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Abortion: Legal and Ethical Issues

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ABSTRACT

The issue of woman's right to abortion is a controversial factor because it not only includes the feminist theory but also should consider other factor which includes human rights, health law, women and children's right. Here the debate starts with the death of the child which is the consequence of abortion. Whether it already carrying a "life" as a fetus when the woman has conceived or it's just a piece of flesh is what still many research fails to explain. A mother who is yet to bring a new life into the world has her only right ahead than anyone else's. It's very important for a person to reach at a proper decision to either save a mother's health first or save the child first. A child can be a blessing only when the mother is happily bringing him or her into the world.

Abortion Laws therefore seeks greater freedom for the women and it has been liberalized more for the sake of women so that never a woman is forced to give birth at the consequences of their health. It doesn't mean women are free to practice their choice. The law is pertinent about its reasons and conditions on abortion. Due to this mandatory reporting procedure laid in MTP Act, many girls under the age of 18 choose to have illegal abortion as they know the fact that medical practitioners might to do so legally due to complications in the legal framework. This violates the women's right over her body. This work aims to study the various legal issues and conflicts pertaining to women's right to health and right of the unborn child.

Keywords: *Mother, Fetus, Abortion, Heath, Right to life*

"You cannot have maternal health with reproductive health. And reproductive health includes contraception and family planning and access to legal, safe abortion."

-Hillary Clinton

I. INTRODUCTION- TRAILS OF THE CONCEPT OF ABORTION

The beginning of safe and legal abortions

Going to the history the very concept of 'abortion' hails from a Latin term "*aboriri*". The meaning of the term is very specific which means 'getting detached from its original site.

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Here the original site is none other than the mother's womb which is the possible safest place for a child to grow in 9 months within the amniotic fluid which acts like a guard from outside world. It's very important to know what abortion is in legal and medical point of view. Both meaning and interpretation should be same in order to make it effective during the legal course.

Abortion means that taking out or destroying the fetus or embryo growing inside the womb of the women.²

There has been a long conflict to accept the concept of abortion due to socio-religious reasons. Before MTP Act came into force Abortion was illegal in India and was a punishable offence under IPC, it is still punishable under IPC but its scope and now narrowed down. In the early times there was no reason for economic pressure and there were no nuclear families hence having children were very easy and there was some one or the other for the upbringing of the child. But in the current scenario many families opt for abortion as they will that the pregnancy is unwanted which might be due to many reasons like economic instability, nuclear family or health of the mother. But if we want to see why under IPC abortion was made punishable as to now it's not so punishable, it is for the only reason that there was a concern of sex taboo. Many families' even royal families were involved in sex determination which is still a crime. The Indian society in those days wanted to abort the fetus if that came to know it was a female child even at the cost of the health of the mother. It so happened that even in the later days of the pregnancy the families had pressured abortion which led to the worsening of women's health and sometimes led to the death of the mother.³

The deeper we go to the history the more agony we feel for the women and the mothers whose rights were always secondary in comparison to the child. Women sacrificed their health and body to bear a child. It is said in Hindu custom women are given an upper hand and are rejected by all means. But when it comes to child bearing we have always seen that the patriarchal family has left no stones unturned to save their decedent first before the mother.

Even if we talk about the Muslims' family there women are forced to become pregnant time and again until they get a boy child even it so happens that women had to die for it. Muslims allow polygamy and yet child was their main motto of their marriage and not the women. They have treated women like a rag who had no rights and freedoms in their life.

² 2 RATANLAL & DHEERAJLAL, *THE INDIAN PENAL CODE, 1860*, 448 (Wadhwa and Co. New Delhi, 29th Ed.)

³ Mohd. Ahmad, Abortion Debate Critical Study in the Light of the Women Choice of Sexual Freedom in the Context of Indian Society, SODHGANGA INFLIBNET AC (Nov. 1, 2020, 9:00 AM), <https://shodhganga.inflibnet.ac.in/bitstream/10603/214275/10/chapter%202.pdf>

The privacy and right to free space for women has evolved in Western countries many years back whereas in India women are still struggling to find their right. In a case of *Olmstead v. United States*⁴, the justice by giving a dissenting opinion held that their Constitution gives the power on each and every individual against the government to be left and be alone and utilize freedom just for themselves. It can be said that this right of 'letting a person be' is the widespread right which all society values. In another case of *Griswold v. Connecticut*⁵ has vividly talked about how women's right to privacy is a constitutional right and also the case held that it is on the women to decide that whether she wants to have the child or not and nobody even the state should not interfere with the individual decision of the women. The Supreme Court in this case talked about the fundamental liberty of women in matters of her marriage, family and children.⁶

