

THE TERMINATION OF PREGNANCY: THE RIGHT TO CHOOSE OR THE RIGHT TO LIFE?

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ABSTRACT

Abortion or the termination of pregnancy has stirred quite a controversy for decades and has been treated as a very delicate topic as it involves the question of taking an innocent life. This research is a critical analysis concentrating on a very grave issue of aborting a life and whether the right to choose of the mother as a woman is to be respected or to protect the life of an unborn child and other related topics to this act. Whose right is to be given importance in such a scenario? The mother or the child? It is often questioned by people whether the act is morally right? Institutions like the church regards this as something that is morally wrong and terms this act as a murder and takes a stand as it is wrong to murder a person and also that the unborn is a person hence it is wrong to murder an unborn. The question of whether the unborn is a person or not is also addressed in this research. People all over the world have divergent and contrasting opinions some supporting the termination of pregnancy as they believe that the mothers right as a human being gets violated. There are different ways that abortion can be performed: surgically or medicinally. The 1973 Supreme Court landmark judgement known as *Roe vs. Wade* marked a paramount turning point in abortion and this was a turning point in history. This decision made it licit to have abortions. Different states have sundry laws on abortion. In this research, norms and, practices performed abroad and in India, the medical termination of pregnancy act has been covered. The termination of pregnancy is a decision which is made after reflecting on law, religious customs, morality, traditions, social norms etc. This research addresses the evolution of the idea of the right to choose which should be available to women. When it comes into question about women in countries like India there are plenty of limitations to this. In societies like ours, where there is absence of access to abortion services, provision of basic health care, and decent life options for their children, 'choice' is a very narrow concept. In a country like ours the choice to be a mother is equally

important to the choice of abortion or not, especially in a society where there is more preference given to a male child and selective abortion of a female child. Today people still have very conflicting opinions on this matter. This research covers all these issues and attempts to answer the questions posed above. Abortion perpetuates to be debated for years together as people have not come to a conclusion as of yet.

Keywords: Abortion, Foetus, Unborn Child, Mother, Termination of Pregnancy, Life, Choice

INTRODUCTION

Abortion from time immemorial continues to be one of the most controversial topics and an issue which has attracted a lot of attention over the past few decades around the world and in India too. In India, the fundamental rights are given a lot of regard especially Article 21 which lays down the Right to life. Under this right, we also discuss of other serious issues like Euthanasia which again like abortion is not permitted in India as it violates the basic fundamental right to life which is treated as the most important right. Here it is extremely important to clarify differences or confusions of any sort between ‘miscarriage’ and ‘abortion’. In the Offences against the Person Act 1861, sections 58 and 59 describe the offence as: ‘procuring the miscarriage of a woman’. However the 1867 Act UK hardly uses the term abortion and speaks only of termination of pregnancy as the word ‘abortion’ can have extremely strong criminal associations, and as the act of 1867 of the UK has a very minimal criminal interest and even though the term termination of pregnancy is more preferred, the word ‘abortion’ cannot be avoided due to its widespread nature¹. Abortion is severely condemned in all religions and there is no faith which supports this practice. But in spite of all this, the question arises whether the mother has the right to choose or the child has the right to life. According to Ronald Dworkin, he did not accept the extreme position taken by the derivative claimers of Abortion that the fetus is a complete moral person from the moment of conception²

¹ J.K MASON, THE TROUBLED PREGNANCY – LEGAL WRONGS AND RIGHTS IN REPRODUCTION 15(2007).

² RONALD DWORKIN, FREEDOM’S LAW: THE MORAL OF READING THE AMERICAN CONSTITUTION 90, (OXFORD UNIVERSITY PRESS ed.,1999).

