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RIGHT OF WOMEN TO ABORT WITH RESPECT TO SUBSTANTIAL FOETAL ABNORMALITIES: A CRITICAL ANALYSIS

AUTHORED BY - DR. SUMER RIZWAN SHAIKHⁱ

“Abortion is advocated only by persons who have themselves been born”

(Ronald Reagan)

Introduction

The right of a pregnant woman to terminate her pregnancy or abort the foetus has been the subject matter of debate across the world. This right gives a woman the ultimate choice as to whether to give birth to the child which she has conceived. India is amongst the countries that recognises this choice of the woman, in its law, and has even expanded this right in recent times with amendments permitting termination at an advanced stage, under various circumstances.

While recognising the choice of the woman the ultimate giver of life in this world, beyond the Omnipresent, such cases highlight the severe dilemma that women undergo while taking a decision to terminate her pregnancy. Courts are no exception in that Judges have to grapple with issues that are not merely factual and legal but also involve ethical and moral factors.

With the emergence of modern technologies to detect abnormalities in an unborn child, the issues surrounding termination and abortion are bound to become more and more complex. Such technologies coupled with the unpredictability in ascertaining the degree of abnormalities, even by medical practitioners, pose challenges to the manner in which society may grow in the future.ⁱⁱ

Difference between Pregnancy Termination and Abortion

The main difference between pregnancy termination and abortion is the reasons why they happen. A termination is a procedure that a woman chooses to have in order to end her pregnancy. The abortion pill actually works by triggering the same processes that occur during a miscarriage.

An abortion is a medical or surgical procedure that usually takes place early in the pregnancy. Most abortions are performed before 13 weeks, but it is legal to have a termination in the UK up to 24 weeks. [Pregnancies can be terminated with the abortion pill](#) or a minor surgical procedure to remove the contents of the womb. Women have abortions for many different reasons. Sometimes it is necessary to protect the woman's life or health. In other cases, women may be worried about the impact on their emotional, social, family or financial wellbeing.

The term miscarriage is used to describe a pregnancy that ends before 24 weeks. Miscarriages can happen for various reasons, such as injuries or pregnancy complications. However, in most cases it isn't possible to diagnose a specific cause. Sometimes it is just impossible for the pregnancy to continue. The foetus may have had an abnormality that was incompatible with life. It is usually impossible to predict who will have a miscarriage and there won't usually be any impact on future pregnancies.ⁱⁱⁱ

Object of the Study

The object of this paper is to study the Right of Women to Abort with respect to Substantial Foetal Abnormalities interpreted through Judicial Pronouncements.

Research Methodology

The researcher has adopted doctrinal research method for present research. The doctrinal research involves the analysis of the statutes, case laws, existing secondary information accessed from various sources, e.g. books, articles, journals, websites etc.

Statement of Research Problem

The MTP Act, 1971 does not define as to what constitutes an "Abortion" and what constitutes an "substantial foetal abnormalities" and thus the Court is required to take the assistance of external material for interpreting the said expression and allowing the Abortion without taking

into consideration the Right of Unborn irrespective of whether born normal or abnormal.

The definitions of the following expressions in various statutes across jurisdictions are set out below:-

<i>S. No.</i>	<i>Country/State Statute</i>	<i>Terminology</i>	<i>Definition</i>
1.	<i>Abortion Act, 1967 (United Kingdom)</i>	<i>physical or mental abnormalities as to be seriously handicapped</i>	<i>1(1)(d) That there is a <u>substantial risk</u> that if the child were born <u>it would suffer from such physical or mental abnormalities as to be seriously handicapped.</u></i>
2.	<i>Northern Ireland, The Abortion (Northern Ireland) (No. 2) Regulations 2020</i>	<i>Grounds for termination: cases with no gestational limit <u>Severe fetal impairment or fatal fetal abnormality</u></i>	<i>7.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the fetus is such that— (a) <u>the death of the fetus is likely before, during or shortly after birth;</u> or (b) <u>if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.</u></i>
3.	<i>USA/Florida, Title XXIX Public Health, Chapter 390 Termination of Pregnancies</i>	<i><u>Fatal fetal abnormality</u></i>	<i>means a terminal condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb and will result in death upon birth or imminently thereafter.</i>

A perusal of the above definitions would show that some of the definitions are extremely broad and wide, whereas, others are narrow and constricted. The question as to what would constitute “substantial foetal abnormalities” is, thus, dependent not only upon the medical conditions of

the foetus, but also, on the broad public policy of the particular State or Country.

