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UNDERSTANDING RIGHT TO ABORTION UNDER INDIAN CONSTITUTION

ABSTRACT

The accompanying review tries to do a comparative research on the rights of women regarding termination of pregnancy. Abortion is one of the main subjects which have been discussed extensively at all the levels, that is, national and international.

The foremost and primary Human Right is Right to Life. This is the kind of right which is to be given to each and every individual and any kind of discrimination should be amputated.

In India, right to life is recognised under Article 21 of The Indian Constitution. Under this right given to each citizen, right to abortion is also believed to be the most crucial fundamental right give to women.

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Abortion may be sinful or immoral according to many religions and moral principles, but it should be the right of women to abort Or not as it is her life at risk as well. Across the globe, women's organisations have fought for the right to access safe and legal abortion for years. Furthermore, International Human Rights laws underpins that all women should have the right to decide independently in all matters related to reproduction, including the issue of abortion.

The termination of pregnancy includes two basic and the most critical aspects of abortion, that is, rights of a woman and rights of an unborn child.

In this particular analytical research on termination of pregnancy is pivoted towards the right of a woman to abortion. This paper is mainly divided into four parts, the introduction –which gives a brief analysis of meaning of abortion, abortion issues and main idea- of abortion, then comes abortion laws in India, abortion laws in other countries mainly The United States and a comparative analysis of Indian abortion laws and other countries.

INTRODUCTION

"Responsible parenthood involves decades devoted to the child's proper nurture. To sentence a woman to bear a child against her will is an unspeakable violation of her rights: her right to liberty (to the functions of her body), her right to the pursuit of happiness, and, sometimes, her right to life itself, even as a serf. Such a sentence represents the sacrifice of the actual to the potential, of a real human being to a piece of protoplasm, which has no life in the human sense of the term. It is sheer perversion of language for people who demand this sacrifice to call themselves 'right-to-lifers.'"

-Leonard Peikoff

The facet of right to abortion is ruled over by various other facets such as religion, morals, ethics and legal values. But despite of that, one question always arises before everyone that whether the mother has a right to abortion or the child has a right to life. The law and various studies have readily tried to strike a balance between this.

Ronald Dworkin, an American philosopher, jurist and scholar of the United States constitutional law, did not accept the claim that the foetus is a complete moral person from the moment of conception and that is the reason why abortion should be prohibited.

Dworkin made a detailed analytical study on the very same issue. According to his study a foetus has no interest of his own before the third trimester. The brain of the foetus is not fully developed until this time and therefore, cannot feel pain. The scientists have also proved that the fetal brain cannot feel pain approximately before the 26th week. Once a foetus can live by itself, it may have interests of its own, which is after the third trimester. But prior to that, abortion should not be forbidden claiming that it is against the interest of the foetus, as it merely depends on the fact that whether the foetus has developed enough to have interests.

The article ends with an evaluation of a pragmatic account. According to this account, one has to examine the different kinds of reasons for abortion in a particular case to decide about the reasonableness of the justification

given. Take the example of a young, raped woman. The account suggests that it would seem cruel and callous to force her to give birth to “her” child. So, if this pragmatic account is correct, some abortions may be morally justifiable whereas other abortions may be morally reprehensible. (Gordon)¹

ABORTION LAWS IN INDIA

Despite 49 years of the incorporation of the MTP act in The Indian Constitution and the validation of women’s right to abort, abortion still remains a debatable and taboo issue in India. Sadly, it has only turned out to give out a cold shoulder when women are facing killing issues. According to the Abortion Assessment Project, the mortality from these unsafe abortions contributed to up to 13% of maternal deaths in our country.

Abortion is not illegal in India since 1971. The Medical Termination of Pregnancy Act, 1971, is responsible for the legalization of abortion in our country. However, legally, it can only be performed up to 24 weeks of conception.

Abortion can be performed only under four conditions:

The idea of terminating your pregnancy cannot sprout up by choice and is purely circumstantial. There are four situations under which a legal abortion is performed:

- If the life of the mother or her physical health or mental health is at risk by continuing the pregnancy.
- If the foetus has any severe abnormalities
- If pregnancy occurred as a result of failure of contraception (but this is only applicable to married women)
- If pregnancy is a result of sexual assault or rape.

