

RIGHT TO ABORTION: JUSTIFIED OR NOT?

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INTRODUCTION

One of the most controversial issues of the women's rights movement has been women's efforts to control their reproductive capabilities. The major battle has been over abortion.¹ The Abortion debate is immensely wide ranging, embracing numerous concepts, such as beginning of human life, the differential perspectives of when a 'person' comes into existence, the theological theory of the ensoulment of the human, the developmentalist idea of the human being and the theory that life is a gift from God and therefore sacrosanct. Confronting these views is the assertion of the moral, ethical and legal right of the woman to choose what shall happen to her body (the concept of autonomy).² The right to life is a very broad concept and is the most fundamental of all. In India, right to life has been recognized under Article 21 of the Constitution. Among various rights which are available to a woman, the right to abortion is also believed to be one of the most essential and fundamental right. Right to abortion has been recognized under right to privacy which is a part of right to personal liberty and which emanates from right to life.³ But the question always arises whether an unborn child should be considered as a human being and be given the status of a person or not. Abortion is an issue clouded with the questions of morality, infanticide, suicide, ethics, religious beliefs and women's rights. According to WHO, around 40 to 50 million abortions occur every year worldwide. However, it is scandalous that such a basic right as the right to help the planning or preventing the birth of a child has been denied to women.⁴ Abortion is one of the subjects that have been in discussion internationally after the landmark judgment of *Roe v. Wade* and commonly referred as Roe v Wade Debate. Every time proposition ends to whether a mother has a right to terminate her pregnancy at any time she wishes or an unborn child has a right to life.

ABORTION: MEANING AND DEFINITION

Abortion can be said to occur when the pregnant uterus empties prematurely. It is commonly understood as wilful and forcible termination of an unwanted pregnancy at an

¹ Kuresten, K. Ashlyn. "Reproductive Rights." *Women and The law: Leaders, Cases and Document*. ABCCLIO. 2003. pg no. 103.

² Daives, Michael. "Abortion and the Law." *Textbook on Medical Law*. 2nd ed. Oxford University Press:NewYork. 1998. pg no. 267.

³ *Roe v. Wade* 410US 113(1973)

⁴ AIR 1997 Journal Section, 129(129).

early stage. Following the basic principles of physiology, the ovum is as alive at the time of impregnation, as is the child or the man. It is for this reason the law recognises 'causing miscarriage' or abortion as an offence. This applies to the period from the moment of conception, as much as to the other periods of pregnancy. This is because of the underlying active life in the ovum or the embryo which may be feeble but not extinct. But, when such evacuation is carried on medical grounds then law does not intervene. The rest of the time, abortion is not justified by law, hence is illegal and is classified as criminal offence. It should be realised that even naturally as a consequence of certain pathological conditions or even accidents, the uterus has been known to empty out spontaneously.

Basic Concept

The Matrimonial Laws also recognise the right of unborn child. Where a woman becomes pregnant during the period of wedlock, she cannot terminate her pregnancy at her will. In *Satya (Smt.) v. Shri Ram*⁵, the High Court of Punjab and Haryana held that termination of pregnancy at the instance of wife but without the consent of her husband amounts to cruelty. In an earlier English Case, *Forbes v. Forbes*⁶, it was held that "if a wife deliberately and consistently refuses to satisfy her husband's natural and legitimate craving to have children, and the deprivation reduces him to despair and affects his mental health, the wife is guilty of cruelty." Here the intention of the legislature may be understood as to bring the unborn child safely to the world. Neither the wife nor the husband individually takes a decision to abort the foetus. But their collective decision is certainly a threat to the life of unborn child. However, such collective decision is also subject to the provisions of Indian Penal Code, 1860 and The Medical Termination of Pregnancy Act, 1971. However, the right to abortion and the right to birth must be decided on merits of each independent case. Any rigid principle in this regard would certainly lead to unnecessary ailment to the mother and to the child in the womb.⁷

Abortion as a Human Right

Human Rights are those rights, which should be available to every individual without any discrimination of any kind. Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom. The most important right of a Human is the right to life. It is the supreme human right from which no derogation is permitted and it is inalienable too. The Article 6(1) of the International Covenant on Civil and Political Rights, 1966 prohibit the arbitrary deprivation of life. But there are some controversial issues related to this supreme right. One such issue is the question of Right to abortion. Among other rights of women, it is believed that every mother has a right to abortion, it is a universal right. But the rights of

⁵ AIR 1983 P&H 252: 1983 Hindu LR 117: 1983 Marri LJ 153: 1983 Punj LJ 192.

