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Gauri Pillai

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CASE COMMENT

## SHADES OF LIFE IN INDIAN ABORTION LAW

Gauri Pillai\*

**ABSTRACT**

*This case comment analyses the recent Kerala High Court decision in Cry of Life Society v Union of India, where a petition was filed to declare India's law on abortion unconstitutional for violating the right to life of the foetus. The High Court dismissed the petition, upholding the constitutionality of the legislation as protecting women's right to life. The author discusses the High Court's order, narrowing in on the right to life argument used by the Court, and the right to life argument that the Court missed. This analysis distills and responds to the 'shades of life' underlying abortion law in India.*

**I. INTRODUCTION**

In *Cry for Life Society v Union of India*,<sup>1</sup> the Kerala High Court dealt with a claim challenging the constitutionality of the Medical Termination of Pregnancy Act 1971 ('MTPA') for violating the right to life of the foetus under Article 21 of the Indian Constitution. The petitioners were societies engaged in contesting 'foeticide under the cover of medical termination of pregnancy', espousing the 'value of life and [the] agony of [the] unborn child'.<sup>2</sup> They claimed that life begins at conception, vesting the foetus with a constitutional right to life.<sup>3</sup> This right can be taken away only in self-defence or for self-preservation. Abortions are not acts of self-defence because the foetus is not an aggressor. Aggression requires 'an act of will', an attribution of responsibility: the foetus, in contrast, cannot be held responsible for its own creation, which is a biological act beyond its control.<sup>4</sup> Self-preservation can be exercised only if the life of the individual is in danger; in 'normal cases' of pregnancy, the life of the pregnant woman is not in danger.<sup>5</sup> The MTPA, the petitioners argued, was thus unconstitutional to the extent that it allowed abortions in situations where the woman's life was not in 'grave and imminent' danger.<sup>6</sup>

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\* Assistant Professor, National Law School of India University, Bengaluru.

1 *Cry for Life Society and Others v Union of India* WP(C) No. 10130/2013 (Kerala High Court, 9 June 2020) ('*Cry for Life*').

2 *ibid* 2.

3 *ibid*.

4 *ibid* 5.

5 *ibid* 6.

6 *ibid* 1.

The Kerala High Court dismissed the petition and upheld the constitutionality of the MTPA. The petitioners have recently filed an appeal in the Supreme Court against the Kerala High Court decision,<sup>7</sup> making it an apt moment to revisit the case. In this case comment, I discuss the Kerala High Court's judgement to draw out the shades of life discernible within abortion law in India. The petitioners' arguments represent one shade: foetal life. The Kerala High Court's response represents a second shade: women's right to life.

In Part II, I set out how the Court developed women's right to life to dismiss the petitioners' claims. I argue that while the Court's right to life framing is helpful, it offers an inadequate basis to constitutionally ground the right to abortion. In Part III, I argue that in failing to engage with the question of foetal life, the Court left the crux of the petitioners' claim unaddressed. It also missed an opportunity to develop Indian abortion law's response to the role of foetal interests in limiting abortion.

## II. THE COURT'S 'LIFE' ARGUMENT

In asking if the MTPA is compliant with Article 21, the Kerala High Court focused on women's right to life. The Court identified that the object of the MTPA is to 'save and protect the life of pregnant women'.<sup>8</sup> The Court held that 'life' is to be interpreted not as threat to life potentially causing death—a restrictive interpretation of 'life' limited to survival—but also as threats to the physical<sup>9</sup> and mental health<sup>10</sup> of the pregnant woman. If so, the provisions of the MTPA that allow abortion in circumstances beyond 'grave and imminent' danger to women's life—that is, those permitting termination on account of 'grave injury' to women's physical and mental health<sup>11</sup>—are 'proportionate to the object sought to be achieved', and thus constitutional under Article 21's right to life clause.<sup>12</sup>

The Court's right to life argument is crucial. At the outset, it preserves the constitutionality of the MTPA, shielding it against the petitioners' claims. The Court's reading also presents an expansive interpretation of 'life'

7 Ashish Tripathi, 'SC issues notice to Centre on plea against Medical Termination of Pregnancy Act' (*Deccan Herald*, 1 September 2022) < <https://www.deccanherald.com/national/sc-issues-notice-to-centre-on-plea-against-medical-termination-of-pregnancy-act-1141324.html> > accessed 14 September 2022.

8 *Cry for Life* (n 1) 15, 17.