Unchanged Law and Added Agony for Women

Till 19th century we didn't notice any change in neither societal behavior for women nor there were any legal acts enacted for the women. The only concern for India was excessive population and there was a need to control the birth. Public started to understand the value of Birth control when they faced economical constraint and government brought a policy of 2 children per family for a short duration. Whereas, in other countries like Western Europe, Japan had started to take the health of the women seriously after long decade of negligence for them. They could opt for abortion when it affected the health of the mother. In 1960s there was two such incidents one German measles epidemic which caused thousands of birth defect as women could not seek abortion due to the prevailing stringent laws for abortion. This led to the birth of many birth defect children whose health and life was affected for life. Had there been proper rules and regulation brought for abortion this situation could have been escaped. No matter how much developments took place in western countries relating to abortion where new legislations were introduced but India were still behind due to its social and cultural taboos. Due to the stringent laws of abortion many women tried to escape going to hospitals for abortion and took help of illegal ways. Those include going to quack doctors and going for Ayurveda medicine for abortion. Such conditions worsened the state of the women and led to many unfortunate deaths and they tried to destroy the fetus in a n improper manner. After ages in 1971 we witnessed a change in our Indian history when Parliament passed the Medical Termination of Pregnancy Act. This act was build up on the model of

⁴ 277 U.S. 438, 471 (1928)

⁵ 381 U.S. 479 (1965)

⁶ Ricky L. Welborn, *Abortion Laws, A Constitutional Right to Abort*, 49 NORTH CAROLINA LAW REVIEW.487 (1971).

British Abortion Act, 1967.⁷ While comparing to the British Abortion Acts, Indian legislation allowed abortion when a couple has taken contraceptive to limit the number of children. But unlike India, British law didn't allow this. They only allowed abortion was restricted to rape and incest and other such conditions where woman's health was compromised. Comparing to Indian Constitution and Irish Constitution, India might not have dealt with privacy cases much but still after MTP Act there was much preference for abortion to save the health of the women and also to given their personal space. But whereas Irish Supreme Court referring to their Constitution held that abortion was absolutely prohibited and women did not have right to privacy which they can simply by terminating their pregnancy. The only exception cases where they allowed was when mother's health is extremely bad to bear the child. There was not mentioning of unwanted child or pregnancy due to any unfortunate incident.

According to WHO, the highest number of unsafe abortions has taken place in Latin America and also in the Caribbean countries approximately? The reports said that there were 4.2 million per year abortions which has taken placed in unsafe and induced conditions which lead to 12% maternal deaths.⁸

Reasons Behind Restrictions on Abortion

Historically there were three reasons as to why abortion were restricted and those reasons are still valid that it brings the judiciary to a point of confusion as to what length abortion should be relaxed. The reasons for restricting abortions were:

1. Doctors were not so trained and this lead to lot of deaths of the mothers. Hence law had to protect the public health which also included the health of the mother. The women having no choice opted for unsafe abortions from quacks which leads to their death in the process.
2. In many religion and culture till now abortions in considered as a sin. The act of killing was nothing but hurting the moral feelings of the society which is very genuine of a feeling. We reflect on our deeds. But it forces us to think to always save a life and not kill a life. But should a life be saved by letting down another person's freedom is something which still many judiciary has left unanswered. That's the reasons laws were made so stringent that it acted like deterrent towards having abortions

⁷ Ahmad, Shakeel, *Constitutional and Legal Issues in Abortion- A Socio-Legal Study with Special Reference to India*, SODHGANGA INFLIBNET AC, (Nov. 10,2020, 5PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/55993/9/09_chapter%201.pdf

⁸ Damian Clarke, Hanna Muhlard, *Abotions Laws and Women's Health*, IZA (Dec 31,2020,2 PM), <http://ftp.iza.org/dp11890.pdf>

3. The last and the main reason were to save the life of the unborn. The child might not have been born yet but definitely has a right even when it's in the womb. But till what extent is something which still need to be discussed.⁹

Conclusion

The stigma related to abortion still exists but finally society has accepted the agony of the women and has liberalized the abortion laws in many ways. Now even women are said about their rights where they can abort their child on time in order to maintain her good health and control birth. The progressive reform in women right to health has witnessed great change from the year 1990, where people started to believe in the concept of small and happy family.

II. THE CONCEPT AROUND LEGALIZING AND DISCRIMINILAZING ABORTION

There are two types of protests which we can notice around the world in many countries. Some says to make abortion safe which means that they want abortion to be in law in some parts and few say to decriminalize abortion fully. By this they mean there should no punishments on abortions whatsoever.¹⁰

Well it cannot be yet said that fully decriminalizing abortion would be a great idea especially for a country like India where people can take this law for an advantage. For avoiding one instance further it can give birth to other types of crimes like sex detection and killing of female feticide which is very common in few states of India. Previously the abortion concept was given a very narrow reason that is forced sexual performance by rape of incest or abortion can be performed due to woman's extreme ill health. There was no consideration on the ground as to whether the woman is willing to carry the child or not. Whether by her wish she can choose to abort. These rights were never considered as there was no right to privacy.