Only the doctor gets to decide about abortion:

It is solely at the discretion of the doctor that a woman may or may not undergo abortion, if the abortion is to take place within the first trimester (up to 12 weeks of conception), she needs only one doctor to sign-off. However, if she exceeds the 12-week bar (from 12 to 20 weeks), she needs two doctors to sign-off.

¹(Gordon)<https://www.iep.utm.edu/abortion/>

You do not need your family's or husband's consent, if you are an adult:

The MTP Act gives adult women the sole right to decide for themselves. A doctor cannot ask for anybody's consent except for the mother's in the case.

Right to Life applies to abortion:

In a benchmark judgement regarding right to **privacy**, the Supreme Court of India said, "A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy".

Also in another landmark judgement the Supreme Court held that, "a woman's right to make reproductive choices is also a dimension of her 'personal liberty' under Article 21 of the Constitution"²

The reason for 20 Week bar:

As per the Medical Termination of Pregnancy Act, abortions can only be carried out till 20 weeks of conception. The present rule, when it was subsumed, was put in place in order to prevent the sex selection testing and hence, sex-selective abortions, which then could only be done after the 20-week mark.

However, what the MTP Act breaks to realize now is that, with the advancement in technology, this test can now be done much before.

The abortions required after 20 weeks bar

There are certain situations where any foetal abnormalities or risks to mother's life come to light after 20 weeks of pregnancy, which the law fails to answer. In such cases, the MTP Act requires the mother trying to a get an abortion to seek approval from the court. Also, in cases involving rape victims and child assault victims, the condition of pregnancy may come to light quite tardy, usually only when the child

² Mrs X and Ors Vs Union of India and Ors, AIR 2017 SC

develops the symptoms. These situations should be brought in front of the court.

But there are certain cases where the Court passed certain exceptional judgments too. Such as in the case of *Murugan Nayakkar vs. Union of India & Ors. W.P.*³, the Apex Court allowed the termination of 32-week old pregnancy of a 13-year-old rape victim holding, “Considering the age of the petitioner, the trauma she has been through because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it is appropriate that termination of pregnancy should be allowed.”

In a similar case, the petitioner was a 10 year old pregnant victim with 32 weeks of pregnancy, was not allowed termination, because the Medical Board opined that the continuation of the pregnancy was less hazardous for the petitioner than termination at that stage.⁴

Thus, we can see that the Medical Board holds an important position at the time of termination of pregnancy post the time bar.

The MTP (Amendment) Bill:

An amendment was brought by Ministry of Health and Family Welfare in October 2014 in the Medical Termination of Pregnancy Act. The bill suggested certain very valid propositions, such as the extension of abortion limit to 24 weeks, elimination of the need of a second doctor's sign-off beyond 12 weeks, giving the right to legal abortion to every woman despite her marital status and so on. The primary objective of the bill was to reduce the number of unsafe abortions that are carried out in India. The draft did some rounds in the cabinets and to the Prime Minister's office, but was stalled.

But The Medical Termination of Pregnancy (**Amendment**) **Bill, 2020** was introduced in Lok Sabha by the Minister of Health and Family Welfare, Dr. Harsh Vardhan on March 2, **2020**.

This amendment exceeds the legal abortion limit from 20 weeks to 24 weeks, making termination of pregnancy easier for women.

³*Murugan Nayakkar vs. Union of India & Ors. W.P. (C) No. 749/2017*

⁴*Alakh Alok Srivastava vs. Union of India W.P. (C) No. 565/2017,*

ABORTION LAWS IN OTHER COUNTRIES

Termination of pregnancy is said to be the most controversial and argued issue all over the world. Following are the abortion laws of various other countries.

The United States

The idea of abortion was said to be immoral and illegal before the judgment passed by the Supreme Court of the United States in *Roe v. Wade*.

