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Roe v. Wade Case and the Abortion Laws in U.S.

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ABSTRACT

In June 1969, a lady named Norma L. McCorvey from US, found out that she was pregnant. Earlier, she had given birth to two children but given both of them in adoption due to the hardships and impoverished situations in her life. Following the same circumstances, this time also she wanted to terminate her pregnancy. Some friends suggested her to pretend falsely that she had been raped so that she can have a legal abortion (not being aware of the fact that Texas Law[2] does not allow abortion in rape cases). However, this scheme doesn't work out as there was no document of police report regarding the alleged rape. At that time, abortion was only allowed by law in case there is any threat to mother's life. She decided to have an illegal abortion but discovered that illegal abortion facility had been caught by the police and thus closed down. After all the schemes of her to obtain an abortion, failed, she was referred to the assistance of attorneys of Texas, Linda Coffee and Sarah Weddington who sought to challenge the existing laws of abortion. They filed a suit in the United States District Court for the Northern District of Texas on behalf of McCorvey (under the alias Jane Roe) against the defendant, Henry Wade. Meanwhile the case was pending before the court, McCorvey gave birth to a child in 1970 and gave him also for adoption. On June 17, 1970, a three judge Bench of the District Court declared that the existing abortion laws are void as it violates the right to privacy as enshrined under Ninth and Fourteenth Amendment Rights. Aggrieved by the decision, the appellant reached to the Supreme Court of United States against the injunctive rulings.

Keywords- *Abortion, Adoption, Amendment, Illegal, Injunctive.*

I. GLOBAL OUTLOOK OF ABORTION LAWS

(A) In Africa

African countries were governed with the similar restrictions laws as that of America.in the French based African countries, abortion was a serious offence under the French Criminal Code of 1810 and was governed by the French law of 1920 that prohibited any provocation to

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[2] Texas Penal Code 1857, Arts. 531-536

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abortion and advertising any anti contraceptive mechanisms.

(B) In Asia

The law on abortion in Asian Countries were more contrary and lenient than in America and Africa. In most of the countries of Asia, abortion was legal except Philippines where it is totally prohibited. In China the abortion laws were widened in 1957 and removed all the restrictions to obtain abortion at whatever stage of pregnancy.

In India also, abortion was permitted due to the high birth rate and for social and economic causes, considering to protect the health and life of woman. However, due to cheap medical facilities the women were unable to access to safe abortion.

(C) In Europe

In most of the European countries, abortion was legal due to social and economic causes till the period of first trimester. After first trimester, there the laws were stringent to obtain abortion but not as that of United States.

II. FACTS IN ISSUE

The appeal was filed by the appellant (Roe) challenging the validity of Texas Abortion Laws. By that time, she already delivered the child and gave up for adoption. The issue was whether the appellant has right to sue after her natural termination of pregnancy and since now the case not being her actual controversy and the decision thereof would no longer affect her. And whether or not the Constitution hold the right of woman to terminate pregnancy by abortion.

III. APPELLANT'S CONTENTIONS

1. The anti-abortion laws are threat to the protection of women's rights, privacy, personal liberty and bodily integrity. The right of personal privacy that is protected under the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the U.S. Constitution.
2. The appellant also contended that access to safe abortion and reproductive freedom are the basic fundamental rights.
3. The existing abortion laws will only give rise to the problems of population growth, poverty and racial implications, rather than solving it.
4. It is also observed by the scholars that refusal to abortion rights equates to forceful motherhood and contended that ban to voluntary abortion violates the Thirteenth Amendment:

   "When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the Thirteenth Amendment. Even if the woman has stipulated to

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have consented to the risk of pregnancy, that does not permit the state to force her to remain pregnant."[3]

5. It was also alleged by the Appellant that there is not only the violation of right to privacy of patients in the doctor patient relationship but also the violation of doctor's right to practice medicine.
6. Also, under the U.S. Bill of Human Rights, a woman has a right to terminate her pregnancy.
7. It is incorrect for a State to interfere in a woman's right to privacy in personal, marital, familial, and sexual decisions.
8. Nowhere, in the history of Court, it has been declared that a developing embryo is a person. Therefore, it cannot be said that an infant possesses any "right to life".