Women's Legal Right to Choose

Why is it so that our Constitution and government decides whether a mother wants to bear a child or not. Isn't it a personal right and choice of a person where they can have enough freedom to choose as to when and when not to carry a child.

In the case of *People v. Belous*¹¹, the S.C of California held that a woman's right to decide whether to have a child or not hails from the concept of privacy which generally a common area when it comes to marriage, family and sex as also mentioned in the case of *Griswold* which has been mentioned previously. This is of women's freedom to decide is definitely an

⁹ Marge Berer, *Abortion and Policy Around the World: In Search Decriminalization*, 19 HHR 13, 17(2017)

¹⁰ MARGE, supra note 8

¹¹ 71 Cal. 2d 954

unremunerated right but that does not mean that this right is not guaranteed. In deciding about abortion women has her right over her body that bodily integrity which even judiciary are bound to respect. As proved is the case of Griswold the women must have privacy to decide on their own choice. Again in another famous landmark judgment of *Roe v. Wade*¹², it again scrutinized the Texas statute which was question as it prohibited abortion excluding when required to save the life of the expecting women. The Justice in this case gave importance to the women's right to privacy and also held that its their fundamental right to choose if they want to have the child or want to abort it. Due to the fundamental right was in question it became necessary for the court to determine at what extent they can apply it as there might be different cases of abortions. The court did a strict scrutiny test where the court divided the duration of pregnancy i.e. 9 months into 3 trimesters. Very wisely Court held that in the first trimester if a woman wants to abort they can do on her willingness. The possible reason for this is that such abortion would be safe and less complicated and would not affect the health of the women in any way. After the second trimester the state can be changed and keeping in mind the mother's health the decision should be taken and after third trimester it becomes obvious that abortion would be risky for mother's health also and hence its regulated depending of the health of the mother.¹³

(A) Abortion Laws around the World

In the current scenario most of the countries allows abortion partially or fully but there are few countries that still prohibit abortion fully. There are around 125 countries who allow abortions on particular reasons which must include threat to mother's mental or physical health any socio-economic reason and any deformity in the fetus which might have been pre-detected.¹⁴ AS mentioned earlier Western European countries were always early in liberalizing the abortion laws along with America. After the judgment of *Roe v. Wade*, which gave the constitutional right to women to choose their motherhood as per their wish and introduced the trimester concept went through a change in the following case *Planned Parenthood v. Casey*¹⁵. In this case also the court followed the *Roe v. Wade*'s judgment like its next generation but made some changes in 'strict scrutiny' principle followed in the previous landmark judgment. They replaced the trimester concept in the *Casey* case in order to deal with the situations as to when the foetus can become viable earlier than what it was

¹² 410 U.S. 113 (1973)

¹³ LII, [https://www.law.cornell.edu/wex/roe_v_wade_\(1973\)](https://www.law.cornell.edu/wex/roe_v_wade_(1973)) , last visited Dec 31 8 PM, 2020)

¹⁴ Racheal B. Vogelstein, Rebecca Turkington, *Abortion Laws :Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Jan 10,2020, 10 AM), <https://www.cfr.org/article/abortion-law-global-comparisons>

¹⁵ 505 U.S.833 (1992)

stated in the earlier case of Roe. The court held that if such situation arises that the fetus becomes viable before time in such case the state can ban such abortion except if it affects the health of the women in any way.¹⁶ The Court also went ahead and held that instead of the trimester concept in Roe's case there should be 'undue burden test' which will help in defining the role of State regulations where they put certain obstruction in availing the abortion this is just to make sure abortion doesn't become easy reach for all cases.

(B) Legal Standing of Abortion Law in India

In India abortion laws are covered are two primary legislation, one being I.P.C and another is MTP Act. Sec. 312 to 316 of IPC deals with abortions. In India whether a woman can abort or not depends of the medical and scientific conditions of the pregnancy of the women and hence only the medical practitioner can decide it. No matter what ever right and laws are guaranteed for the women, there are many doctors who do not conduct the abortion due to the fear of legal punishments or any further complication which might arise. As IPC and MTP Act frequency infringes the women' right to privacy and right to health and life and liberty, the woman goes for unsafe methods of abortion to escape all the complications which leads to death of the woman which in turn oversteps the right of a woman to live with dignity as guaranteed under fundamental rights in our Constitution.¹⁷ Article 21, proudly says that no person should be deprived of his life and his personal liberty. Under this statement person includes woman and which means a mother has her right to choose her own health and her own body before her child. There are many rights and privileges for which people and women across the globe are fighting that also includes right to freedom as fundamental right. Like under article 19 freedom of speech and expression is a fundamental right which comes which certain restrictions same abortion should also be made legal with necessary restrictions.