Illustratively, the following decisions delivered after the enactment of the 2021 Amendment, have been considered by the Court:

<i>S.No.</i>	<i>Case Name</i>	<i>Period of Gestation</i>	<i>Medical Condition/Abnormality</i>	<i>Decision</i>
1.	<i>Roshni Ashik Khan v. State of Maharashtra & Anr. [W.P.(L) 18582/2021, decision dated 26th August, 2021]</i>	33 weeks	<i>Serious neurological and skeletal abnormalities in form of ‘Gros Hydrocephalus, small compressed posterior fossa with spina bifida and large meningomyelocele with a tethered spinal cord (Arnold Chiari malformation II_ and bilateral clubfoot’.</i>	<i>Termination of pregnancy permitted.</i>
3.	<i>Smt. Nivedita Basu v. The State of West Bengal & Ors. [W.P.A. 2513/2022, decision dated 17th February, 2022]</i>	34 weeks, 6 days	<i>Open spina bifida (lumbosacral myelomeningocele) with lemon sign (Arnold Chiari malformation) and severe ventriculomegaly (hydrocephalus).</i>	<i>Termination of pregnancy permitted.</i>
2.	<i>Pratibha Gaur v. Government of NCT of Delhi & Ors. [W.P.(C) 14862/2021, date of decision 31st</i>	28 weeks	<i>Tetralogy of Fallot (TOF) with absent pulmonary valve (APV). The disease includes a hole in the heart (Ventricular Septal Defect, VSD) along with poorly developed valve that guards the blood vessel taking blood from right side of the heart (right</i>	<i>Termination of pregnancy permitted.</i>

	<i>December, 2021]</i>		<i>ventricle) to lungs which leads to bothobstruction & leaking of valve. The blood vessels of the lungs (pulmonary arteries) are usually grossly enlarged. In addition to the heart disease, the patient may also have associated airway problems thatmay lead to requirement of respirator support in one-third of cases with infirst year of life. TOF with APV does not have impact on immediate post-natal survival.</i>	
4.	<i>Neethu Suhas&Ors. v. State of Kerala, Represented by Secretary, Department of Women & Child Development &Ors. [W.P.(C) 20872/2022, Date of decision 1st July, 2022]</i>	<i>33 weeks.</i>	<i>Distension of the stomachand a dilated proximal duodenum, suggesting obstruction at the level ofthe distal duodenum suggestive of atresia/stenosis. Along with this, there is growthrestriction (EFW at 3 centile – 28 weeks 4 day)and renal findings.Foetal dopplers are normal with high resistance in the mean uterine artery Doppler. Collective findings pointto an increased possibility of chromosomal abnormalities likeDown's syndrome in around 30% of cases.Also reported association with somegenetic</i>	<i>Terminationof pregnancy permitted.</i>

			<i>syndromes which may be evident only postnatally.</i>	
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An overall analysis of the judicial decisions mentioned above would show that Courts have permitted termination of pregnancy even at an advanced stage i.e., even in the ninth month if substantial foetal abnormalities are detected in the foetus. But in all the above cases, the Medical Board gave an opinion in favour of termination of the pregnancy.

