a notion of autonomy has been termed by many as Conscientious autonomy. We find an allusion to this expression in the second judgement of Justice Kholi. This analysis makes it amply clear that what is going on in the name of the autonomy of a pregnant woman is not so easy to determine. The calculation of autonomy involves multifarious factors, and we can hardly be sure whether they have been considered objectively. Does the woman in the present case have the adequate competence to adopt an autonomous decision, or is she predisposed to such a decision by factors either unknown to her or circumstances beyond her control? These are some questions which need further scrutiny.

In the email above the doctor particularly underscored two points towards which we need to draw attention: (a) “the baby is currently viable (will show signs of life and have a strong possibility of survival).”¹⁰ Termination at this stage, therefore, amounts to committing foeticide. (b) If foeticide “is not performed, this is not a

⁷ Mackenzie, C. “Autonomy”. *Ibid.*, p. 279.

⁸ *Ibid.*, pp. 279-280.

⁹ Cited in “Autonomy” by Mackenzie, C. *Ibid.*, p.281.

¹⁰ Miscellaneous Application no. 2157 of 2023 in Writ Petition (Civil) No. 1137 of 2023, p. 6.

termination, but a pre-term delivery..."¹¹ In her view, such a delivery may interfere with the *baby's quality of life*. These two points, in effect, stole the limelight.

The three-judge bench was in a fix. Hence, they thought it imperative to elicit further medical opinions on specific questions. While framing these queries, it wanted to know "whether any alternate administration of medication consistent with the pregnancy would be available so as to neither jeopardise the well-being of the petitioner or the fetus..."¹² From this extract, it becomes evident that the learned judges were resolutely looking for an alternate route to give importance to the interest of the foetus (a much-debated issue), on the one hand, and the mother, on the other. In its observations, the medical board stated, "with proper care and treatment under appropriate medical supervision, the mother and baby can be managed well during pregnancy..."¹³ This prompted the judges to step in and invoke the MTP Act, which they termed "progressive legislation". As the current situation does not involve "a risk to the life of the pregnant woman" and there is no foetal malformation, the judges thought it wise to continue the pregnancy with the arrangement they suggested for the foetus post-delivery.

The Court recalled its previous judgement for 'complete justice' (a very appealing expression but open to numerous and sometimes contrary interpretations). The judges used two important expressions: (1) 'viable foetus' and (2) stopping the heartbeat. The judges expressed their disinclination to direct the doctors to stop the heartbeat. Because of this, the aborted foetus will face the "risk of lifelong physical and mental disabilities."¹⁴

Thus, the judges showed their leaning towards conferring rights to an unborn child, which they thought could cohere with the rights of a decisional autonomy of an expecting woman and by holding such a view, they placed the duo on a par. Placing them on an equal footing will give rise to heated argumentation. This is one side of the issue. However, if we peruse the problem from a philosophical mindset, we can say that a foetus has been accorded an autonomous moral status in this judgement. This conferral of the independent moral status to a viable foetus has far-reaching implications. It has been presumed that a viable foetus is a life. The point of commencement of life has been a matter of debate since ancient times. In recent discussions, viability has been considered a dawning point of life. Validation in the *Roe v Wade* case gave it a fillip. However, we find several other contenders for this

¹¹ *Ibid.*, p. 6.

¹² *Ibid.*, p. 8.

¹³ *Ibid.*, p. 9.

¹⁴ *Ibid.*, p. 19.

point of inception in the literature. Some such favourites are quickening, developing the Central Nervous System (CNS), emolument, etc. Moral philosophers, religious leaders, and legal practitioners have put forward their views on this pivotal issue. Let us have a short glimpse of their ideas.