(C) Consent V. Privacy – A Tussle within Conflicting Laws

Women equally enjoy the right to life and can enjoy whatever rights available pertaining to her body. Although our Indian Constitution is ambiguous on the women's right and does not specify as to what extend they can protect their right but it certainly is sure that a woman can enjoy her personal liberty in whatever way she wants and Article 21 will remain subjective to interpretation.¹⁸ Married or not a woman can still choose her right to privacy over any other

¹⁶ JUSTIA US SUPREME COURT, <https://supreme.justia.com/cases/federal/us/505/833/>, last visited 13 Jan, 2021)

¹⁷ Abhipsa Gochhayat, *Understanding of Right to Abortion under Indian Constitution*, MANUPATRA (Jan 13, 2021, 7 PM) <http://www.manupatra.com/roundup/373/Articles/PRESENTATION.pdf>

¹⁸ Sneha Mohanty, *Abortions Laws in India*, LEGAL SERVICE INDIA (Jan 14, 2021), <http://www.legalse>

legislation preventing her from taking abortion as her fundamental right. Section 5 of the MTP Act¹⁹, specifically due to health and mental health ground of the mother allows taking abortion after twentieth week of pregnancy has been completed. But likewise some of the provisions of MTP Act are playing with the privacy and liberty of the women, to be specific Sec.14 of MTP Regulations.²⁰ Under this section it makes mandatory for the authority to inform about any such incident with the adolescent girls like consensual or non-consensual non-marital sex which might have caused in the pregnancy. And other unlikely situations where without consent any family member has committed any sexual offence, any such offence must be reported. Therefore this Sec. 14 is conflicting with Sec 4 of MTP Regulations²¹ which talks about giving all protection and privacy to the women. To make sure even hospital maintains a procedure which is for strictly keeping the documents “SECRET” as mentioned in the Regulations.²²

In India it has been found by 2015 reports that many adolescents aged within 15 to 18 are sexually active and in India even the sexual activity has been performed under consent, the POSCO Act treats it as an offence. Hence many such children at the cost of their health do not perform the mandatory duty of reporting the incident to health care worker and choose unsafe abortions. MTP Act casts that any abortion to be taken place for a girl under 18 there guardian should give written consent for that but doctors and health care worker has no duty to inform the police about such incident. But POSCO mandates on the health care workers and doctors to report the case of pregnancy of an underage girl, this leaves the medical fraternity in a conflicted position as they do not know how and when they should report a case of abortion of such underage girl. Rule 5 of POSCO again talks about protecting the privacy of the child and give necessary advice on the pregnancy of the child but there are no proper guidelines as to what extent they have their right.²³

The observations after comparing various provisions of different legislations of different Acts it would not be wrong that even when our Constitution recognized right to privacy and right to life women of India are suppressed under the terror of patriarchal family and also the low minded society who would possibly judge them and backlash their character. Even though in

rviceindia.com/legal/article-1121-abortion-laws-in-india-.html

¹⁹ The Medical Termination of Pregnancy Act, 1971, No.34, Acts of Parliament, 1971 (India)

²⁰ *Id* at 4

²¹ Medical Termination of Pregnancy Regulation, 2003

²² Dipika Jain, Brian Tronic, *Conflicting Abortion Laws in India: Unintended Barriers to Safe Abortion for Adolescent Girls*, 4 IJME 310, 311 (2019).

²³ Vrinda Grover, *Criminalization of Even Consensual Sex Between Adolescents Obstructs Safe Abortion for Girls*, THE TIMES OF INDIA (Dec 15,2020, 9AM), <https://timesofindia.indiatimes.com/blogs/toi-edit-page/criminalisation-of-even-consensual-sex-between-adolescents-obstructs-access-to-safe-abortion-for-girls/>

India we have proper abortion legislation young girls are scared to go to hospitals for proper abortion that is because of POSCO which still criminalizes consensual underage sexual act and also mandatory reporting under MTP Act. These are obstructing the privacy provisions which are also mentioned under MTP Regulations and under Indian Constitution. Therefore any situation of a child or a woman who are deciding to go for abortion should be the sole decider for herself. Neither the guardian nor any society should keep any pressure in the decision of the women. Because if so happens that a family wants to abort the child just because she is unmarried and the women still wants to keep the child it would otherwise create a deep mental effect on the mother's mental health if she is forced to abort. In the case of *Suchitra Srivastava v. Chandigarh Administration*²⁴, the Court held that the only person who has the authority to decide about her reproductive autonomy is the mother alone. The Court also held that in that process the best interest of the survivor should be taken into consideration and also the social circumstances around the women.

Somewhere we always consider that right of the mother exists first because the fetus is still unborn as according to Article 1 of UDHR, it says that all human being are born free and they have equal right but in this case unborn children are excluded from the Art.3 of the UDHR because right to life would be for those who are born and not those who are "unborn".²⁵ And since mother here has been born before as a women first it is the duty of all to first save the mother, mother' health and also should save her wishes.