9 *Tapasya Umesh Pisal v Union of India* (2018) 12 SCC 57.

10 *Mamta Verma v Union of India* (2018) 4 SCC 289; *A v Union of India* (2018) 14 SCC 75; *Sarmishtha Chakraborty and Another v Union of India* (2018) 13 SCC 33.

11 Medical Termination of Pregnancy Act 1971, s 3(2).

12 *Cry for Life* (n 1) 18; A similar position was adopted in *Nand Kishore Sharma v Union of India* AIR 2006 Raj 166.

within abortion law, in line with broader constitutional jurisprudence under Article 21, guaranteeing not just a right to survival but also a right to physical and mental health.<sup>13</sup> Moreover, right to life arguments have been mobilised elsewhere to reduce public opposition to abortion in light of foetal interests;<sup>14</sup> they could perform a similar function in India. Finally, right to life arguments are especially important in a global legal climate where even provisions allowing abortion to save the life of pregnant women are under threat.<sup>15</sup>

However, on principle, the Court's endorsement of the right to life alone as the constitutional basis for abortion under Article 21 leaves much to be desired. Article 21 protects both the right to life *and* the right to personal liberty.<sup>16</sup> As the Constituent Assembly Debates note, the 'sacredness and sanctity of personal liberty'<sup>17</sup> is a product of the 'inviolable' personality of an individual.<sup>18</sup> As a result, the right to personal liberty under Article 21 preserves for each individual 'a zone of choice and self-determination', recognising their ability to 'make choices and to take decisions governing matters intimate and personal',<sup>19</sup> including 'whether to bear a child or abort her pregnancy'.<sup>20</sup> The MTPA infringes on personal liberty by allowing abortion only under fixed conditions, within specified time limits, and on sanction by medical professionals.<sup>21</sup> Simply put, a woman cannot access an abortion based on her own assessment of the harm from continuation of pregnancy. Yet, the Court's framing on abortion, being rooted only in the right to life, endorses this denial of personal liberty. This is evident in its observation: 'it cannot be said that everyone, who is not interested

13 For an analysis of Article 21's expansive reading of 'life', see Anup Surendranath, 'Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 756-76.

14 Bianca Stifani et al, 'From Harm Reduction to Legalization: The Uruguayan Model for Safe Abortion' (2018) 143 *International Journal of Gynecology & Obstetrics* 45; Pauline Cullen and Elzbieta Korolczuk, 'Challenging Abortion Stigma: Framing Abortion in Ireland and Poland' (2019) 27 *Sexual and Reproductive Health Matters* 6; Cynthia Beavin et al, 'Activist Framing of Abortion and Use for Policy Change in Peru' (2019) 27 *Sexual and Reproductive Health Matters* 160; Richard Sambaiga, 'Health, Life and Rights: A Discourse Analysis of a Hybrid Abortion Regime in Tanzania' (2019) 18 *International Journal for Equity in Health* 135; Radka Dudová, 'The Framing of Abortion in the Czech Republic: How the Continuity of Discourse Prevents Institutional Change' (2010) 46 *Czech Sociological Review* 945.

15 Mary Ziegler, 'Why Exceptions for the Life of the Mother Have Disappeared' (The Atlantic, 25 July 2022) <<https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/>> accessed 13 September 2022.

16 Constitution of India 1949, art 21: 'No person shall be deprived of his life or personal liberty except according to procedure established by law' [emphasis added].

17 KT Shah, Constituent Assembly Debates (Volume VII, 1 December 1948) [7.64.129], [7.64.130].

18 Brajeshwar Prasad, Constituent Assembly Debates (Volume CII, 2 December 1948) [7.65.69].

19 *KS Puttaswamy v Union of India* (2017) 10 SCC 1, 141 (Chandrachud J.).

20 *ibid* 229 (Chelameshwar J.); *ibid* 239 (Nariman J.).

21 Alka Barua et al, 'The MTP 2020 Amendment Bill: Anti-Rights Subjectivity' (2020) 28 *Sexual and Reproductive Health Matters* 2.

to continue with the pregnancy, is entitled as of right, to seek medical termination of pregnancy on any grounds other than the one mentioned under Section 3 of the [MTPA]'.<sup>22</sup> The Court's grounding of abortion within the right to life thus de-emphasises the role of personal liberty within Article 21's guarantee of right to life *and* personal liberty.<sup>23</sup> It also fails to recognise the close connection, in the abortion context, between the denial of personal liberty and the denial of life. Restrictions on abortion (which deny personal liberty) often compel women to seek abortions outside the healthcare system, with backstreet abortion providers. This causes mortality and morbidity amongst women, harming life and health.<sup>24</sup> In other words, the denial of personal liberty leads, in effect, to a denial of life. In ignoring this connection, the Court comes to the unfortunate conclusion that the MTPA is not just necessary—to preserve life—but also sufficient (or proportionate) under Article 21.