IV. RESPONDENT'S CONTENTIONS

1. It was argued by the opponent that there is no constitutional foundation on this issue and the lack of any provisions in the Constitution can only be fulfilled by the legislative procedure i.e. the State Legislatures rather than a comprehensive ruling of the Supreme Court.
2. In case of lack of unanimity on the question that when a meaningful life begins, it is paramount to prevent the damages of causing harm.
3. It is also asserted that personhood commences at the outset of fertilization or conception and therefore should be preserved by the Constitution.[4]
4. Moreover, it is the duty of the State to protect prenatal life.

V. LEGAL ASPECTS

(A) Abortion Laws of U.S. Prior To The Case

In 1857, with the establishment of a physician's trade organization i.e. American Medical Association (AMA), a new law enacted and abortion became a criminal offense. This was however not only the outcome of moral edge but also because of scientific and practical reasons. The AMA argued that morally taking a life of anybody is not acceptable. Some physicians contended that abortion at the earliest stage is also immaterial because soon after fertilization takes place a new human life begins to develop if remain uninterrupted. And prominently, the practical reason was that if it made legal then the midwives and other persons who are competent to provide abortion services would reduce their patients. Amidst all this,

[3] Koppelman Andrew, *Forced Labor: A Thirteenth Amendment Defense of Abortion*
[4] Doe v. Bolton [1973] 410 US 179

the AMA succeeded in its campaign on the basis of moral superiority. *Forced Labor*: *A Thirteenth Amendment Defense of Abortion*"

By 1880, all the states of America enacted criminal abortion laws with the only exception when there is a risk to a woman's life. However, despite introducing such stringent laws, there were still some doctors who performed illegal abortion and were therefore prosecuted for it. Meanwhile women were compelled to become witness in cases brought against doctors. In the courts, the women were obliged to answer such personal questions that the feel humiliated and besides being sent to the prisons they faced public criticism for obtaining abortion. This led to deter other women who might have considering abortion.

(B) Abortion and Right To Privacy

Although the right to privacy is not expressly enumerated in the Constitution but referring to several decisions by this Court as in *Union Pacific R. Co. v. Botsford*[5], *Meyer v. Nebraska*[6], and *Eisenstadt v. Baird*[7] it was concluded that right to privacy in certain areas is implicit in the Constitution.

Abortion is not explicitly protected as a right to privacy under the American Constitution, but it has been protected implicitly as a constitutional right in the Fourteenth Amendment. In the revolution of 1960s, prominently regarding the sexual diversity, even the judges of the Supreme Court of United States observed that to liberalise the right to privacy it has to be extended beyond its legislative framework.

In a case of *Griswold v. Connecticut*[8] the majority of the US Supreme Court judges ruled out that a law prohibiting access to any drug or medicine to prevent conception or any other medical procedure to obtain abortion violates a woman's "right to marital privacy". The judges in this case gave different perspectives regarding the right to privacy. In the opinion of Justice Arthur Goldberg, the source of this protection can be found in the Ninth Amendment, while according to Justice John Marshall Harlan opined that it lie in the Due Process of Clause of the Fourteenth Amendment.

However, in the words of Justice Harry Blackmun, "The Constitution does not explicitly mention any right to privacy. In a line of decisions, however, the Court has recognized that a right of personal privacy does exist under the Constitution. In varying contexts, the Court or individual Justices have indeed found at least the roots of the right in the First

[5] [1891] 141 US 250, 251
[6] [1923] 262 US 390, 399
[7] See *infra* fn. 10
[8] [1965] 381 US 479

Amendment, *Stanley v. Georgia*[9], and in the penumbras of the Bill of Rights."

A contrary view was also observed in *Griswold* case by Justice Potter Stewart, according to him, "With all due deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

The Supreme Court in its decision in the case of *Eisentadt v. Baird*[10] permitted the purchase and use of contraceptives to marries as well as unmarried people.