II

In India, the Ayurveda Śāstra's explanation of the nascence of a foetus is a bit unique. For it, a mere union of the father's semen and the mother's blood is not enough for the formation of a foetus. Such a union "can produce the foetus only when the *ātman* with its subtle body... becomes connected with it by means of its *karma*."¹⁵ Thus, in addition to the mother's blood and the father's semen, the *karma* of each plays an essential role. The process of transmigration, as stated by Cakrapāṇi, is like this: after death, the soul with subtle body and *manas* moves into a womb. The womb is decided by its *karma*. When it comes in contact with the mingling of the mother's blood and the father's semen, the foetus's growth is kick-started. Thus, we find the association of the subtle body, which comes from the preceding body of a dying person, triggers the development, of course, with the union of semen and blood. Suśruta holds that "the very subtle eternal conscious principles are manifested...when the blood and semen are in union."¹⁶ We can say that the association of the soul with the subtle body imparts life to the blood-semen union. Caraka's account is a bit different as he holds that at the time of combination of the effective semen of a male with the blood of a female having no defect of organs, the soul is connected with the help of *manas*, and a foetus begins its journey.

Some Buddhist scholars, e.g., Madhyamaka scholar Candrakīrti, give an account of the foetus's development, invoking the notion of *dhātus*. When the five *dhātus* (coming from father and mother) admix with the *viññāna*, which is the sixth *dhātu*, the foetus begins its odyssey. Thus, a mere union of father and mother is not the sufficient cause for its beginning. It needs to be aided by some other factors.

The dogma of the subtle body is a contribution of Indian thinkers. It works like a substratum. In the 40th *śloka* of *Sāṅkhya-kārikā*, we get its reference (i.e. of subtle body). The subtle body persists ceaselessly till its entry into a state of salvation. Before this, at 'each birth it receives a new body and at each death it leaves it.'

Religious leaders often play a significant role in this debate. Some incidents in Ireland bespeak our claim. The prohibition of abortion in that country was done mainly

¹⁵ Dasgupta, S. N. (1957) *A History of Indian Philosophy*. Vol. I. Cambridge: At the University Press, p. 302.

¹⁶ *Ibid.*, p. 303.

under the influence of Catholic Churches. This caused much uproar in that country, and ultimately, this official forbiddance was removed through a referendum in 2018.

Buddhist's stance on this issue is pragmatic. They hold that individual human beings come into existence right from fertilisation, i.e., from conception. Hence, fetal abortion amounts to the killing of a human being. However, if the decision is taken on compassionate grounds to save the life of a mother, it can be allowed even though this kind of reasoning is full of difficulties. We know how abortion rampantly takes place in Buddhist-dominated Japan. To show their penitence and own moral responsibility for such deeds, women in Japan, China and Thailand observe one ritual known as *mizukokuyō*. In Christianity, abortion is an issue where we find many shades of view, ranging from absolutists to liberals. In Islam, abortion amounts to homicide. The *Qur'an* holds life's sanctity. For many Muslim scholars, life begins with ensoulment. The statement of the *Qur'an*, "If any of you saved a life, it would be as if one had saved the lives of all human kind"¹⁷ conveys that abortion is not endorsed by it. However, taking a circumspect view, some modern Islamic scholars hold that in extraordinary circumstances, abortion is permissible. In Judaism, the rabbis, after much deliberation, finally decide that personhood can appropriately be applied at the moment of birth, which in turn implies that abortion is not homicide.

III

Among the several time frames, viability has taken precedence and attracted the attention of legal luminaries. Since its validation in Roe's doctrine, it has become a topic of many debates. In the recent past (2019), the Calcutta High Court, in one judgement, held that at a late stage of pregnancy, the foetal right to life takes priority over the mother's mental trauma. Despite this attestation of the viability stage of a foetus, a section of legal experts seem to take a contrary stand. Suhrith Parthasarthy finds flaws in the recent SC judgement as he says that the judgement "places the rights of a foetus at a pedestal, above that of the rights of a pregnant woman to her privacy and dignity."¹⁸ He further shows that this judgment is incompatible with some other preceding decisions where judges held that "the right to privacy—implicit in Article 21 of the Constitution—enabled individuals to exercise autonomy over their body and mind, and allowed women complete freedom to make reproductive choices."¹⁹ Some analysts have argued that the judgement accorded equal protection and of life to a foetus, which our constitution or the relevant law either did not spell out or remained silent. Thus, primacy has tilted towards the foetus in the verdict, though the law

¹⁷ Source: <https://quran.com/5/32?translations=31,17,19,20,85,84,95>, p. 113.

¹⁸ Parthasarthy, S. *The Hindu* (Delhi), Nov. 2, 2023, P.6.

