

ARTICLE 21 & UNBORN CHILD

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1. ABSTRACT

According to Jurisprudential perspective, unborn child is attributes by fiction as “legal person” for some purpose. The fascinating characteristics of legal person is that who can’t breathe but possess some rights and capable to discharge duties. Here, the fundamental query specifies that whether right to life extends or not in favor of an unborn child. If it is so, then from which period does it enforce and what the judiciary says. This study demonstrates how an unborn child can claim right to life guaranteed under Article 21 of the Constitution.

Key Words: Legal Person, Unborn Child, Fundamental rights, Article 21.

2. INTRODUCTION

Article 21 of the Indian Constitution deals with “Protection of life and personal liberty” it envisages that “No person shall be deprived of his life and liberty except according to procedure established by law”.¹ This right is available to every person and also alien {foreigner} alike. The honorable Supreme Court describes this right as “heart of fundamental rights”.² The main tenets of this fundamental right are ‘when the right to life and personal liberty of a person is taken away by the state, it should be only according to the prescribed procedure of law. This implies that this right has been provided only against the State. Here the State means and includes government, government departments, local bodies, legislatures and Executive actions etc.’³ Any private individual encroaching on these rights of another individual does not amount to a violation of Article 21. The remedy for such victim would be under Article 226 or any general law. Article 21 requires following conditions to be fulfilled before a person is deprived of his life and personal liberty-

- a) There must be a law,
- b) There must be a prescribed procedure by that law,
- c) The procedure is just, fair and reasonable.⁴

¹ Dr. J. N. Pandey, Constitutional Law of India, Central Law Agency, 51st edition, 2014.

² <https://byjus.com/free-ias-prep-right-to-life-article-21/>.

³ Maneka Gandhi vs Union of India, AIR 1978 SC 597.

⁴ Maneka Gandhi vs Union of India, AIR 1978 SC 597.

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3. OBJECTIVES:

- a) To clarify the doubts pertaining the right to life of an unborn child provided by the Constitution of India.
- b) To know the Judiciary Perspective on the subject matter.
- c) To rectify the petty mistakes existed on the said law.
- d) To put forward suggestion and recommendation for the like-minded people and the law makers.

4. METHODOLOGY:

The study is being carried out purely based on “Doctrinal methods”. In this research work National and International instruments, Constitutional Provisions and other relevant statutory materials besides relevant case laws touching on the topic have been analyzed. The Primary data have been collected from various books, journal, newspaper, articles, Court rulings and various enacted laws have been relied upon. The secondary sources of data will consist of various interpretations made in commentaries on the Jurisprudence, Indian Constitution, the books, articles and research paper published in different journals.

5. FINDINGS

5.1 MEANING AND DEFINITION OF PERSON

The term ‘person’ is derived from Latin word “persona” which means a mask worn by actors playing different roles in a drama. Today it has been used in a sense of a living person capable of having rights and duties. The term has been used in different senses in different disciplines. The phrase has been used to refer to human reasoning in both philosophical and moral contexts. In Law it has a wide meaning. It means not only human being but also associations as well. This personification both theoretical and practical clarifies thoughts and expression. There are human beings who are not person according to the Law such as outlaws and slaves [in early ages]. In the same way there are legal persons who are not human beings such as companies, trade unions, corporations etc.

The Fatal Accident Act, 1855 ‘person’ means ‘body politic and corporate under section 4.⁵

The Latin word "Persona," which denotes those acknowledged by the law as being able to have legal rights and be subject to legal obligations, is where the word "person" originates.

It means both- a human being, a body of person or a corporation or other legal entity that is recognized by law as the subject of rights and duties.

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The Indian Penal Code, 1860 defines “Person” as any company or association or body of persons, whether incorporated or not, under section 11.⁶

According to the General Clauses Act, 1897 Section 3-42 define ‘Person’ as ‘shall include therefore other entities can also be treated as ‘person’ any company or association or body of individuals, whether incorporated or not.’⁷

In Karnataka Bank Ltd vs State of Andhra Pradesh, the honorable Supreme Court held that “definition of ‘Person’ is illustrative and not exhaustive.”⁸

Person" is defined by Savigny as the object or holder of right.