### III. THE MISSING 'LIFE' ARGUMENT

The Court's reliance on women's right to life is inadequate for a second reason. It fails to engage with the petitioners' claims on foetal right to life. The petitioners argue that the foetus has a right to life from conception. They rely on the Hindu Succession Act 1956 ('HSA') where the unborn child is entitled to a share in the property of the Hindu undivided family<sup>25</sup> to suggest that Indian law recognises foetal right to life: 'There can be no right to property without an attached right to life'.<sup>26</sup> However, the relevant provision under the HSA makes clear that only '[a] child who was in the womb at the time of the death of an intestate *and* who is subsequently born alive shall have the same *right* to inherit to the intestate'. This implies that the right to inherit property vests only after the birth of the child, indicating that the foetus, before birth, has neither the right to property, nor the right to life. The petitioners also argue that international human rights law protects

22 *Cry for Life* (n 1) 27.

23 This is reflective of a general critique of right to life arguments for abortion for failing to affirm reproductive autonomy: See Catherine Albertyn, 'Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts' (2019) 1 Oxford Human Rights Hub Journal 89-97.

24 World Health Organisation, 'Safe Abortion: Technical and Policy Guidance for Health Systems' (2012) 90 <[http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf?sequence=1)> accessed 13 September 2022 ('Legal restrictions on abortion do not result in fewer abortions nor do they result in significant increases in birth rates'); Gilda Sedgh et al, 'Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008' (2012) 379 *The Lancet* 625; David Grimes et al, 'Unsafe Abortion: The Preventable Pandemic' (2006) 368 *The Lancet* 1908.

25 Hindu Succession Act 1956, s 20.

26 *Cry for Life* (n 1) 5.

life before birth.<sup>27</sup> This claim is legally incorrect: international human rights law 'clearly rejects claims that human rights should attach from conception or any time before birth'.<sup>28</sup> As I argue elsewhere, abortion law in India also does not recognise foetal right to life at any stage of gestation;<sup>29</sup> at best, it recognises a 'compelling State interest' in protecting the 'prospective child' or the 'potentiality of human life'.<sup>30</sup> The Court thus ought to have rejected the petitioners' arguments on foetal life right at the outset.

Moreover, had the Court explicitly responded to the petitioners' claims, it could have assessed whether legal restrictions on abortion are suitable and necessary to protect foetal potentiality. Suitability and necessity are two prongs of the four-part proportionality test,<sup>31</sup> which the Court correctly identified as applicable in this case.<sup>32</sup> Suitability asks whether the means the State adopts to pursue a given legitimate aim are *appropriate* in achieving the aim. Necessity asks if the means, even when appropriate, are *required* to achieve the aim; or, are there alternate means which can achieve the same aim to a 'real and substantial' extent?<sup>33</sup>

Here, as per the petitioners' arguments, the aim is to protect foetal potentiality (incorrectly identified as foetal right to life). The suggested means is to prohibit abortion within law, except in cases where the pregnant woman's life is in 'grave and imminent' danger. For these means to be consistent with proportionality, legally prohibiting abortion has to be both suitable and necessary to protect foetal potentiality. In this case, it is neither.

A legal prohibition on abortion does not actually reduce the number of abortions (and thereby protect foetuses). It simply pushes women seeking abortions towards unsafe abortion providers,<sup>34</sup> harming both foetuses and women. Thus, prohibiting abortion within the law is not a suitable means of achieving the aim of protecting the foetus. It is also not a necessary means,

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27 *ibid* 7.

28 Rhonda Copelon et al, 'Human Rights Begin at Birth: International Law and the Claim of Fetal Rights' (2005) 13(26) *Reproductive Health Matters* 120-9. This was also recognised by the Bombay High Court in *High Court on its own Motion v State of Maharashtra* 2017 CriLJ 218, 15, 20.

