



Rights of an Unborn Child

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Abstract: Unborn child being recognized as 'gift of god' or 'forms of god' by many, in various circumstances his rights have been taken away or deprived by the law, thereby superseding mother's right, this may be due to the mother's right to life and personal liberty or dependence for specified time to his mother or not fully adapts the shape, size and odor of homo sapiens but render devaluing to his viable characteristics and has tendency to loss of his life as well as mother. Though the law attributes unborn child as 'legal person' for some purpose, therefore, it is paramount significant to brings his rights into an umbrella at both 'national and international' level. This article covers the rights of an unborn child in both national and international spheres also cover does 'human rights extend to an unborn child'.

Key words

Unborn child, legal person, children, rights

I. INTRODUCTION

India, being popularly recognizes as the second largest democratic country in the world, it is saddened to know that, the nations do not have a specific law that provides rights and protect the integrity of an unborn child, at present there is no specific law that directly deals with an unborn child. Being listed under developing nation, India is rapidly progressing towards the development of science & technology, infrastructure and many other fields pertains to achieve the goal for being recognized as the great/developed nation, but what is the use of such development when our future generation is itself not safe. Where the present generation has begun a journey to erase the future generation before birth by practicing abortions [whether legal or illegal] or administering other contraceptive pills etc., there is highly required a law that specifically regulated to an unborn child. Though absence of specific laws does not make him incompetent to access the rights, his rights were scattered in nature and can be traced from the Constitution of India, Substantive and other Procedural Laws which renders him as "Legal Person".

II. Concept of an UNBORN CHILD

According to Merriam Webster Dictionary "unborn "means 'existing without birth' or 'not born'. Thus, it can be drawn that an unborn child simply means 'child existing without birth' or 'not born yet.'"¹

According to Health & Safety Code 1963, Sec 171-7 defines "Unborn Child" as a human foetus or embryo in any stage of gestation from fertilization until birth."²

According to The Unborn Victim of Violence Act 2004, Sec 1841 2D(d) defines as, the term "unborn child" means a child in utero and the term "child in utero" or "child, who is in utero means a member of species of homo sapiens, at any stage of development, who is carried in the womb."³

¹www.merriamwebsterdictionary.com

²https://statutes.capitol.texas Health and Safety code 1963, chapter 171.

³https://definition.US legal.com

III. Rights of an unborn child in India-

Statutory Provision

1. Article 15[3] of the Indian Constitution empowers the state to make any special provision for women and children. According to Merriam Webster dictionary the term “children” means “an unborn or recently born person”. Therefore, the states have the authority to make any special provisions in the interest of an unborn child.⁴
2. Article 21 of the Constitution of India states that “No person shall be deprived of his life and liberty except according to procedure established by the law”. While investigating the term “Person” I have found that ‘it simply refers to all those Peoples/human beings who posses’ rights and capable of discharged his duties’. Therefore, this right can also be avail by an Unborn Children.⁵
3. Article 45 of the Constitution of India states that the “state shall provide early childhood care and education for all children until they complete the age of six years. The complexity of this article is that it specifically provides the upper age limits which is six years but silent about the lower age.⁶
4. Section 82 of the Indian Penal Code, 1860 states that “Nothing is an offence which is done by a child under 7 years of age.”⁷
5. Section 416 of Code of Criminal Procedure, 1973 provides that if any pregnant woman is punished with death sentence, such order can’t be executed till her delivery.⁸
6. Section 299 Explanation III of Indian Penal Code 1860, provides that causing death of a child in its mother’s womb is culpable homicide though it is not born completely but if any part of the child has come forth, it is punishable according to the law.⁹
7. Hindu Law-provides the provision for the transfer of property in favor of the unborn child. A gift can be made in favor of a child who exists in the womb of her mother.¹⁰
8. In a partition, a share of the property will be allotted to the unborn child as well. If it is not done the child after his birth can challenge the partition and can claim his share.¹¹
9. Section 20 of the Hindu Succession Act, provides that an unborn child has the same right to inherit the property as if he had been born at the time of the death of the intestate.¹²
10. Section 113 of the Indian Succession Act 1925 and Section 13 of the Transfer of Property Act 1882, provides that there can be a valid transfer in favor of an unborn person. This section provides some requirements to be fulfilled. Such as, if transfer is of limited interest in favor of a living person and at the time of his death, the unborn person must be born alive transfer once he is born absolute right, must be given to him after attaining majority.¹³
11. Sec 6 of the Limitation Act, 1963, provides that “where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified there for in the third column of the schedule.”¹⁴

Explanation- For the purpose of this section, ‘minor’ includes “a child in the womb”