1. Does the unborn have the right to life greater than a woman's right to choose and right to life?

While dealing with abortion, one of the most important questions that come into play here is whether the unborn has the right to life? Even if it is there, is it greater than a woman's right to choose or life? The landmark case *Vo vs France*³ helps us understand whether an embryo or fetus can be treated as an individual with a separate existence from its mother. Here clarity can be gained also on whether the embryo or fetus enjoys the right to life under Article 2 of the European Convention of Human Rights which says that everyone's right to life shall be protected by law. The case dealt with the issue of an abortion made accidentally due to an error on the part of a physician. The pregnant woman whose fetus was aborted took the matter to the European Court of Human Rights contending that a homicide was committed. Here the Cour de cassation-the French court held that the doctor was acquitted of involuntary homicide on grounds that the fetus was not a person. As the woman thought that it violated her child's right to life, she appealed to the European Court of Human Rights who left open the question whether or not the life of a fetus falls under scope of Article 2 and said that even if it was to be assumed that the Article 2 was applicable to a fetus, there had been no failure on the part of the Cour de cassation as under this criminal proceedings were deemed unnecessary, but it considered the possibility for the applicant to bring an action for damages as sufficient and found that there was no violation made to the fetus right to life.

It was said that the fetus falls into the scope of Art 2 of the Convention, in the *Vo case*, France, by not making it possible for a doctor to be criminally prosecuted, has failed in its positive obligation pursuant to art.2.⁴

In the matter of abortion, there are different types of rights available to the pregnant woman, which are liberal rights, equal rights and special rights for example-rights to the disabled as they are differently abled.⁵ There should also be freedom as the right to choice. Although we do need rights, rights emerge from a particular need, however this isn't covered. Abortion is only one of the many female reproductive rights, there are many other required rights like

³ *Vo v. France*, ECHR 2004-VII

⁴ JAKOB PICHON, DOES THE UNBORN CHILD HAVE A RIGHT TO LIFE? THE INSUFFICIENT ANSWER OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE JUDGMENT *VO VS. FRANCE*, *IN RIGHT TO LIFE AND THE RIGHT TO DEATH: A STUDY 2-9* (Anila V Menon, 2007)

⁵ ELISABETH PORTER, *HYPATIA, ABORTION ETHICS AND RESPONSIBILITIES* (1994)

contraception, childcare etc. The right to choose is inadequate on many levels. It is premised on abstract notions of rights, debatably assumed to apply to all. It has individualistic connotations, rights that need not take into account other relationships and social contexts. It leaves the individual as the sole moral arbiter, providing no assistance with how individuals should choose or how law should incorporate such rights⁶

Then also comes the reproductive rights and reproductive freedom, where a woman should have the right to make her own decisions , Given the social position of women,, we need to make sure that the autonomy is defended. Insofar as women are not only responsible for pregnancy but also usually for the care of children, women must be the ones who ultimately decide on contraception, abortion, and childbearing.⁷

When it comes to the question of the right to choose the arguments supporting the woman's right to choose feel that pregnant woman have right to privacy which gives them the liberty to decide what they want to do also. Since they are the ones who are actually going through the trouble of carrying the child for 9 months, they also have a moral right to decide what they want with their bodies. Other arguments supporting the woman also involve the fact that it is extremely vital for gender equality. The right to abortion is also very important for individual/single women or mothers to achieve their full potential. When abortion is banned, it also puts women at a risk of forcing them to do it by illegal abortionists. A woman is deserves this right and It ought to be one of the reproductive rights that enables women to make a truly free choice whether she wants to terminate the pregnancy or continue with it and give birth to the child. While on the one hand, we have to think of how an abortion is morally and on humanitarian grounds terribly wrong to an unborn child, these arguments also remind us that even in this debate of abortion, we should regard the woman as a person and not just as a container for the fetus. Therefore equal consideration is ought to be given to her rights and needs as well as those of the unborn. Like any other issue, both sides of the matter have to be carefully looked into.

⁶ ELIZABETH KINGDOM, WHAT'S WRONG WITH RIGHTS? PROBLEMS FOR FEMINIST POLITICS OF LAW. : Edinburgh University Press. (2000)

⁷ ALISON JAGGAR, ABORTION AND A WOMAN'S RIGHT TO DECIDE. IN WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION, (Carol C. Gould and Marx W. Wartofsky ed.,G. P.Putnam's Son 1976)

At the same time it is not true that pro-choice women's rights activists take a casual or callous attitude to the foetus. They do take into mind the situation of the foetus too; the opposite is usually true, and most of them do accept that choosing an abortion is usually a case of choosing the least bad of several bad courses of action.