VI. REPRODUCTIVE RIGHTS

Reproductive rights of women are the legal rights and freedom relating to reproduction and reproductive health including right to easily obtain a lawful and safe abortion. In the 1870s, the feminist movement advanced the perception of voluntary motherhood and criticized the idea of involuntary motherhood by criminalising abortion and put forward the idea of mother's liberation. Although advocates of involuntary motherhood criticized conception and argued that women should indulge in sexual activity only when there is a purpose of reproduction.

The reproductive rights of a woman may be understood as a broad concept that include the following rights within its domain: the right to safe and valid abortion, the right to regulate one's own reproductive choices, the right to get standard reproductive healthcare and also the right to access to education in order to be aware that reproductive functions are free from compulsion, violence and discrimination.

Moreover, in the 1960s and 1970s, the movement for birth control also encouraged for the framing of laws of abortion to legalize it and significant education campaigns related to contraception were organized by the governments. In the 1980s, due to the problem of increasing population, the organisation of birth control and population control collaborated to grant women the right to obtain abortion and contraception putting a collective emphasis on "choice".

VII. A WOMAN'S RIGHT TO ABORTION

The Feminist Movement in the 1960s, most prominently in France and the group of women at international platform during the period of 1990s claimed for the rights of abortion and contraception through various mottos like, "My body is mine", "My body, my choice", "A child when I want, if I want", and "Let her decide". Women asserted that to protect right to take decision related to their own bodies, right to establish sexual relationship dissociated from

[9] [1969] 394 US 557
[10] [1972] 405 US 438

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reproduction and to decide freely whether they have to bear a child or not. Moreover, it should not be considered as a women's duty and a biological certainty.

(A) 14th Amendment To The U.S. Constitution

The 14th Amendment to the U.S. Constitution added in 1868 is related to granting of citizenship to all persons born or naturalized in United States. According to Justice Harry A. Blackmun there is an implicit right to privacy for women to decide whether to terminate a pregnancy and it is now an inseparable part of liberty which is protected under the Due Process Clause of the 14th Amendment, otherwise it would indirectly imply the regulation of sexual conduct. Therefore, a foetus cannot be considered as a person under the Constitution and thus it cannot have legal right to life. Earlier in the 19th century, the prohibition of abortion was due to the reason that at that time there was no safe mechanism to obtain abortion.

(B) 13th Amendment To The U.S. Constitution

The 13th Amendment to the U.S. Constitution, 1865, was ratified to abolish slavery. It states that slavery and involuntary servitude, except in case of punishment of crime are totally prohibited in the United States or at any place where its jurisdiction extend. The petitioners asserted that according to some scholars, prohibition on obtaining abortion is equal to forceful motherhood and it is argued that ban on abortion therefore violates the Thirteenth Amendment. It leads the women to subject to 'involuntary servitude'.[11]

(C) Application of Substantive Due Process Jurisprudence

The interpretation of U.S. Constitution is broadly doen in two ways: 1) Substantive Due Process, and 2) "Compelling State Interest". The substantive due process implies that not only the lawful procedures enacted by a State is law but rather the laws must define the personal rights of citizens and it is the duty of the court to examine whether the laws of a state are made with respect to these rights. In the 1890s, the Supreme Court initiated to issue rulings that the regulations imposed by the state are unreasonable and violates the Due process of law. However, it is also recognized by the Courts that Due process can be denied when there is "compelling state interest" to restrict, for instance the freedom of speech, freedom of press, etc. can be denied when there is any state interest.

However, the "compelling state interest" need not to be applied with regard to the Texas Abortion laws. Although the interests involved in regulating abortion laws was protection to an unborn child or health of mother but it is necessary that the interests of state outweigh the

[11] See *supra* fn. 3

restrictive rights of mother's privacy. Because the word 'person' has not been defined in the Constitution and the term is restricted to post-natal life i.e. "person born or naturalized". Moreover, in other legal areas also there is no effort to define status or rights of an unborn child. And more prominently, Texas statutes cannot violate right to privacy of a woman merely on one specific notion of when life begins. The legal state interest in the life of an unborn child and health of mother becomes rather "compelling" at later stages of embryo development. The state interest for protecting life comes into play only after the foetus comes out of the womb and capable of life.