⁶ (1955) 2All ER 311.

⁷ AIR 1996 Journal Section, 136 at pp. 139, 140.

the mother are to be balanced with the rights of the unborn. Earlier the right to abortion was not permitted and it was strongly opposed by the society. The termination of pregnancy was termed to be a murder of the foetus. But due to the change in time and technology, nowadays this right has been legally sanctioned by most of the nations after the famous decision of *Roe v. Wade* by the US Supreme Court. But the strong oppositions still exist in this regard and people do believe that it should be legally prohibited. Throughout history, induced abortions have been a source of considerable debate and controversy. An individual's personal stance on the complex ethical, moral, and legal issues has a strong relationship with the individual's value system. A person's position on abortion may be described as a combination of their personal beliefs on the morality of induced abortion and the ethical limit of the government's legitimate authority.

It is a woman's individual rights, right to her life, liberty, and to the pursuit of her happiness, which sanctions her right to have an abortion. A woman's reproductive and sexual health shape her reproductive choices. Reproductive rights are internationally recognized as critical both to advancing women's human rights and to promoting development. In recent years, governments from all over the world have acknowledged and pledged to advance reproductive rights to an unprecedented degree. Formal laws and policies are crucial indicators of government commitment to promoting reproductive right. Each and every woman has an absolute right to have control over her body, most often known as bodily rights.⁸

Since its inception the United Nations has maintained that reproductive freedom is a basic human right.⁹ The vast majority of Governments world-wide theoretically recognize this right but in the absence of political will it has not yet been accepted as a part of Municipal law. However, some have taken steps to include the abortion right in their constitution. During the past few decades a number of U.S writers claim that the right to abortion is a woman's absolute right.¹⁰

Right to Life and Personal Liberty

The Right to Abortion is an attribute of the Right to Privacy. But the Indian Constitution does not grant in specific and express terms any right to privacy as such. Right to Privacy is not enumerated as a Fundamental Right in the Constitution. However, such a right has been culled by the Supreme Court from Article 21 and several other provisions of the Constitution read with the Directive Principles of State Policy. For the first time, as early as 1963 in *Kharak Singh*¹¹, a question was raised whether the right to privacy could be implied from the existing Fundamental Rights, such as, Article 19(1)(d), 19(1)(e) and 21.

⁸ http://www.legalserviceindia.com/articles/adp_tion.htm

⁹ AIR 1997 Journal Section, 129 (131).

¹⁰ AIR 1997 Journal Section, 129 (131).

¹¹ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295

The majority of the judges participating in the decision said that “our constitution does not in terms confer any like constitutional guarantee” to right to privacy.¹² On the other hand, the minority opinion (Subba Rao J.) was in favour of inferring the right to privacy from the expression ‘personal liberty’ in Article 21. In the words of Subba Rao J.: “It is true that our constitution does not expressly declare a right to privacy as Fundamental Right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life...”

In *R. Rajagopal v. State of Tamil Nadu*,¹³ the Supreme Court has asserted that in recent times the right to privacy has acquired constitutional status; it is “implicit in the right to life and liberty guaranteed to the citizens” by Article 21. It is a right to be let alone. A citizen has a right to “safeguard the privacy of his family, marriage, procreation, motherhood, child bearing and education among other matters”. The right to privacy has several aspects. One such aspect is the right to procreate. This is also known as “the right of reproductive autonomy”. The right of a woman to abort falls within the ambit of the Right to privacy. The Andhra Pradesh High Court has observed in *B.K. Parthasarathi v State of Andhra Pradesh*¹⁴ that: “The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or women. Necessarily, such a right includes the right not to reproduce. The intention of the state into such a decision making process of the individual is scrutinised by the constitutional courts in the country and in America with great care”. So from the above cited cases it can be concluded that a woman has right to abortion under Article 21 of the Indian Constitution. Although, such a right is not expressly provided as a fundamental right of a woman.