Abortion is an important element of women's rights because women are more affected by the abortion debate than men, both individually (if they are considering an abortion) and as a gender.

Pregnancy has the most severe effect on the pregnant woman involved. As Sarah Weddington put it to the US Supreme Court in *Roe vs. Wade*⁸ that a pregnancy for a woman changes everything for her by leaps and bounds by having major effects on her physique, her work so because the main person who would be affected would be the pregnant woman herself who is carrying the child, she also deserves the right as to what she wishes to do about her pregnancy.

Other renowned philosophers like Judith Jarvis Thomson also had similar views like Sarah Weddington, who said that quite a lot turns for women depending on whether abortion is or is not available. If abortion rights are denied, then there is a restriction on the liberties of a woman that is extremely essential for her; and if there is a restriction to do so considering that the foetus is entitled to life from the time it was conceived, then it is forced on the woman where she does not necessarily need to accept this by both morals or reasoning.

Above all other things, most people regard the right to control one's own body as one of the key moral rights and if women are not allowed to abort an unwanted foetus they would be completely deprived of this right. Argument in favour of abortion who support the idea of a woman's right to choose feel that as the woman is the one who would be undergoing the pregnancy, it is necessary to see what she wants and to let her have the right to decide, which would mean that she should have the right to decide what she can and can't do with her body. As the foetus exists in her body, she should be the first one to have the right to decide whether the foetus remains in her body. Thus when we look into the issue of abortion we also get an idea about few correlating human rights like every human being has the right to own their own

⁸ *Roe vs. Wade*, 410 US 113 (1973)

body and others do not have a say with regard to that, a foetus is part of a woman's body therefore a woman has the right to abort a foetus she is carrying.

One of the most important landmark judgments *Roe vs Wade* up to some extent supported that view when it ruled that a woman's right to abort her unborn child came under the freedom of personal choice in family matters and was protected by the 14th Amendment of the US Constitution and this leads some people to claim is that it is unethical to ban abortion because doing so denies freedom of choice to women and forces 'the unwilling to bear the unwanted'.

However opponents of this argument counter these arguments by saying that a foetus is 'part' of a woman's body. It is argued that a foetus is not the same kind of thing as a leg or a liver: it is not just a part of a woman's body, but is (to some extent) a separate person with its own right to life and own individual existence.

Another counter argument which is the second objection to this argument is that people do not have the complete right to control their bodies. All people are subject to various restrictions on what they do with their bodies - and some of these restrictions (laws against suicide or mercy killing/ euthanasia are such examples)

The whole argument for abortion of a pregnancy is not only related with delivering the child but the challenges which come while bringing up the child in the later years. Thus if a woman is not allowed to have an abortion she is not only compelled to continue the pregnancy to birth but also thought to support and look after the resulting child whether or not she is a single mother/ has the financial means to handle the responsibility of looking after another life and providing for it until it is able to manage independently for many years to come (unless she can get someone else to do so).

Furthermore, they add to this that by bearing children, women's freedom and life choices are limited and restricted to certain boundaries as there are certain stereotypes, social customs, and oppressive duties that go along with this as imposed by the societies that they live in.⁹

A pregnant woman also should have a legal right to not consent medical treatment, surgery or therapy needed by the foetus and this was tried to be shown in the arguments of various people

⁹ Bbc.co.uk. (2012). *BBC - Ethics - Abortion: Arguments in favour of abortion*.
http://www.bbc.co.uk/ethics/abortion/mother/for_1.shtml [Accessed 25 Feb. 2018].