(D) Reasons For Abortion Legislation In 19th Century

The reasons for which the anti-abortion laws were enacted in the late 19th Century is possibly to protect women from unsafe procedures to obtain abortion as earlier the state interest was to safeguard health of mother. Secondly, some scholars believed that those laws were framed with regard to a "pre-existing ethos" and no court have even tried to found a relation between illegalization of abortion and regulating sexual activity. Another possibility which can be derived is that the right to life of an unborn child cannot be equated with to that of a post-natal life.

VIII. POLITICAL SPHERE

The relationship of political association to abortion rights can be evaluated from the organized group National Abortion Rights Action League (NARAL) founded in 1969 and it is the oldest abortion rights advocacy group in the United States. According to NARAL, every woman has a basic human right to decide her own reproduction and therefore it is against all laws and practices that would force any women to bear a child against her will. The purpose of NARAL as defined by its Planning Committee is that it proposes to initiate and integrate all such social, political and legal actions by individuals and groups that tends to provide safe procedure of abortion by skilled physicians to women seeking to obtain abortion irrespective of their economic conditions.

(A) Judgment In A Glance

1. State of Texas is allowed to appeal directly to the Supreme Court for a declaratory judgment.
2. The appellant i.e. Roe has standing to sue.
3. The State has no legal interest in prohibiting abortions until first trimester.
4. The Statues of Texas criminalizing abortion are unconstitutional.

(B) Overview Of The Judgment

Generally, one cannot appeal directly to the Supreme Court for a declaratory judgment but State of Texas is allowed to do so because in the present case the appellants have appealed the injunctive relief judgment and the substance of both the issues are same.

Further, the Court examined the preliminary issue on mootness of the case because the pregnancy of the appellant has naturally terminated. However, in cases involving pregnancy[12] which is "capable of repetition, yet evading review" is an exception as an actual controversy can exist at review stage and moreover, the appellant has brought a class action.

The laws of Texas Statutes which criminalize abortion only considered to save life of a foetus without considering the stage of pregnancy and other rights of women, have violated the Due Process Clause of the 14th Amendment to the U.S. Constitution which prevents State to infringe right to privacy including a right of woman to obtain abortion. The State cannot supersede that right in protecting a life of an unborn child. Thus a State can interfere in later stages to balance a health of mother and life of child by balancing test and regulation of abortion at three trimesters of pregnancy: 1) Until the first trimester of pregnancy, the decision of abortion must be left to the pregnant woman and to her medical condition as directed by the doctor, 2) During the second trimester the government, with the purpose to protect the health of mother, can regulate the abortion, and 3) In the third trimester the State for protecting the "potentiality of human life" restrict abortion except in case when there is a risk to life or health of mother or the child or in cases of rape or incest. The right to obtain an abortion is a fundamental right and therefore the State need to evaluate and strictly scrutinize the abortion laws.

Further, abortion shall only be done by a licensed physician defined by the State and the State may exclude those persons who are not so defines as physician by the State. For this the recommended standards adopted by the Executive Board of the American Public Health Association in October, 1970,[13] to be followed which include that:

1. A simple and quick abortion service shall be promptly available through the State, local public health department, medical society and other non-profit organization.
2. The purpose of counselling should be to make simple and advance the facility of abortion service so that there is no interference in providing abortion service.

[12] Southern Pacific Terminal Co. v. ICC [1911] 219 US 498, 515

[13] *Recommended Standards for Abortion Services*. Adopted by the Executive Board of the APHA at the 98th Annual Meeting in Houstan, Texas

3. The consultation of a psychiatric should not be necessarily obtained as in some specific medical services where certain advice is obligatory sought.
4. The person who are providing service must be properly trained, from the concerned helpers to the expert physicians should be licensed counsellors of abortion.
5. Patients should be mad aware of other method like sterilization and conception.