¹⁹ *Ibid.*

demands the opposite. Conceding personhood to a foetus, contended by some analysts, is perilous to a woman's reproductive freedom, her dignity and many other things. Justice Nagarathna also seems to uphold this view, although couched differently.

Privacy is an issue that is very frequently evoked in the abortion debate. Privacy is a morally weighty issue and intimately related to other moral concerns such as autonomy. However, 'privacy' is a term which is susceptible to different expositions. Privacy matters in the healthcare sector as it can impact other vital interests. Alan Rubel, in his "Privacy, Surveillance, and Autonomy", holds that privacy may "be justified by direct appeal to individual autonomy, either insofar as privacy is an important object of autonomous choice or insofar as privacy is an important condition for exercising autonomy."²⁰

While arguing in favour of their stands, the counsels of both sides clear out some confusions that ordinary men labour under. The Union's counsel stressed that the foetus has a chance of survival. So, the state must uphold its responsibility. The woman's lawyer emphasised that the mother's interest should override all other considerations. If it is not given paramount importance, the mother's *privacy* and *dignity* will be under threat, and hence, a pregnant woman's choice should be respected. However, the delivered judgement goes by the view that a woman's autonomy ought not to eclipse the rights of an unborn foetus. It reminds us that rights are seldom absolute and usually contingent on multifarious factors. If so, have women's rights to choose been watered down in the present case? This is a moot point.

Neither the Indian legal system nor possibly any country's legal system provides us with an outline of whether a foetus, before or since its viability, is a living being. There is no gainsaying that since conception, a foetus is a potential human being. But when the interests of the mother and of the foetus come into collision, we adopt a stand either based on a religious standpoint or ideology to which we tend to subscribe, e.g., an adherent of libertarianism will put individual freedom at the top of the hierarchy. Only a significant advancement in embryology can shed more light on our debate, which may help us make some headway in the current controversy. Without this, the current arrangement, i.e., striking a balance between the two—pregnant women's autonomy and the rights of the unborn child—is a Hobson's choice for us.

In the judgement and subsequent analyses, Article 14 and Article 21 of the constitution were invoked and interpreted differently. Even the petitioner's counsel argued that her plea is under article 21, which brushes off the MTP Act. Chief Justice

²⁰ Rubel, A. "Privacy, Surveillance, and Autonomy" in (Ed.) Arras John D, Fenton Elizabeth, and Kukla Rebecca (2015). *The Routledge Companion to Bioethics*. Routledge, New York, p. 315.

explained the difference between the intent of the expression 'life' used in MTP, where termination of the pregnancy is allowed in the event where it is 'necessary to save the pregnant woman', and the term 'life' occurred in Article 21 of the Constitution. They should not be equated as "Article 21 upholds an individual's fundamental right to a dignified and meaningful life."²¹ Explaining the difference, he says that MTP "uses life in the context of a life-and-death situation when medical opinion confirms that a woman's very existence hangs in the balance if she attempts to carry her pregnancy to full term."²² In contrast, in Article 21, life has a broader target.

Some analysts have controverted the above interpretation of equality and privacy. Gauri Pillai, for example, disagrees with the view of the CJI and holds: "Typically, abortion cases are seen as involving the right to privacy. However, abortions are also necessary to guarantee women equality. Denying abortions perpetuates women's disadvantage: In pushing some women to seek abortions with unsafe providers, their lives are threatened. For those who are forced to carry an unwanted pregnancy, there is a risk to their physical and mental health.... Being denied abortions has a socio-economic impact on women. It also entrenches stereotypical assumptions about women's role as mothers, leading to abortion stigma and provider bias. The Court has repeatedly held that perpetuating the disadvantage of a historically disadvantaged group is what inequality looks like. Under this definition, the denial of abortion is an obvious equality issue."²³ Thus, the intricate notion of 'equality' has been interpreted differently. This (i.e., equality) is a very appealing but nuanced term, and even after long research over decades, we could not explore all the facets of this notion. Pillai holds that behind the apparently plausible interpretation of the SC lies a more significant issue that we cannot ignore. She finds a chasm between the proclaimed stand on abortion by the laws/judgments and in practice. Though it has been repeatedly asserted that a woman alone has 'the right over her body', practice is replete with contrary instances; hence, she calls it a rhetorical approach as this leads to incoherence in jurisprudence.