who speak in favour of the woman by seeing her side of the matter. by examining aspects of the values inherent in the right of any other competent adult patient to refuse medical treatment on the one hand, and in a woman's right to abort on the other, as these are explained within the relevant US law. At the same time this does not mean that the discussion is of no relevance to the English laws but the only answer to this is that it is mostly in the laws of USA do we find the discussion of these ideas, concepts, values, it is simply that it is primarily in the US law that we find discussion of these values and to understand this it is suggested that people would begin the process of understanding why a pregnant woman should have the legal right to deny medical treatment properly begins with a consideration of the development of the ordinary competent patient's right to refuse life-sustaining medical treatment.¹⁰ Finally what would matter is that, whose right should be given priority: the mother or the child? This is still widely disputed today.

CAN THE EMBRYO/FOETUS BE TREATED AS A PERSON AND BE ENTITLED TO RIGHTS?

The question in abortion that arises most of the time is whether the foetus can be treated as a separate person from the mother. While it is not disputed that it is a human tissue, it is often thought as to whether it is a part of its mother or has an individual, separate existence from that of its mother, but is it a human entity that has its own humanity? Here let the philosophy that no human being is entitled to rights until he or she has a separate cognitive existence be ignored. If it is to be believed that a foetus is to be taken to be a human being, then the most popular idea would be to also take into mind of how many months is the foetus at the time of termination. However the development of the foetus is an extremely slow process and there are no drastic changes exhibited by the foetus, there is no major developmental difference of the different stages of growth of the foetus. Thus it would not be logically correct to treat the foetus in a different manner on the merely on the basis of its age. It is said that human life would commence at the time of implantation. Thus abortion at any stage of pregnancy is wrong, however if one goes against abortion itself, that does not mean that the woman's right to privacy

¹⁰ Scott R, RIGHTS, DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT:(Hart Publishing)
(2002)

is not given enough importance, but here it is also essential to think about the unborn child as there as no legal rights bestowed to it. But if one goes by this, they are to believe that there is no maternal- fetal conflict here as, a conflict would essentially involve two persons and the foetus cannot be treated as a person. However the laws do protect the life of the unborn child indirectly by preventing the woman from taking the life of her own unborn child. Here the concept of the viable fetus is also discussed, which is primarily an American concept which stemmed from one of the most popular cases in the matter of abortion, *Roe v. Wade*¹¹. Even though it had its focus on viability led to preserving a few rights for the foetus, it did not define these rights very well to the level of implementation, this being because viability is only artificial in nature.¹²

WHAT ARE THE LAWS PROVIDED IN INDIA IN THE MATTER OF ABORTION?

The Indian Penal Code 1862 and the Code of Criminal Procedure 1898, with their origins in the British Offences against the Person Act 1861, made abortion a crime punishable for both the woman and the abortionist except to save the life of the woman. The 1960s and 70s saw liberalisation of abortion laws across Europe and the Americas which continued in many other parts of the world through the 1980s^{13 14}

Under the Indian Penal Code which forms the basic and most eminent criminal laws in the country, it is said that induced abortion is a criminal offence after keeping in mind the religious, social, moral, and ethical background of the country under sections 312 to 316 of the Indian Penal Code. Sec 312 of the IPC relates to the unlawful termination of pregnancy, even though the term abortion has not been defined by the lawmakers, even the terms “miscarriage” and “abortion” has not been defined by the lawmakers but by voluntary causing miscarriage as mentioned in the code, we get to know that it is criminal abortion and is an offence under the code.¹⁵Section 312 of the code makes voluntary causing of miscarriage an offence under two

¹¹ *Roe vs. Wade*, 410 US 113 (1973)

¹² J.K MASON, THE TROUBLED PREGNANCY – LEGAL WRONGS AND RIGHTS IN REPRODUCTION 16-20(2007).