(C) Concurrences

The majority of the Supreme Court judges gave concurring opinions. Justice Potter Stewart who filed a concurring opinion wrote that in the absence of any explicit right to obtain abortion without restriction, the decision of the Court is permitted to interpret the application of Substantive Due Process which states that right to liberty guaranteed under Due Process Clause can be extended beyond basic procedures and guarantee certain fundamental rights. It is also held in several decisions of this Court that freedom of decisions in personal matters like marriage and family are protected as liberties by the Due Process Clause of the Fourteenth Amendment.[14] Moreover, unborn children are represented by guardians *ad litem* and their rights and interests depend upon the contingency of their live birth.[15] Thus it implies that unborn are not recognized as persons in law. Justice William O. Douglas stated in his concurrent opinion that he believes the decision of the Court is correct to consider right to obtain abortion is a fundamental right which has its source in the Ninth Amendment to the U.S. Constitution according to which if a right is not specifically mentioned in the Constitution that shall not be understood that the people of United States do not hold it, rather it can be drawn up from the Due Process Clause of the Fourteenth Amendment. Chief Justice Warren Burger also gave the concurring opinion in which he wrote that it would be possible to permit a State to certify an abortion by two licensed physicians before performing it.

(D) Dissents

There were two dissenting opinions filed by Justice Byron Raymond White and Justice William Hubbs Rehnquist. White wrote that the opinion of the majority is arbitrary based on a rigid structure deprived of any constitutional or other legal framework to support it. According to him. This excessive use of judicial power is beyond the role of the Court interfering with the legislature of the state and superseding their powers to enact laws. He asserted that the appropriate way to do any reform in the laws can only be achieved through political mechanism instead of the court that decide when the priority has to be given to the mother and when to the

[14] Loving v. Virginia [1967] 388 US 1
[15] Louisell, *Abortion: The Practice of Medicine and the Due Process of Law* [1969] 16 UCLAL Rev. 233, 235-238

foetus. On the other hand, Justice William Hubbs Rehnquist took further the opinion of Justice White. Firstly, that due to the natural termination of pregnancy of the Appellant, the present case is not being her actual controversy now. And it is held by the several decisions of this Court that a party can only claim for his own constitutional rights and cannot strive for vindication of rights vested in others.[16] He also conducted research on the laws of abortion in the 19th Century and the status of the controversy at the time of adding the Fourteenth Amendment to the U.S. Constitution. According to his research, the criminalization of abortion by State was legal at the time of the Fourteenth Amendment, therefore, the framers could not have considered to provide rights contrary with them.

IX. CONCLUSION

The case of *Roe v. Wade* continued for approximately three years. This case is so significant that the judges of the Supreme Court were very focussed in revising all of the minute details of the case they had received during the entire trial. It is an enormously wide case that resulted in the modification of abortion laws of America. After revising all the facets of this case, it was held conclusively by the Court that right of women to obtain abortion is a right to privacy (referring to *Griswold v. Connecticut*) as enshrined in the Fourteenth Amendment. The Court also held that women can freely choose to have an abortion until the first trimester of pregnancy and after that with some restrictions during the second and third trimester with regard to the state interest in protecting potential life. It was also ruled that although declaratory relief, and not injunctive relief was issued, the statues of abortion are unreasonable and hence void. Thus, prominently, this case is so effective that it set a framework on which other laws can be based upon. Lastly, we see that as a consequence of this case the matter of abortion is now the concern of patient and her doctor to govern.

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[16] Moose Lodge v. Irvis [1972] 407 US 163; Sierra Club v. Morton [1972] 405 US 727

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X. REFERENCES

- *Roe v. Wade [1973] 410 US 113*
- *Doe v. Bolton [1973] 410 US 179*
- *Griswold v. Connecticut [1965] 381 US 479*
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- *Union Pacific R. Co. v. Botsford, [1891] 141 US 250, 251*
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Sierra Club v. Morton [1972] 405 US 727.

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