We find a similar quandary in a litigation in 2017. In that case, the SC turned down the plea of a 37-year-old woman (Justice Sharad Arvind Bobde and Justice L. Nageswara Rao). The woman wanted to abort the foetus, which was 26 weeks old, as it showed indications of Down syndrome. Finding a fix, the woman challenged the validity of the MTP Act as it did not allow a woman to exercise her rights. Therefore,

²¹ *The Hindu* (Delhi), Oct. 17, 2023, p. 12.

²² *Ibid.*

²³ Pillai, G. *The Hindu* (Delhi), Oct. 27, 2023, p. 11.

the learned judges wanted to elicit expert opinions to decide whether a foetus is an independent life.

IV

The most intransigent and unavoidable questions currently are: Is the foetus or organism a person? If not, is it a potential person (in other words, if not terminated, in due course, will it become a person)? An affirmative answer begs the question: will this embryonic structure, once it achieves a state of exercising its rational power, desire its death? Then, we must estimate the benefit/cost/harm analysis in prolonging the foetus. We need to persuasively state reasons for showing that the termination of a foetus is morally permissible. The issue traversing through all these questions is the determination of personhood. What I intend to say is that defining the status of a foetus and having an acceptable definition of a person hold the key to the moral evaluation of active intervention in terminating a foetus. Michael Tooley articulates the second strand of the question thus: ‘What properties must something possess in order to be a person, in the ethically relevant sense?’²⁴

The doctor’s email raised the question of the enormous expenses required for keeping the foetus alive in case of pre-term delivery. This question has drawn the attention of moral philosophers for a long time because of the scarcity of resources available in the medical sector. It is an extremely sensitive and vexing issue, and many thinkers espouse medical rationing. The doctor also raised the issue of quality of life, which requires independent deliberation. If later on, after growing up, the child comes to learn that her/his parents wanted to terminate her/him, will it detract from her/his quality of life? It is a profound issue.

Another pertinent distinction is between 'the death of a person' and 'the death of a biological organism'. Coinage of expressions such as 'right to life' and 'sanctity of life' sometimes partially obscures the distinction. In case of active intervention in terminating a foetus after a benchmark, e.g., viability, we are handling with an organism, which is a potential person. By and large, it is agreed upon that it is morally wrong to harm a likely person.

The rationale for the prohibition of abortion in many countries was that the ‘right to life of the foetus’ was given equal weight with ‘the right to life of the mother’. It is this thing that compounded the problem. During the debate between pro-choicers and pro-lifers, they advance many arguments supporting their respective stand. A

²⁴ Tooley, Michael (1979). “Decisions to Terminate Life and the Concept of Person” in *Ethical Issues Relating to Life and Death*. Ed. Ladd, John, Oxford University Press, New York, p. 67.

cursory look at their ideas makes us think they hinge on a central point. It is that, for pro-lifers, the foetus, at whatever stage it is, right from the time of conception, is either a human being or a potential human being. The pro-choicers come up with several arguments to substantiate their claim that a foetus is not a human being. Feminist writers, of course, added a new dimension to this claim by asserting that abortion is ethically neutral and that it is a woman's *right* to decide about their own body. As an Irish woman said during the referendum campaign: "We were told for so long what to do." As the referendum brought an opportunity to them, she added, "But now, give women the right to choose." All this amounts to saying, "Our Bodies, Our Choice." These summarise the feminist stand.

The question: 'Does a foetus have an equal right to life as that of its mother?' ultimately boils down to asking: Is foetus a human being? This debate has been going on for a fairly long time, though any conclusive answer is yet to be found. A layman's study of genetics gives the impression that a foetus has its genetic code right from the time conception starts. It is this unique code that differentiates it from other members of the species. Then, it keeps developing. This development is a continuous process. Thus, any time limit set, such as before quickening, viability and so on, is contrary to experience gained from scientific research and hence preposterous. For example, consider the 12-week limit: Is there any significant difference in the foetus on its 85th day compared to its 84th day? Embryologists will have to work hard to determine the minuscule difference in an embryo between these two days. Again, if quickening, viability or CNS are regarded as watertight time, the questions we shall confront are: Do they remain static in all cases? and at all the time? The time regarded as viable now might change with the advancement of medical science and the advent of new and more sophisticated neonatal technology. So, any argument given for setting a time limit for the legalisation of abortion fails to stand firm before the tribunal of reason. Finding out the difference in foetuses' growth continuum is a formidable task for embryologists.