The existence of unborn has created quite a fuss over the mother's right and whether a woman would be punishable for killing the fetus. In this regard *De Martell v. Merton and Sutton HA*²⁶, an English case where the question before the court was same as of me. And the English Court very clearly held that if any injury was caused to that unborn child in the mother's womb, there cannot be any legal obligation because it's not subject to any legal duty as the unborn still does not exist and cannot give rise to criminal liability. As per our logic and as law prescribes, there cannot be any question of harm because the unborn still does not exist in this world. Therefore whatever it might be the priority should be given to the mother's life and not the life of the unborn for the simple reason that the legal right if the unborn still does not exists.

(D) Conclusion

The debate over, pro- choice and pro-life are some debate which has been going on for few

²⁴ (2009) 14 SCR 989

²⁵ Ganiat Mobolaji & R. Ahmad, Fundamental Principle of International Human Right Law- Basis for the Right to Life of the Unborn Child, 5 UUM JOURNAL OF LEGAL STUDIES 149, (2014)

²⁶ (1992) 2FCR 832

years now.²⁷ Pro-choice is nothing but giving a women the choice to decide about her reproductive system as to when she wants to bear the child and has no sentiment for the growing fetus. Whereas pro- life is something where mother doesn't consider the life of the child and is responsible for killing the fetus. This Act so often happens taking the leverage of easy going Abortion Act. Giving right to one person doesn't means taking right before it's born.²⁸

III. MATERNAL OR FETAL RIGHT- AN ALL-TIME CONFLICT

The confusion arises as to what point the life starts growing in the unborn child. Can we say that embryo which looks like flesh has right to life? A fetus whatsoever cannot be said to have any individual right whatever right it has comes from the mother. Here the analogy is simple that mother carried the child and until she wishes the next life cannot be brought and hence what we should first save is mother in order to save the life of the unborn. With globalization and modern technology the concept of legality and right to life has become more complex.

Art. 2 of ECHR talks about the right to life everyone has. Here everyone is subject to interpretation, now can we bring unborn child under the purview of "everyone" according to Art. 2 is something still very vague and yet nit decided by the Court. The Greek legal system specifically about unborn child regime says that it has right only after it is born alive.²⁹

There for in many cases especially the U.S Supreme takes due care of women's health care system. Hospitals and Municipality should keep a track on how and under what conditions abortions are been taking place. In the case of *Babbits v. McCann*³⁰, the defendant pleaded the Court that it is the duty of the state to protect the fetus. Later the Court held that State cannot interfere with the women's right of refusing to carry the fetus in her early pregnancy days this is because aborting the fetus in the early trimester is not so dangerous for the mother's health and it a safe process. There are certain definite rights extended to the fetus before it is born like right to inheritance but unfortunately the right o born is not mentioned in any of the legislatures. Many still thinks that there should be judicial reforms which will protect the constitutional right to protect the unborn child. Without due process of law

²⁷ Sushmita Pati, *Unpacking Choice: What does Feminist Theory have to Rethink After the Nemo Nari Niketan Case*, MANUPATRA (Jan 15, 2021, 4 PM), <http://docs.manupatra.in/newslines/articles/Upload/3BC8BBE3-AD6F-4DE8-B88E-C753AFF9A8E8.pdf>

²⁸ Lisa Cuntinho, *Constitutionality of Abortion Laws in India*, LEGAL SERVICE INDIA E- JOURNAL, (Jan 15,2021, 6PM), <http://www.legalserviceindia.com/legal/article-1691-constitutionality-of-abortion-laws-in-india.html>

²⁹ K. Kalivianaki & Georgia Sakka, *The Foetal Right to Life*, 2 ARISTOTLE BIOMEDICAL JOURNAL 40,

³⁰ 310 F. Supp. 293 (E.D. Wis. 1970)

governing the fetus life there can be many injustices done to fetus as well as the embryo. This has been held in many cases like *Hatala v. Markiewicz*³¹, where in this case the Connecticut Court held that the life begins at the time when the women conception. Also Blackstone has said that life is something which is like a gift of god and the right of the unborn creates at the time when it is able to stir in the mother' womb. Similarly another Court of Ohio in the case of *Williams v. Marion Rapid Transit, Inc.*³² held that a fetus can be said to be a person under Ohio Constitution. Therefore of any person tries to abort the child except for the reason that it effects the health of the mother such abortion would not be allowed without the established process of law.

Time and again different Courts have given different interpretation for having “life” in the fetus but what so ever nobody has kept the mother’s heath at stake.