Salmond defines “Person” as ‘any being whom the law regards as capable of rights and duties’, any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person even though he be man.

6.2 KINDS OF PERSON:

6.2.1 Natural person: is a human being with a natural personality and as per law, is capable of rights and duties.⁹ According to Holland, a natural person is “such a human being as is regarded by the law as capable of rights and duties. According to another writer, natural persons are “living human beings recognized as persons by the state. The first requisite of normal human being is that he must be recognized as possessing a sufficient status to enable him to possess rights and duties.

⁵ <https://www.indiankanoon.org/doc/594667/>.

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

⁷ <https://www.indiacode.nic.in/bitstream/123456789/15374/1/the-general-clause-act>.

⁸ 2008, 2 SCC 254, <https://www.indiankanoon.com>.

⁹ <https://www.studocu.com/in/document/university-of-lucknow/jurisprudence/legal-person/33370266>, accessed on, 14/03/23, 9.10pm.

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6.2.2 Legal persons are real or imaginary beings to whom personality is attributed by law by way of fiction where it does not exist in fact juristic persons are also defined as those things, mass of property, group of human beings or an institution upon whom the law has conferred a legal status and who are in the eyes of law.¹⁰ capable of having rights and duties as natural person. There are two essential elements of legal person-corporis and animus. The corpus in the body into which the law infuses the animus, will or intention of a fictitious personality. The animus is the personality or the will of the person. There is a double fiction in a juristic person¹¹. By one fiction, the juristic person is created or made an entity. By the second fiction, it is clothed with the will of a living being, juristic persons come into existence when there is in existence a thing, a mass of property, an institution or a group of persons and the law attributes to them the character of a person.

6.3.CAN UNBORN CHILD CLAIMS RIGHT TO LIFE GUARANTEED UNDER ARTICLE 21
OF THE INDIAN CONSTITUTION?

Article 21 of the Indian Constitution quotes that “No person shall be deprived of his life and personal liberty except according to procedure established by law”. According to Fleming and Haines “the right to life of all human being has the nature of non-transgressed norms”¹². The honorable Supreme Court in *Maneka Gandhi vs Union of India* held that the right to life and personal liberty under Article 21 is not limited to mere animal existence but includes the right to live with dignity.¹³ Thus impliedly it can be understood from the above arguments ‘to access this rights one must be considered as “Person”, in contrast with an unborn child can he claim this right? the most general answer is No, because in the eyes of law “unborn child” is by fiction considered as ‘juristic person’, acquires property and has different rights envisages under the various Procedural laws, and perhaps juristic person cannot takes breathe but can be sue or be sued. However, nowhere in the law book it specifically written that “unborn child” is considered as “Natural Person”. The US Supreme Court in the case of *Roe vs Wade*¹⁴ held that “personhood could not be granted to a foetus before “viability”-the point around 24 weeks of pregnancy when

¹⁰ <https://legallore.info/post/the-concept-of-legal-personality>, accessed on 22/03/23, 10.15 am.

¹¹ <https://www.cribd.com/document/person-english-jurisprudence-question-and-answer-Toppers-Law-College-2013-2014>.

¹² Aarti Bhardwaj, [no date], *Transfer of Property to unborn child*, Accessed on-1/03/2023, <https://www.legalserviceindia.com/legal/article-2055-transfer-of-property-to-unborn-child>.

¹³ AIR 1978 SC 597.

¹⁴ 410 U.S. 113 (1973).

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a foetus can survive outside the womb and established a constitutional right to access abortion”. The honorable Supreme Court observe that “the word “Person” in the 14th Amendment of the US Constitution [can also be seen in Article 21 of the Indian Constitution] has only postnatal application [means after birth] with no indication of any possible prenatal application. The presumption seems to be that the rights and interests protected by the Due Process Clause and the Equal Protection Clause just do not have practical application to a foetus. In combination with the fact that “person” is not constitutionally defined, the Honorable Court refuses to attribute Personhood to foetus. Another similar judgment can also be seen in the case of Mahima Suri Mukherjee vs State,¹⁵ the Delhi High Court held that “unborn foetus is not covered within the definition of ‘Child’.