V

Moral status: cornerstone of the debate

Let us go back to the previous question: Is a foetus a human being irrespective of its stages of development? If it can be proved that a foetus is a human being, it will have a moral status, which in turn implies that we are not free to act towards it in any way we like, thereby ignoring its well-being, preference and continued existence. Being moral agents, we need to care about its needs, wants and safety. Mary Anne Warren, a notable scholar in this field, writes beautifully that to have moral status is to

be morally considerable or to have moral standing. It is to an entity or being towards which moral agents have moral obligations.²⁵

Without any prior thought, we can say that we usually attribute moral status to any human being once it is outside the mother's womb, irrespective of his/her stages of development. Now, what is at issue is whether we can extend this status to foetus *enventresa mere*, regardless of its stage of development. Some thinkers insist on the ontological continuity of preborn and post-partum human beings. In contrast, some stress on differences between these two states and point of birth is regarded as demarcation. There is no denying the differences in these two stages regarding location, size, stage of development, and dependence. The delivery of a foetus is indeed a quantum leap, as right from that time, many rights are appropriately applied to it. But whether these are enough reasons or appropriate or relevant variables not to accord moral status to a preborn is a moot question. We find no reason to do so as all these, i.e., location, size, and stages of development, are irrelevant to the possession of the status of a human being. Thus, any denial to extend moral status to the fetus is arbitrary. If we do some more hair-splitting analysis, it might help us to have a better understanding of the issue.

Thinkers show reservations about calling a foetus a person when in the mother's womb. This brings us to the question: on what basis do we ascribe moral status to some being? Moral status is accorded based on intrinsic value, and inherent value, in turn, is vouchsafed by intrinsic properties. For an adult, the appropriate intrinsic property is the possession of rational capacity. Is, in this sense, a fetus can be called a person? Many scholars have attempted to find an answer to this question. However, we must remember that such a mind-bending issue does not admit any easy solution, and we need the required finesseto find an acceptable answer.

Even feminists' argument will be nullified as it will confront a clash between rights and interests, on the one hand, and moral obligations, on the other. Feminists' claim of interest or ownership in their own body, though apparently seems cogent, moral scrutiny will show its indefensibility on account of its susceptibility to gerrymandering. Certain limiting factors accompany every right. Cecile Fabre asks, though in a different context: "Is there a Right to do wrong?"²⁶

We have seen that one key factor in the ongoing debate is the determination of personhood. Parameters of personhood have been a matter of deliberation for quite

²⁵ Warren, M. A. (1997) *Moral Status: Obligations to Persons and Other Living Beings*. Clarendon Press: Oxford.

²⁶ Faber, C. (2006). *Whose Body is it Anyway?* Clarendon Press: Oxford. P. 23.

some time, and the literature is too vast, which only substantiates Tagore's notion of 'surplus.' Many definitions of persons have become untenable because of the advent of artificial intelligence, e.g., robots, as it matches many characteristics of persons. Some attributes of personhood that philosophers talk about are experiencing pain and being able to relate and connect these experiences, having memories and dispositions, possessing a state of consciousness, having intentional states, and being self-conscious. Philosophers discussed all these characteristics threadbare. However, people need more confidence in these criteria as they need more comprehensiveness in isolation or together. For philosophers, any adequate definition of a person must contain within its fold the morally relevant concept of a person. Such a notion does not see a person as a mere process or happenings; instead, it is something more. For Tooley, "[S]omething is a person if and only if it is a continuing subject of experiences and other mental states that can envisage a future for itself and that can have desires about its own future existence."²⁷ Derek Parfit puts a reduced view of the person while discussing personal identity thus: "A person's existence just consists in the existence of a brain and body, and the occurrence of a series of interrelated physical and mental events."²⁸ A perusal of some of these accounts makes it clear that according to these premises, self-consciousness capacity is a defining characteristic of personhood.