(A) Abortion for Protecting Basic Human Rights

Lawful abortion became very much necessary to deal with the health care facility and to provide abortion under proper environment, clean environment because many a time unsafe abortions leads to infection and that can lead to slow death of the mother. WHO guidelines on abortion has analyzed that many countries do not perform abortion and kept the gestation period up to 8 weeks, but it has been noticed under medical science that safe abortion can be done up to 12 to 14 weeks under proper medical guidance.³³ The over regulations and over scrutiny of a particular area makes not only the patient scared but also leave the medical practitioners in the dark. Due to the various chilling effect of the laws in many countries doctors denies performing the abortion even when the mother knows that the child has some physical deformity. In such a condition the woman is forced to have the child due to lack of clarity in both medical and legal standards.

(B) Savita Halappanavar’s Death – A Change in Ireland’s Women’s Fate

Dr. Savita was a dentist who lived in Galway with her husband. She was expecting her first child but things went back when she was in her 17th week of pregnancy. After complaining on a back pain she was admitted to hospital when hospital authorities informed that she was going to have a miscarriage. Whereas she knew that her fetus would not survive in such a condition and aborting would be the best idea but her husband informed Ireland being a catholic country would never allow abortion when the fetus got its heartbeats. Due to this condition, she waited until the heartbeats stopped and after which she got abortion. But it was

³¹ 26 Conn. Supp. 358,224 A.2d 406 (Sup. Ct.1966).

³² 152 Ohio St. 114, 87 N.E.2d 334 (1949)

³³ Janna N. Erdman, *Theorizing Time in Abortion Law and Human Rights*, HHR (2017)

too late she had already sacrificed her health in this waiting period. She got an infection and died from septicemia. After her death all the nations of Ireland including the Indians raised their voice for such backward law which was punishing the health system of the women. After a thorough investigation by the Ireland's National Health Service it was determined that the country's bad abortion law was the reason why it affected her health and was cause of her death.³⁴ Many said it's the infection that killed her and not laws. But is it fine to kill a person with infection in the name of law was what world was wondering.

Following which there was a spur for new legislature governing abortion which would allow abortion up to 12 weeks with medical guidance in favor of the women's health. After many years Ireland introduced the act called Health (Regulation of Termination of Pregnancy) Act, 2018.

The Eighteenth Amendment in the Ireland's Constitution did not go well because it recognized the right to life to the fetus and also made sure that right of women are equal to that of the unborn child. In Ireland, Abortion was already prohibited under Offences under the Person's Act, 1861, and this 18th amendment went a step ahead to change the abortion laws which were not in favor of the women.³⁵

(C) Conclusion

Ireland was forced to change their abortion law because of one such incident which made voices to rise from all over the world against injustice. In the same way justice is not free. There are many countries where still strict abortion laws are followed and they permits abortion only in severe case. They don't respect the right of the women as it is. There are still many religious and other beliefs which govern the laws of abortions more than the statutes and judgments, this is the reason why women are yet scared to open about their right. Here abortion is nothing but killing a lively body is something which is full of guilt and in unacceptable for many. This has been a very hard decision for all to make a choice between mother and a fetus but at the end we always want to save a life which is already full of life. We would never want to see a person go away who is full of life because of someone who is yet to be born. Health involves mental and physical health which is the prime objective why all the countries had to amend their abortion laws. Healthier the citizens the richer are the country.

³⁴ Megan Specia, *How Sarita Halappanvar's Death Spurred Ireland's Abortion Rights Campaign*, THE NEWYORK TIMES, (Jan 16, 2021, 3 P.M), <https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html>

³⁵ Anna Carnegie, Rachel Roth, *From the Grassroots to the Oireachtas :Abortion Law Reform in the Republic of Ireland*, HHR, (2019)

IV. ABORTION JURISPRUDENCE AND ITS LANDMARK JUDGEMENTS

Roe v. Wade³⁶

This is the major landmark case and standing pillar judgment of abortion laws without which many Courts cannot decide on the basic guidelines. In this case the Court gave an idea about the legality of the fetus and held that fetus is not a person but it has the potential life in it. The fetus not being born has no constitutional right of its own. In this case the Court also mentioned a very important point of women having right to abortion and also they have implied right of privacy.

Abortion on ground of mental and Physical health

In the case *Mrs. X v. Union of India*³⁷, in the landmark judgment, S.C allowed to abort the 22 weeks old fetus. This decision was taking by 7 members of Medical Board who analyzed the situation and felt that continuing with the pregnancy would affect the physical and mental health of the women. The Court has enumerated the right to liberty and included the women's reproductive right in the light of Article 21 of the Indian Constitution. It also says that every woman has her choice and bodily integrity by which she can make choices to abort the child.

The Court took this decision in light of other past decisions where Supreme Court permitted to terminate the pregnancy as it was dangerous for the mother and fetus. This decision was given in the case of *Tapasya Umesh Pisal v. Union of India*³⁸, where the woman was 23 weeks old pregnant.