12. Sec 2[e] of the Indian Succession Act, 1925, states that “minor’ means any person subject to the Indian Majority Act, 1875 [9 of 1875] who has not attained his majority within the meaning of that Act,

⁴ PM Bakshi, The Constitution of India, Universal law Publication, 14th edition, 2017, p-40

⁵PM Bakshi, The Constitution of India, Universal law of publication, 14th edition, 2017

⁶ PM Bakshi, The Constitution of India, Universal law of Publication, 14th edition, 2017, p-128

⁷K.D Gaur, The Indian Penal Code 45 of 1860, Universal law of Publication, 6th edition, 2016

⁸ S.N. Misra, The Code of Criminal Procedure, 1973, Allahabad Law Agency, 24th edition, 2017

⁹ K.D Gaur, Th Indian Penal Code 45 of 1860, Universal Law of Publication, 6th edition, 2016

¹⁰ Dr. Paras Diwan, Modern Hindu Law, Allahabad Law Agency, 24th edition 2017

¹¹ ibid

¹² Supranote5

¹³ Dr. R.K. Sinha, The Transfer of Property Act 1882, Central Law Agency, 17th edition, 2016

¹⁴ J.D. Jain, The Limitation Act 1963, Allahabad Law Agency, 4th edition, 2020

and any other person who has not completed the age of eighteen years and minority means the status of any such person.¹⁵

13. Rights of an unborn child in international law: Rights of an unborn child can also be traced from the international law. Several human declaration and convention provide fetus right. Though some are direct in nature and some are indirect in nature that can be understood by interpreting the same. However international law is not binding in nature but act as pillar through which state parties can take the ideology and framed their own states law.

IV. Rights under International Law

I. Universal Declaration of Human Rights, 1948 is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 [General Assembly resolution 217 A] as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages. The UDHR is widely recognized as having inspired, and paved the way for, the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels [all containing references to it in their preambles].¹⁶

I. Article 1 of the UDHR, 1948- states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

II. Article 2 of the UDHR, 1948-states that “everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-government or under any this limitation of sovereignty”.

III. Article 3 of the UDHR, 1948-states that “Everyone has the right to life, liberty and security of person”.

IV. Article 5 of the UDHR, 1948-states that “no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment”.

V. Article 6 of the UDHR, 1948-states that “everyone has the right to recognition everywhere as a person before the law.”¹⁷

2. International Covenant on Civil and Political rights 1966- adopted and opened for signature, ratification and accession by General Assembly resolution 2200A [xxi] of 16 December 1966, entry into force on 23 March 1976, in accordance with Article 49.¹⁸

I. Article 2[1] states that “each state parties shall undertake to respect and to ensure to all individual within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

II. Article 2 [3-b] states that “each state parties shall ensure that any person whose rights or freedom as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

III. Article 6[1] states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

IV. Article 16 states that “everyone shall have the right to recognition everywhere as a person before the law”.

¹⁵ K Kannan, The Indian Succession Act 1925, Lexis Nexis, 12th edition, 2019

¹⁶ <https://ohchr.org/en/universal-declaration-of-human-rights>

¹⁷ Supra note 13

¹⁸ <https://www.ohchr.org/document/professionalinterest/ccpr>

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V. Article 24[1] states that “every child shall have the right to such measures of protection as are required by his status as a minor on the part of his family, society and the state, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth”.

VI. Article 24[3] states that “Every child has the right to acquire a nationality”.

VII. Article 26 states that “All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guaranteed to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁹

3. African Charter on Human and People’s right 1981: it was adopted on 18th Assembly of Head of State and Government, June 1981 in Nairobi, Kenya.²⁰

I. Article 3[1] states that “every individual shall be equal before the law”.

II. Article 3[2] states that “every individual shall be entitled to equal protection before the law”.

III. Article 4 states that “human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life”.

IV. Article 5 state that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

V. Article 16 [1] states that “every individual shall have a right to enjoy the best attainable state of physical and mental health”.

VI. Article 16[2] states that “state parties shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick”.

VII. Article 19 states that “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another”.

VIII. Article 20[1] states that “all people shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”.

IX. Article 24 states that “all peoples shall have the right to a general satisfactory environment favorable to their development”.

4. African charter on the rights and welfare of the child, 1999. It was adopted on the 26th ordinary session of the Assembly of the Head of State & Government of the OAU, Addis Ababa, Ethiopia in July 1990 and entered into force on 29th Nov, 1999.²¹

I. Article 5[1] of the charter states that “every child has an inherent right to life. This right shall be protected by law”.