The SC of India has said “The Right to Privacy is implicit in Article 21 of the Constitution of India and right to abortion can be read from this article.” We can justify this statement of SC of India through many of the ruling on cases like *V.Krishnan v. G. Rajan*¹⁵:

The question relating to abortion to save mother's life and the answer to the same are as follows-

“If the mother's actual life were threatened, a conscientious doctor would try to save both. In the rare, rare case where such a decision is really needed, the problem would be that of balancing one human life against another (note that all other reasons given for abortion are reasons less than human life itself). In such a case, it would be proper to give to the local family and local medical and ethical authorities the right to make whatever decision they believed right. An ethical physician would certainly try to save both, but might have to make a choice. The proposed Human Life Amendments allow this exception.”

¹² AIR 1963 SC 1295

¹³ AIR 1995 SC 264

¹⁴ AIR 2000 AP 156

¹⁵ (1994) 1 Mad LW (Cri) 16

Also Halsbury's Laws of England¹⁶ were cited in the above mentioned case that deals with Medical termination of pregnancy. It reads: "No offence is committed under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family greater than if the pregnancy were terminated, or that there is a substantial risk that if the child were born mother would suffer such physical or mental abnormalities as to be seriously handicapped."

Also in the most celebrated case of *Suchita Srivastava v. Chandigarh Administration*¹⁷ the Hon'ble SC observed: "A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

So from the above cited cases it can be concluded that a woman has right to abortion under Article 21 of the Indian Constitution.

ABORTION LAWS IN INDIA

There are various abortion laws prevalent in India. Our Indian Penal code has different relevant provisions in connection with abortion i.e. (Section 312, 313, 314 and 315). During the last few years many countries have liberalized their abortion laws. Many countries are having very restricted abortion laws and there are many countries where abortion is available at the request of woman. Among all those countries India made the abortion laws liberal in 1971 by enacting MTP Act which was designed to create certain exceptions to the strict provisions of IPC which declare that all abortions, miscarriage are criminal unless they are undertaken to save the life of a pregnant woman.

The Medical Termination of pregnancy Act, 1971, provides for the termination of certain pregnancies by registered medical practitioners. It extends to the whole of India except the

¹⁶ Fourth Edition, Vol.30, ¶44 page 37

¹⁷ Judgements Today 2009 (11) SC 409

State of Jammu and Kashmir.¹⁸ It lays down that ‘notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.’ [s.3 (1)].

The Act defined ‘registered medical practitioners’ as meaning ‘a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules under this Act.’ [s. 2 (d)].

This Act further provides that ‘notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not registered medical practitioner shall be an offence punishable under that Code and that Code shall, to this extent, stand modified.’ [s. 5 (2)].

Section 4 of the Act states that ‘No Termination of pregnancy shall be made in accordance with this Act at any place other than-

- a) A hospital established or maintained by Government, or
- b) A place for the time being approved for the purpose of the Act by the Government.’

Abortion in Minor Girls

In the month of December, 1993 a father of a minor girl of 16 years of age filed a writ petition before the Madras High Court under Medical termination of Pregnancy Act, 1971 for a direction from the court to terminate the pregnancy of his minor daughter. The Hon’ble High Court of Madras dismissed the writ petition and held that abortion cannot be forced on minor girl when she is willing to bear the child.¹⁹

The Parental right under MTP Act to seek information of pregnancy of a minor girl, such right is subject to two conditions²⁰:

- The maturity of understanding of the minor girl.
- The opinion of the Doctor.