Termination of pregnancy and age factor

As we already know all the Courts allows terminating the pregnancy if it has been due to rape or incest but the complication arises for the judiciary to decide when more than 24 weeks have passed. We have seen many judgments where Medical Board has allowed abortion at 20th week, 24th week and even 25th week. But in the current case of *Murugan Nayakkar v. Union of India*³⁹, a 13 year old rape victim was pregnant when already 32 weeks has been complicated. In such a situation it is very risky even for a grown up to go for an abortion and in this case she was just a small adolescent girl. But the Court in this case considered her small age and the trauma which she has gone through due to sexual abuse and with the help

³⁶ 410U.S 113 (1973)

³⁷ 2016 (14) SCC 382

³⁸ (2018) 12 SCC 57

³⁹ Writ Petition (Civil) No. 749/2017

of medical report allowed terminating the pregnancy.⁴⁰

MTP Act a barrier to women's right to life and health

When there has been cases where Supreme Court has flexibly interoperated the provision of MTP Act and in exceptional cases and allowed terminating the pregnancy even after 20th week but its not so similar in all the cases. In a similar case named, *Dr. Nikhil Dattar & Ors. v. Union of India*⁴¹, the issue in the Court was regarding whether the gestation period can be increased from 20 weeks to twenty- four week or above. In this case the physicians of the married couple were informed about the heart illness of the unborn child. The Court opined that their hands were tied because as per Sec. 3(2)(ii) of MTP Act would not be satisfied.⁴²

(A) Judiciary on Reproductive Rights as Fundamental Right to Health

In end number of cases different High Court and Supreme Court has held that right to health cannot be compromised in any way. In *Sandesh Bansal v. Union of India*⁴³, the Delhi High Court in the case of PIL which was filled for the maternal deaths which were happening due to low health care facility due to which women were unable to survive the pregnancy. This violates the women's fundamental right under Article 21 of the Indian Constitution where it impliedly mandates that every woman should survive the pregnancy and also should be able to save the child.

Yet another case on Article 21 and abortion was *High Court on its own Motion v. State of Maharashtra*⁴⁴, In this case the Bombay High Court strictly held that even women prisoners have right to life and they should also have access to abortion this will maintain their right to dignity which is guaranteed to every person under Article 21 including prisoners. The Court also found that forcing a woman to continue with the pregnancy is hurting the woman's bodily integrity which is in turn affecting her mental health.⁴⁵

(B) United States on Women's Health

In the case of *United States v. Vuitch*⁴⁶, it was the first case which reached the Supreme Court, on the matter of constitutionality of the District of Columbia Law which gave the right

⁴⁰ CENTER FOR LAW AND POLICY RESEARCH, <https://clpr.org.in/blog/abortion-jurisprudence-in-the-supreme-court-of-india-is-it-the-womans-choice-at-all/> (Last visited Jan 17,2021).

⁴¹ (2008) 110 BOM L.R. 3293

⁴² Shrishti Talukdar & Jechun Palzer, Right Over the Womb Right of Unborn Child: A Comparative Study of Abortion Laws in India and USA, 4JLSR 384, 393(2018)

⁴³ W.P. No. 9061/08

⁴⁴ Suo moto PIL No. 1 of 2016

⁴⁵ CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf> (last visited Jan 17 ,2021).

⁴⁶ 402 U.S 62 (1971)

to abortion only to save the mother's life and her mental health. The Court in this case which was filled by a doctor himself held that the statute was vague and by "health" it also means psychological wellness and also physical wellbeing. The Court also made sure that to prove that the burden of proof will lie on the prosecutor and not on the petitioner.

*Doe v. Bolton*⁴⁷, this case is a decedent of *Roe's* case which gave a new dimension to the women's right to life and health as the purview of abortion was extended more to other dimensions. In this case, the S.C overturned abortion law of Georgia because it allowed abortion only when pregnancy was caused due to rape or incest or due to any health crisis. The law had too many complicated procedures which made the women difficult to reach to their rights. Seeing this the U.S Supreme Court held the Georgia law unconstitutional as it interfered with the women's right to choose and to decide about her decision to terminate the pregnancy.

(C) Indian Judiciary Rejecting Termination on Health Grounds

*Alakh Alok Srivastava v. Union of India*⁴⁸, in this case the Supreme Court did not consider the termination of pregnancy of 10 year old girl who was a rape victim and was at 32 weeks pregnant. We have seen a similar case where the judiciary has allowed the abortion considering the age factor and the mental trauma of the girl but not all cases are similar. In this case the Court felt that continuing pregnancy would be less harmful than terminating it at such later stage when the fetus is half developed. After this case the Courts understood the necessity of having a Board who would deal with such cases of pregnancy where it's above 20 weeks. The Court requested the Center to setup up a body governing such situations of pregnancy above 20 weeks.