This case decriminalised abortion all over the nation in 1973. This decision imposed a uniform framework for the state legislation on the subject as it was already legal in several states.

In *Roe v. Wade*⁵ the Supreme Court invalidated all the previous laws and set guidelines for the availability of abortion. *Roe* established the right to privacy and the concept of “trimester”, that is, 12 weeks. The Supreme Court broadly held that abortion is legal only before fetal viability and only when mother’s health is in danger after that period.

In present day scenario abortion is still argumentative in The US and there are not enough abortion clinics. Also some states have effectively banned abortion. Alabama’s new law bans all abortion from the time a “woman [is] known to be pregnant”. Georgia, Ohio, Kentucky, Mississippi and Louisiana – have passed bills which prohibit abortion after about six weeks – before many people even realize they are pregnant.

The United Kingdom

Abortion is legally available throughout The United Kingdom of Great Britain and Northern Ireland. In Northern Ireland abortion is not a criminal offence.

In Great Britain abortion carried out to be regulated under criminal law, but is legally available through the Abortion Act 1967, which permits abortions if there is:

- Pregnant woman’s risk to the life;

⁵ *Roe v. Wade*, 410 U.S. 113 (more) 93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S. LEXIS 159

- When abortion is required and is necessary to prevent grave permanent injury to the mental and physical health of the pregnant woman;
- When there is any risk of injury to the mental or physical health of the pregnant woman or any existing children of her family (up to a term limit of 24 weeks of gestation); or
- Risk that if the child were born, the it would suffer from such mental or physical abnormalities as to be seriously handicapped.

The Republic of Ireland

Abortion is regulated by Heath (Regulation of Termination of Pregnancy) Act, 2018.

Abortion is allowed during the first 12 weeks of pregnancy, and later in cases where the pregnant woman's life or health is at risk, or in the cases of fatal foetal abnormality.

Irish abortion law received conclusive attention on the *death of Savita Halappanavar*⁶ in 2012, who had been denied termination of her pregnancy while suffering a septic miscarriage. Her death lead to the passing of Protection of Life During Pregnancy Act 2013.

COMPARATIVE ANALYSIS

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The abortion laws of all the countries mentioned, that is, The United States, The United Kingdom, The Republic of Ireland and India are more or less the same in apropos of women's health.

In case of The United States, the laws are quite inflexible and harsh, as compared to The United Kingdom, The Republic of Ireland and India, at present.

The abortion laws mainly mushroomed in The United Kingdom in early 1803, but the primary credit of turmoil and acknowledgement of women's right in case of termination of pregnancy, is give to The United States after the landmark case of Roe v. Wade.

⁶ Svita Halappanval case, Ireland,2012

The main focus of all the countries was argumentative in the matter of women's right and health and that of fetal pain at the time of termination of pregnancy.

In Ireland, strict abortion laws came to fore-front in 2012 after Savita Halappanval Case. In India also urgent calls to amend the statute as long standing critiques of the policy were brought into scrutiny after the case of *Dr. Nikhil Datar & Ors v. Union of India*.⁷

This case made an address to the Supreme Court, regarding physical and mental trauma which is experienced by women who are developed with fetal abnormalities.

There are a lot of points which should be considered by all the countries as concerned to complications and aberrations after the time bars given by them (the countries) for termination of pregnancy.

CONCLUSION NAD SUGGESTIONS

The matter of termination of pregnancy brings into picture the neoteric understanding of moral and legal questions when it comes to right to life.

The answer of the crucial question, "who's life is more inestimable and should be valued more?" would fail to turn up due to the very nature of scrutiny of any court across the world.

When it comes to India, there are absolutely no laws regarding abortion after the time of 24 weeks. There are a lot of exceptional cases which should be looked upon by the doctors, as abortion is stringently a medical and personal issue. Also it should be solely be at the discretion of the doctors and not the law in such cases.

A medical committee should be set up for these exceptional cases, to prevent cases that occur due to the grinding legal system.

A humanitarian approach should be taken into consideration for special cases all over the world.

⁷ Dr Nikhil Datar v. Union of India, AIR 2009, SC



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