On account of our incapacity to ascertain the presence of the above capacities in a foetus, thinkers are at loggerheads in giving a fetus full moral status for many reasons. However, some concede some moral position to them, which falls short of full moral status. This raises the question: Are there several sorts of moral standing? If it is, what are they, and how can we determine them? The onus of interpreting this has to be borne by ethical philosophers. We have seen that the mere variable of having intrinsic properties is not enough to determine such a subtle issue. Because of different moral statuses, we treat human and non-human beings differently. When we try to search out relevant variables based on which we concede another moral position to a foetus from an adult human being, the main reason we find for making such differentiation is the lack of sophisticated cognitive capacities in the fetus and the presence of this in an adult of a human being. Some experts in this field have underscored this capacity. They think that if a human possesses sophisticated cognitive abilities, either intellectual or emotional or both, then he/she satisfies the necessary conditions for conferring full moral status.

For Immanuel Kant, the ground for the dignity of all rational beings is his capacity to select ends through practical reasoning. For him, therefore, reason is the

²⁷ Tooley, *Ibid.*, p. 91.

²⁸ Parfit, D. (1984). *Reasons and Persons*. Clarendon Press: Oxford, P. 211.

only touchstone for regarding a being as an end. Beings lacking reason do not qualify this litmus test. In abortion discourse, the answer we are seeking is contingent on the meaning we ascribe to the expression "possession of reason." Does it mean actual possession of reason or only having dispositional property will meet the requirement? The analysis does not end here. If the latter interpretation is accepted, is it the only actual one, or will it suffice if it is future-oriented? A fetus definitely has the potential to reason, which is future-oriented. Thus, our reasoning tilts towards giving moral status to a fetus.

But other thinkers also talked about some distinct variables such as self-awareness, capacity to value, bargain, assume duties and responsibilities, care, etc. A fetus might lack these capacities or fully bloomed sophisticated cognitive aptitude, but it can develop these competencies if allowed to grow unhindered. Is it not a fact that understanding a process requires proceeding with the flow of the process and not putting an end to the process? Hence, whether we should ignore this potential capacity of a fetus is debatable.

Given all these views, we can say that even if we have a reservation about giving full moral status to a foetus, we should not have reservations about giving it some sort of moral status as it possesses cognitive capacities that might still be at a rudimentary level. It can be proved definitively by citing the reactions it shows when it is inflicted pain. The famous miniseries documentary premiered on the National Geographic Channel (2005) entitled "Life Before Birth" beautifully portrayed it. Intensive research is going on in cognitive science to unmask this curious reality. We can only hope that with some breakthrough in this area of study, determination of this capacity of a fetus and finding out the difference between an adult human being and a fetus (in possession of this cognitive capacity) will pave the way for entering deeper into the debate and which in turn will give a fillip in the determination of rightness and wrongness of our choice. It is imperative to decide as any court's decision or state law on this issue is based on this crucial point. Only on such a landscape can law, life, and literature dovetail. Justice O'Connor et al., in their landmark judgment given in *Planned Parenthood v. Casey case* (1992) in U. S. A., observed that abortion is a profound moral and spiritual question and hence, "Our obligation is to define the liberty of all, not to mandate our own moral code." It demonstrates that the court can only definitively resolve this profound philosophical question with the help of more scientific research and ethical reflections. The present level of research and reflections neither conclusively proves nor disproves that a fetus is a living being. It has been held that from womb to tomb, life manifests a mystery! It is a unique nature of the human mind that it tries to unravel this mystery. This air of mysteriousness has always

intrigued the human mind. Let there be no mellowing down in our effort to unmanifest it. Hence, the assertion “curiosity has its own reason for existence” becomes relevant. A spirit of enquiry is at the centre of philosophical inquisitiveness. It tends to unsettle us from the familiar path, urges us to pursue a hitherto unfamiliar route, and is often rugged though rewarding. This approach propels our society to a more rational and progressive thinking. Human history is replete with such instances.