¹³ Berer M, *Making abortions safe: a matter of good public health policy and practice*, 78 Bulletin of World Health Organization 580-92(2000)

¹⁴ 24 RAHMAN A, KATZIVE L, HENSHAW S, A GLOBAL REVIEW OF LAWS ON INDUCED ABORTION, (1985-1997) International Family Planning Perspectives 56-64 (1998)

¹⁵ UPENDRA BAXI, ABORTION AND LAW IN INDIA, Journal of the Indian Law Institute 28-29 (Alice Jacob, 1986-87)

circumstances: When a woman is with child (when the gestation begins), and when a woman is quick with child (that is when the mother feels the movement of the fetus). The section permits abortion only if it is necessary to protect the mother's life that is it permits the termination of pregnancy only on medical grounds if it is needed to save the mother of the unborn.

Several countries have however liberalized their laws on Abortion. The liberalisation of abortion law in India began in 1964 in the context of high maternal mortality due to unsafe abortion. Doctors frequently came across gravely ill or dying women who had taken recourse to unsafe abortions carried out by unskilled practitioners. They realised that the majority of women seeking abortions were married and under no socio-cultural pressure to conceal their pregnancies and that decriminalising abortion would encourage women to seek abortion services in legal and safe settings¹⁶. India did this by enacting the Medical Termination of Pregnancy Act in 1971 which was enacted so as to make exceptions to the strict provisions of the IPC. Under the act, termination of pregnancy can only be done in good faith by a registered medical practitioner which can be done up to 12 weeks of pregnancy and the opinion of more than two medical practitioners is required if the same is to be done between 12 to 20 weeks of pregnancy, because of various reasons like risk to the mother's life, grave injury caused to the physical or mental health of the mother, if the pregnancy is the result of a rape, or if there is a possibility for the unborn child to be born with mental/physical disabilities as seen in *D.Rajeswari vs State of Tamil Nadu and Others*¹⁷ as the pregnancy caused mental issues and anguish to the mother as it was a result of a rape, it was permitted to be terminated. However after 20 weeks, abortion is not allowed under the act. The issue regarding the statutory time limits for abortion during 20-24 weeks was raised in the case of Niketa Mehta where the Supreme Court held that abortion could be done at 24 weeks for an abnormal pregnancy. In India both abortion and abortion on demand is not allowed after 20 weeks. The Medical Termination of Pregnancy Rules and Regulations 1975¹⁸ define the criteria and procedures for approval of an abortion facility, procedures for consent, keeping records and reports, and ensuring confidentiality. In 2002 - MTP (Amendment) Act Mifepristone approved for medical

¹⁶ 3. CHHABRA R, NUNA S, ABORTION IN INDIA: AN OVERVIEW, Veerendra Printers, (1994)

¹⁷ *D. Rajeswari v. State Of Tamilnadu and Others*, Cri. L J3795(Mad) (1986).

¹⁸ Government of India. The Medical Termination of Pregnancy Rules and Regulations. Vide GSR 2543, New Delhi: Gazette of India, 1975

abortion by Drug Controller General of India and in 2003 – the MTP Rules and Regulations were amended, 2004 - National consensus guidelines for medical abortion were laid down.¹⁹

CONCLUSION

In this research, the main aspect focused here was whose rights are more important, here in the maternal foetal conflict, both the arguments were taken into consideration: the need for thinking about the woman's right as it would otherwise violate her right to choose and right to privacy of her life, when the laws are imposed on her. The need for abortion in many special cases like rape, disabled unborn, prove as exceptions to abortion. Women also have right over their anatomy. On the other hand, it is also seen that the foetus does not have legal rights and there an increasing need for legal right to life under the law provided to the unborn. Abortion is extremely brutal and cruel and wrong on all grounds. Countries must promote alternatives like adoption to pregnant women who want to terminate their pregnancy as abortion could be the worst ever option as it is taking someone else's life voluntary with their own mother's consent where they have nothing to say. Abortion is one of the most devastating and unfortunate realities of the world we live in today.

¹⁹ SIDDHIVINAYAK S. HIRVE , ABORTION LAW, POLICY AND SERVICES IN INDIA: A CRITICAL REVIEW: Reproductive Health Matters, Vol. 12, No. 24, Supplement: Abortion Law, Policy and Practice in Transition (114-121.,Nov, 2004),