But, if scientifically understand and investigate the phases of unborn child, the probable answer is yes, because after Conception to embryotic phases development of child in the womb takes places. The embryotic stage begins after the fertilization process, which continues to structure the human body, likes tissues, organs, body parts etc. and last for not more than 8 weeks, after that embryo is called as “foetus”. The Hindu theologist believes that “life occurs at 7 weeks of pregnancy i.e., at the stage of embryo.¹⁶

From this a simple notion can be drawn that “Child” means natural human being or natural person, as stated in Article 21 of the Indian Constitution and not consideration of unborn fetes as child means rejecting the attribution of unborn foetus as “natural person”. So, considering a ‘person’ at pre-embryo tic stage without begins of heartbeat is not justifiable. Heartbeat of an unborn child begins around six weeks. Therefore, an unborn should have to attain the stages of fetes to exercise all the rights given to him by law. The Indian law is silent at this point as to ‘when exactly unborn is considered as person’, this is open for all the likeminded peoples who is willing to express their perception. The judiciary in cases of *Prakash & Other v. Arun Kumar Saini & Another*¹⁷ held that “an unborn child less than 5 months in mother’s womb is a ‘Person’.¹⁸In *Karnataka State Road Transport Corporation v. Vidya Shinde*¹⁹ held that “foetus of 37 weeks for all purpose considered

¹⁵ AIR 2015, <https://indiankanoon.org/doc/194156180>, accessed on 29/05/2024, 10:35 am.

¹⁶ A. M Bhattacharjee, in your faith, when does human life begins, The Norman Transcript, May 6, 2010, Update on October 10, 2014.

¹⁷ AIR 2005, SCC 478, <https://www.indiankanoon.com>.

¹⁸ AIR 2009, High Court of Delhi, <https://www.indiankanoon.com>.

¹⁹ AIR 2005, ACJ 69 Karnataka High Court.

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as “Person”. In *Dobbs vs Jackson Women’s Health Organization*,²⁰ Justice Samuel Alito ‘declared in the Supreme Court’s majority opinion that Roe was “egregiously wrong from the start.” Now, laws that establish fetal personhood-meaning they extend the legal rights of people to a fetus or embryo before viability-could be the next frontier in the legal battle over reproductive rights in the United States.’²¹

On May 15 2024, the honorable Supreme Court refused to entertain a plea of 20-year-old unmarried woman seeking termination of her over 27 weeks pregnancy. The honorable Supreme Court opines that the “foetus in the womb also has a fundamental right to live”.²²

6. CONCLUSION

According to law, unborn child can claim right to life and personal liberty, but the law is silent on exactly from which period such right can be enforced. Earlier unborn person does not come under the purview of Article 21 but after came into force of the Medical Termination of Pregnancy Act, 1971, foetus can claim right to life. Also, impliedly this right can be understood from the last gestational age i.e., after foetus attained 24 weeks of pregnancy, abortion is strictly prohibited because during this stage, aborting to foetus can affect the life and health of pregnant mother and as well as unborn child.

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²⁰ *Dobbs vs Jackson Women’s Health Organization*, 19-1392, U.S. 577 (2022), <https://www.supremecourt.gov/opinions/21pdf/19-1392>, accessed on 2-5-24, 10:35 am.

²¹ <https://time.com/6191886/fetal-personhood-laws-roe-abortion/> accessed on 2-5-2024, 10:10 am.

²² <https://www.thehindu.com/news/national/Supreme-court-rejects-plea-for-termination-of-over-27-week-pregnancy-says-foetus-has-fundamental-right-to-live/article-68178164.ece/amp>, accessed on 15th may 2024, 11:15am.

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