29 Gauri Pillai, 'Two Courts, Two Conclusions: Abortion Law in India' (*Indian Constitutional Law and Philosophy*, 26 July 2022) <<https://indconlawphil.wordpress.com/2022/07/26/guest-post-two-courts-two-conclusions-abortion-law-in-india%E2%80%9C/>> accessed 13 September 2022.

30 *Suchitra Srivastava v Chandigarh Administration* (2009) 9 SCC 111.

31 *Puttaswamy (II) v Union of India (Aadhaar)* (2019) 1 SCC 1, 118-126 (Sikri J.) ('*Aadhaar*'). All four limbs of the proportionality test (legitimate aim, suitability, necessity, proportionality *strictu sensu*) have to be satisfied for a law to be held constitutional under Article 21. However, here I focus on just two limbs in light of considerations of space.

32 *Cry for Life* (n 1) 18.

33 *Aadhaar* (n 31).

34 See (n 24).

as there exist alternate steps that the State can adopt to achieve the same aim. In legally restricting abortion, the State attempts to reduce the number of abortions (seemingly) to protect foetuses. The State can, alternatively, achieve this end by lowering the very need for abortions by targeting the root causes of abortions in India: lack of access to temporary contraception,<sup>35</sup> violence against women and girls,<sup>36</sup> and lack of State support for parenting.<sup>37</sup> In fact,

there is a wealth of evidence that suggests that a concern for protecting [foetal] life can be *more effectively* pursued through policies that attack the incidence of unwanted pregnancy (for example, through improving the quality of sex education and contraceptive provision, and making motherhood a more realistic possibility for women struggling to balance childcare alongside other commitments).<sup>38</sup>

Despite this, an insistence on restricting abortion as the means to protect foetal potentiality suggests that:

the underlying rationale...is not—or at least not only—the protection of the [foetal] right to life, but something less articulated and more difficult to grasp...*conceptions on gender relations and the place of women in society*.<sup>39</sup>

The petitioners' arguments in this case offered the Court a perfect opportunity to raise these questions, and flush out pernicious assumptions about women that typically underlie restrictions on abortion.<sup>40</sup> These assumptions are suspect under the constitutional prohibition on sex

35 Leela Visaria, 'Abortion in India: Emerging Issues from the Qualitative Studies' (2004) 39 Economic and Political Weekly 5044–5052; Susheela Singh et al, 'The Incidence of Abortion and Unintended Pregnancy in India, 2015' (2018) 6 The Lancet Global Health e111, e118; Melissa Stillman, 'Abortion in India: Literature Review' (Guttmacher Institute 2014) 16.

36 Jay Silverman et al, 'Reproductive Coercion in Uttar Pradesh, India: Prevalence and Associations with Partner Violence and Reproductive Health' (2019) 9 SSM - Population Health 100484; TK Ravindran and P Balasubramanian, '"Yes" to Abortion but "No" to Sexual Rights: The Paradoxical Reality of Married Women in Rural Tamil Nadu, India' (2004) 12 Reproductive Health Matters 88.

37 Visaria (n 35); Shelly Makleff et al, 'Exploring Stigma and Social Norms in Women's Abortion Experiences and Their Expectations of Care' (2019) 27 Sexual and Reproductive Health Matters 55–6.

38 Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36 Oxford Journal of Legal Studies 358 (emphasis added); Catherine MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100 The Yale Law Journal 1320 ('The *most effective* route to protecting the fetus—given illegal abortion, *perhaps the only effective route*—is supporting the woman') (emphasis added).

39 Veronica Undurraga, 'Criminalisation under Scrutiny: How Constitutional Courts Are Changing Their Narrative by Using Public Health Evidence in Abortion Cases' (2019) 27 Sexual and Reproductive Health Matters 43 (emphasis added).

40 Reva Siegel, 'Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression' (2007) 56(4) Emory Law Journal 815.

discrimination.<sup>41</sup> In evading the question of foetal right to life by focusing on women's right to life, the Court thus missed an opportunity to develop Indian abortion law's response to the role of foetal interests in limiting women's right to abortion. The stage, then, is set for the Supreme Court.

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41 Constitution of India, art 15; *Ministry of Defense v Babita Puniya* AIR 2020 SC 1000; *Union of India v Annie Nagaraja* (2020) 13 SCC 1. These arguments are developed further in my Doctor of Philosophy Dissertation: Gauri Pillai, 'Reproductive Rights in India: The Search for a 'New' Constitutional Home' (University of Oxford, June 2022).