But in *Shahishtha and Others V. The State, 2022 SCC OnLine Kar 1596*^{iv} The Karnataka High Court stated that “It is shocking that an agreement is entered into between the parties in respect of an “unborn child”. It is for the District Child Protection Unit to take the responsibility of all such cases. It is well settled that ‘an unborn child has a life of its own and rights of its own and the rights of unborn are recognised by law. No doubt, only if the unborn can be treated as a person, the right to life of the unborn can be equated with the fundamental right of the mother guaranteed under Article 21 of the Constitution. True, an unborn is not a natural person, but it is well known that after six weeks, life is infused into the embryo, thus converting embryo into foetus and once an embryo evolves into a foetus, the heartbeat starts. In other words, the unborn has life from the stage it transforms into foetus. If the unborn has life, though it is not a natural person, it can certainly be considered as a person within the meaning of Article 21 of the Constitution, for there is absolutely no reason to treat an unborn child differently from a born child. In other words, the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution of India’.”

Most recently the Kerala High Court in *XXX v Union of India, 2024* Permits Termination Of 27 Weeks Pregnancy Citing Foetal Abnormalities But Says Parents Will Be Responsible If Child Born Alive.^v

Relying upon the Apex Court decisions in *K.S.Puttaswamy v. Union of India (2017)*, *Suchita Srivastava v. Chandigarh Administration (2009)*, *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi (2022)*, the Court stated that reproductive autonomy is an integral part of the right to personal liberty and privacy under

Article 21 of the Constitution. In *XYZ v State of Gujarat (2023)*, the Apex Court ruled that a woman alone has the right over her body and she is the ultimate decision maker on abortion.

In the facts of the case, the Court constituted a Medical Board consisting of seven doctors that examined the petitioner and the foetus. The Court observed that the child could develop significant and permanent foetal anomalies. It thus permitted the petitioner to undergo medical termination of pregnancy.

However, the Court ruled that since the petitioners are a married couple who opted for a voluntary pregnancy and the foetus in its 27th week of gestation, they cannot evade from their responsibility if the child is born alive. It added,

“If the foetus is found to be alive at birth, the hospital shall give all necessary assistance including incubation either in that hospital or any other hospital where incubation facility is available in order to ensure that the foetus survives. Further, the baby is to be offered the best medical treatment available so that it develops into a healthy child. The petitioners shall take full responsibility of the baby, offer best medical treatment and rear the child in its best interest.”

Accordingly, the Court disposed of the petition allowing medical termination of pregnancy.

Conclusion:

In India, judicial precedents have supported the rights of women to abort/medically terminate the pregnancy, depending upon the gestational period, the medical condition of the foetus, the physical and mental health of the woman, and other such factors.

But the very important law which governs the whole universe is the God made laws provided through its religious holy books and one such is the Holy Quran which says through :-

SURAH AL-ISRA AYAT 31

“And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin.”

SURAH AL-AN'AM AYAT 151

Say, “Come, I will recite what your Lord has prohibited to you. [He commands] that you not associate anything with Him, and to parents, good treatment, and do not kill your children out of poverty; We will provide for you and them. And do not approach immoralities – what is apparent of them and what is concealed. And do not kill the soul which Allah has forbidden [to

be killed] except by [legal] right. This has He instructed you that you may use reason.”

SURAH TAKWIR AYAT 8

“And when the girl-child buried alive shall be asked”

Therefore from the above said religious laws it is clear that though whatever may be the reason the Unborn should not be killed/Aborted/terminated.

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ⁱⁱ modern technologies to detect abnormalities in an unborn child. (n.d.). Retrieved August 28, 2024, from https://www.verdictum.in/pdf_upload/pms06122022cw166072022151751-1445131.pdf

ⁱⁱⁱ Miscarriage, D. B. P. T. A. (n.d.). Difference Between Pregnancy Termination and Miscarriage | 132 Healthwise. Retrieved August 28, 2024, from <https://www.132healthwise.com/difference-between-pregnancy-termination-and-miscarriage.php>

^{iv} 2022 SCC OnLine Kar 1596

^v Jolly, T., & Law, L. (2024, August 28). Live Law. Live Law. Retrieved May 9, 2024, from <https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-terminate-pregnancy-27-weeks-foetus-disabled-mtp-act-257232>