(D) Conclusion

It has to be making sure that any cases of abortion going before the court regarding abortion after 20 weeks should be disposed as soon as possible. This is because termination of pregnancy is something which should be done on time or else it could be fatal for both mother and the child. In order to save the mother first also it is very important that fast track Courts are set up for speedy justice. In this way India would be able to a step ahead in health care regime for women and children. When morality, health and privacy is making its demand 20 weeks or 25 weeks should not make much difference. Court should see the possible reasons for the women choosing abortion and should allow it by having a

⁴⁷ 410 U.S. 179 (1973)

⁴⁸ W.P. (C) No. 565/2017

progressive mind set. Judiciary should not always interpret law as it is but it should try to widen its scope in order to include all possible ingredients whenever necessary.

V. CONCLUSION

By this research it is very clear that morbidity rate is higher in case of women because they choose unsafe abortions which are done not in proper hospitals or health care centers. The underage girls are more victims of such unsafe abortions who are unaware about the current legal status of abortion in our Countries. In rural areas the women still take Ayurveda medicines for aborting the child which has proven highly unsafe even it so happened that women has committed suicide as she knows that she would not be able to feed her child is born.

Clinical services should be improved in semi urban and village areas so that women can easily reach a health care center on time. That way there would not be over population and children won't die out of starvation. In India one of the major problems are many uneducated women still thinks that if they become pregnant, they have to bear the child no matter how many children they already have. To meet the need of unwanted pregnancies there should be sufficient training given to the uneducated and backward classes on abortion and pregnancy in order to take a wise step on correct time. It is not new in India to have witnessed where many families commit suicide with their children as they are financially weak and are unable to feel their children. It is very important to understand that small and happy family is much better than killing someone by hunger.

In many countries still fetus rights are considered superior than the mother's life and health ,which is absolutely vague in legal terms because we should first save someone who already exists and its always better to save her legal right before saving another's who is yet to born. If a mother is forced to give birth to unwanted child there is not only severe consequences on the mother' physical and mental health but also there is a chance that the child would love get parental love and hence become parent less child. Slowly that child might indulge into delinquent activities due to psychological effects. Therefore legalized abortion always has its own value and plus points. The process of abortion is becoming easier now a days by illegal manner and somewhere it's a tragedy that our legal system are not able to save it.

Like abortion by wish is something on the other hand there is this concept of forced abortion. Killing a potential life makes the women feel the brutality each point which can also make the woman sick. Hence every decision of abortion should be left on the women and not the guardian or family member. Because many times family member induces the woman to take

a certain step in order to save their respect and name in the society. There are still many cases where a girl of 16 to 18 expects a child; her family forces her to marry someone by aborting the child to escape the social stigma. It is high time for people to understand that “abortion” is not a social stigma it’s just a medical process which society treats like a taboo. People should work on their mentality in order to achieve a better healthier society with better mind set.

A moderate decision is always better than favoring a particular class of women. If women are important for the future of our country and then all other rights are equally important too. If every mother starts thinking in the same way that they are happy alone, then the world would probably be facing its end days. In case of late abortions state should have the right to interfere and interpret the situation so that the situation is in favor of mother’s health. Many a times Court rejects the plea for abortion at later stages of pregnancy which leads to agitation all over the nation. But no matter how much pain and agony and sad story might be behind the reason of pregnancy, a judiciary’s decision on such case would be decided with the help of medical experts. If they still feel that such abortion could be fatal then the Court is bound to restrict such termination under MTP Act. Court cannot act exceptionally in all the cases because one bad precedent can make all the future decisions look equally bad. There are many situations which Court has to investigate like late abortions sometimes takes place due to female feticide. Many States still try to determine the sex of the child and try to get rid of it if it’s a girl child feeling it’s a burden on them. Such exceptional precedents and MTP Act will look like a boon to such opportunist people who are ready to take such advantage of the loopholes in the legal framework. Hence society and every person living in the world should raise their voice against the correct fact and should make a judgment look bad. Because it’s the judiciary because of whom our country witnesses a lot of changes. Even Abortion Laws has got lot of loose ends just because we live in democracy where our right to life, liberty and personal space is equally respected. When laws are made for us and on behalf of women, it’s their duty to use in only on good faith and on genuine reasons.

Recommendations

The judiciary should never interpret the case as it is and should always try to give broader interpretations of the provisions. That way many women would be able to save their right to life and liberty which is guaranteed under Article 21 of the Constitution.

Every women has her right to live and also has right to decide about her body as to how she wants to use it. In that way even the fetus starts growing in her womb she can kill the embryo and get no criminal liability because the fetus was part of her body and it’s her sole decision

maker about her body. In that aspect and judiciary cannot stop a woman from terminating the pregnancy. But this should not be used as per the wish of the women. Any law would be good when it has some binding as well as some loose ends in order to meet with the justice.