The Madras High Court judgment is a landmark decision on the subject. The MTP Act needs changes in this direction. It is so because under Indian Penal code sexual intercourse with a minor wife of 15 years or above is not an offence. The Hindu Marriage Act, 1955

¹⁸ Dikshit, P.C. “ Regulation and Control of Medical Practice in India”.*HWV Cox: Medical Jurisprudence and Toxicology*. 7th ed. Lexis Nexis ButterWorth’s: New Delhi. 2002. pg no. 153.

¹⁹ *V.Krishnan v. G. Rajan alias Madipu Rajan*, (1994) 1 LW (Cri)16 Mad (DB).

²⁰ Jain, M.P. “Part III- Fundamental Rights”. *Indian Constitutional LawI*. 6th ed. Vol. 2. LexisNexis Butterworths Wadhwa: Nagpur. 2010. pg no. 1059.

and the Child Marriage Restraint Act, 1929 also did not invalidate the marriage of a minor girl. Therefore, these legislations recognised indirectly the right of a minor girl to marriage and thereby to conceive. The parent at this stage cannot be allowed to interfere with the aid of MTP Act to deprive a minor girl of her natural right to conceive. No legislation confers on any person to subject a minor girl to any unwilling treatment.²¹ Thus, it can be logically concluded that Child Marriage should be completely abolished. In cases where a minor has conceived, she should be given the right to decide for herself whether to continue with that pregnancy or not. This case can also be inferred to mean that the Right to abortion also includes the opposite right of 'Not to Abort'. In *Maheer v. Roe*²² the Supreme Court held that a woman has at least an equal right to choose to carry her foetus to term as to choose to abort it.

*"Physical and emotional damage from abortion is greater in a young girl. Adolescent abortion candidates differ from their sexually mature counterparts, and these differences contribute to high morbidity. They have immature cervixes and run the risk of a difficult, potentially traumatic dilatation. The use of laminaria in no way mitigates our present concern over the problems of abortion."*²³

But the main question lies here is

- Whether the Right 'not to abort' is recognised under the Right to Privacy in Indian Constitution?
- Whether Right not to abort would prevail over Right given to the guardian to decide to cause termination under the MTP Act, 1971?

The right to abortion is recognised by the Indian constitution and it was proven when the Medical Termination Act was brought into effect. Thus, the wider aspect of this right should also be adopted and right not to abort can be inferred under Right to privacy.

As per this case, the Right not to abort overpowers the Right given to the guardian to terminate the pregnancy but generally it should not be done so. Instead of giving this right to either of the two concerned parties i.e. the minor or guardian it should be based on two aspects i.e the maturity of understanding of the minor girl and the opinion of the doctor. It should be based on these two requirements which ultimately lead to the 'best interest' of the minor. There might be instances where morally it would be justified to abort the baby taking the societal mind-set and the stigma that would be attached to the girl as well as the minor but at the same time abortion can pose more risk to the girl than to bear the baby

²¹ AIR 1996 Journal Section, 136 (138).

²² 53 L.Ed.2d 484

²³ Russel. J. "Sexual Activity and Its consequences in the Teenager." Clinics in OB, GYN, Vol.1. No.3. Dec. 1974. pp.683-98.

Section 5: When Section 3 and 4 - not to apply- The provisions of Section 4 and so much of the provisions of sub-section (2) of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in *good faith*, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

It is not necessary for the surgeon to wait until the patient is in peril of immediate death if he has reasonable grounds to believe that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.²⁴ In such a case the court is entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother. Thus, a mother can be allowed to abort in order²⁵:

- to preserve the life of a pregnant mother
- to preserve and protect a pregnant mother from the risk of grave physical injury or mental wellbeing.
- to prevent the completion of a pregnancy that has resulted from rape
- to prevent the birth of a child with serious deformity, mental deficiency, or genetic abnormality
- to exercise birth control, that is to help from having a child for social or economic reasons.
- To avoid the risk to the health of a pregnant woman by reason of her actual or reasonably foreseeable environment.

Today in most countries abortions are permitted for the above-mentioned reasons.