II. Article 5[2] of the charter states that “state parties of the charter shall ensure, to the maximum extent possible, the survival, protection and development of the child”.

III. Article 6 of the charter deals with names and nationality, it states that-

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. State parties to the charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other state in accordance with its laws.²²

¹⁹ See supra note 13

²⁰<https://www.legalserviceindia.com/legal/article-7942-african-charter-on-human-and-peoples-rights-a-summary-for-law-students.html>, visited on 14/09/22, 10:15 pm

²¹<https://au.int/en/treaties/african-charter-rights-and-welfare-child>

²² See supra note 13

IV Article 16 of the charter deals with Protection against Child abuse and torture, it states that:

1. States parties to the Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.²³

2. Protective measure shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of the instances of child abuse and neglect.

5. The Declaration of the rights of the Child, 1959. On 20 November 1959, the Declaration of the rights of the child was adopted unanimously by all 78 members state of the United Nations General Assembly in Resolution 1386 [xiv]. It marked the first major international consensus on the fundamental principles of children's right. The Declaration of the rights of the child lays down ten principles²⁴

1. The right to equality, without distinction on account of race, religion or national origin.
2. The right to special protection for the child's physical, mental and social development.
3. The right to a name and a nationality.
4. The right to adequate nutrition, housing and medical services.
5. The right to special education and treatment when a child is physically or mentally handicapped.
6. The right to understanding and love by parents and society.
7. The right to recreational activities and free education.
8. The right to be among the first to receive relief in all circumstances.
9. The right to protection against all forms of neglect, cruelty and exploitation.
10. The right to be brought up in a spirit of understanding, tolerance, friendship among peoples, and universal brotherhood.

V. The Human Rights and Unborn Child

Human beings are rational beings. Human being by virtue of their being human possesses certain basic and inalienable rights which are commonly known as human rights. These rights are essential for all as they are consonant with their freedoms, dignity and conducive to physical, moral, social and spiritual welfare. Human rights are also necessary as this provide suitable conditions for the material and moral uplift of the people, because of their immense importance to human beings; human rights are sometimes referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights.²⁵ In spite of being so important, the fundamental question is 'does it extends to an unborn child? To give an authentic answer one must have a sound knowledge on what constitute human rights?

Majority of the Legal scholar and Philosophers agree that every human being is entitled to some basic rights. Human rights are generic term and it embraces civil rights, civil liberties and social, economic and cultural rights. It is therefore difficult to draw a concrete definition, but it can be said that "the rights that all people have by virtue of being human are human rights". These are the rights which no one can be deprived without a grave affront of justice. There are certain deeds which should never be done, certain freedoms which should never be invaded, something which are supremely sacred.²⁶ The idea of human rights is tied up with the idea of human dignity.

Justice J.S. Verma quotes that "human dignity is the quintessence of human rights"²⁷

²³See supra note 13

²⁴ <https://www.humanium.org/en/declaration-rights-child-2/>

²⁵Dr. O. Agarwal, International Law and Human Rights, Central Law Publications, 21st Edition, 2016

²⁶ Maurice Cranston quoted in L.J. Macfarlane, 'The theory and Practice of Human Rights' (1985), p.7

²⁷ The New Universe of Human Rights, P.3

Justice P.N Bhagwati quotes that “all rights which are essential for the protection and maintenance of dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent may be termed as human rights”²⁸

According to the Declaration stated in the World Conferences on Human Rights held in Vienna in 1993 “all human rights derive from the dignity and worth and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedom”²⁹

According to DD Basu “as those minimum rights which every individual must have against the State or Other public authority by virtue of his being a member of human family, irrespective of any other consideration”³⁰

Therefore, human rights are those rights which belong to an individual as a Consequence of being human as a mean to human dignity. These rights are ought to have by all men everywhere at all times, something of which no one can may be deprived without a grave affront to justice. Since these rights belong to them because of their very existence, they became operative with their birth. That is to say, to claim human rights unborn needs to be born.³¹

VI.Conclusion

Unborn child being ‘forms of god’ is somewhat religious perspective followed by different Theologist. His jurisprudential status is considered by ‘fiction for some purpose’ thus attribution to natural entity is inconsistent, further the law is mumbled at this point. His rights are scattered in nature, and highly required to make in the shades of an umbrella. On several circumstances, his rights were superseded, by mother rights because his life is depend on her mother or may be mother is regarded as natural person.

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²⁸ See Observation of Justice P.N. Bhagwati in *Maneka Gandhi v. Union of India*, A.I.R 1978, Supreme Court P. 597 at P.619 <https://www.legalserviceindia.com..>>, accessed on 19/2/24, 9.10 pm

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