To sum up it can be said that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the health of the pregnant woman. Thus, the termination of pregnancy is dependent on the formation of medical opinion in good faith that such a risk as mentioned above is present. Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention.²⁶

²⁴ *Rex v. Bourne* (1983) 3 All ER 615.

²⁵ Dr. Singhvi, L.M.& Jagdish Swarup. "Part III- Fundamental rights: Protection of Life and Personal Liberty". *Constitution of India*. 2nd ed. Vol.1. Modern Law Publications: New Delhi. 2006. pg no. 1056.

²⁶ Dikshit, P.C. "Regulation and Control of Medical Practice in India". *HWV Cox: Medical Jurisprudence and Toxicology*. 7th ed. Lexis Nexis ButterWorth's: New Delhi. 2002. pg no.154.

Thus it can be concluded that it is illegal to terminate a pregnancy unless it is carried out under the terms of the Medical Termination of Pregnancy Act, 1971. The grounds are the same. All the indications of the MTP Act are applicable only up to 20 weeks of pregnancy. Up to 12 weeks of pregnancy, only one doctor may form an opinion on the applicability of the indications. Above 12 weeks of pregnancy and up to 20 weeks, the decision about the abortion should be taken by two doctors. The Act also imposes restriction that all operations must be performed in approved premises. However, the pregnancy can be terminated at any stage if it is necessary to save the life of the mother. In such cases, the decision can be taken by a single doctor alone and the operation can be performed at any place- whether approved or not. Termination of pregnancy is justified only if it is done with the consent of the pregnant woman unless she is a minor or a lunatic one, in which cases, the consent of her guardian is required but the consent of the husband is not necessary, if minor is married.²⁷

CONCLUSION

The right to conception, the right to abortion and the right to birth are very much conflicting rights and became controversial subject matters of law and procedure of the time. These involved many questions of values on moral, ethical, sociological and legal grounds. Any rigid statute to regulate these rights will pose critical problems and challenges both to the well-being of a woman and an unborn child. For example, when a woman has liberty to conceive, it implies liberty to terminate the pregnancy if she dislikes continuing it, which in turn breeds a new right to kill the foetus. But the right to kill in any manner cannot be inferred from the Statute, when right to birth (life) is recognised, it implies absence of right to abortion which in turn imposes a duty on woman to carry on unwilling child. Therefore, today's existing law stands good and serves the purpose in this concern. Under the present law a woman has an absolute discretion whether to conceive or not. At the same time such discretion for abortion is limited by IPC and MTP Act which allow abortion under exceptional circumstances only. The unborn child under the present law may lose its life under certain conditions. While interpreting the Indian statutes it can be said that since the Right to privacy is provided by the Indian Constitution the mother has full rights on her body. But since every right is restricted reasonably, similarly the right to abortion recognised under right to privacy is subject to reasonable restrictions that are recognised under the special statutes i.e. MTP Act, 1971, The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, etc. Since, section 3 clearly specifies the limited period within which the abortion can be conducted i.e. within 20 weeks, therefore, even if the woman wants abortion within that period for the mere reason that she is not ready, that right to abortion should be granted. Such limit has been kept taking into account the various medical facts and therefore it indirectly implies that

²⁷ AIR 1997 Journal Section, 129 (129)

abortion within that period is not amounting to killing of a foetus. Section 299(3) of IPC states: "The causing of a death of a child in mother's womb is not homicide". Also, in international conventions it has been stated that the foetus is not a natural person unless the child pops out of the birth canal. It is very logical to think this way that a mother who is supposed to take care of the child all through its growing age, if not ready for it, how can she be expected to do so willingly and without mental pressure and burden. How can a foetus suffering from some abnormality that has been diagnosed, even if given the right to live, is expected to live a normal life if born.

Thus, there stand many reasons for legalizing abortion which include the bodily sovereignty of a woman, danger to the life of a woman or foetus and in such case it's not about not saving the life of a foetus but at least saving one life when both are in danger and last but not the least if abortion is banned this would lead to "back street" abortions. Therefore, Right to Abortion is justified provided it is not misused.