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UNRAVELING THE LEGAL TAPESTRY: EXPLORING ABORTION LAWS IN INDIA FROM A JURISPRUDENTIAL PERSPECTIVE

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Abstract

Abortion is a phenomenon that has been deliberated upon since times immemorial and continues to be a topic of contention even today. Abortion is multi-faceted because it involves the culmination of many aspects such as religion, ethics, medicine and law. Abortion is a social issue that provides liberation to women and gives them power to make their own decisions. In this paper the researcher tries to discuss the human rights concerning Abortion, Constitutional and Legal Stand points on Abortion Policies in India Along with the view of different Jurists and Socio-Ethical Problems in Indian Society. Many countries have introduced different grounds on which a legal abortion may be allowed. Therefore, it becomes important to explore from some jurisprudential perspectives whether legalizing abortions are permitted or not. This article focuses on two such theories, natural law and the sociological school of law. Both natural law and sociological school of law offer very much a contrasting viewpoint regarding the legalization of abortions. Natural law, focusing more on the moral aspects of law vehemently refuses the idea of allowing for abortions and it can be seen somewhat extreme. In contrast, sociological school of law takes a more pragmatic view and focusing on social engineering tries to bring about the best the law can be. However, even the sociological school of law finds it difficult to give an exact answer to the question, hence it becomes a case of circumstances, where abortions are permitted on a limited number of grounds and deciding on those grounds then becomes the duty of the law and policy makers of the country who have the balance out the competing interest of the relevant stakeholders.

INTRODUCTION

The term “abortion” actually refers to any premature expulsion of a human foetus, whether naturally or spontaneously, as in a miscarriage or artificially induced, as in surgical or chemical abortion.¹ Today the most common usage of the term “abortion” applies to artificially induced abortion. The term “abortion”, in criminal law, is ordinarily used to describe an intentional termination of pregnancy. Miscarriages or spontaneous abortions, however labelled by the medical professions, are not regarded by law as abortions at all. Abortion privileges are some of the most ardently disputed issue in most of the societies across the world including India. Abortion is a very common and indispensable reproductive healthcare practice which roughly about one third of women all over the world at some time in their life undergo.²

The issues pertaining to abortion needs an urgent consideration on recent laws, religious norms, social mores, emotions, family contexts, conventions and relationships. Human rights bodies have repeatedly condemned restrictive abortion laws as being incompatible with human rights norms.³ Abortion leads to legal, moral and ethical dilemmas. The battle is generally between two segments pro-life supporters and pro-choice supporters. The pro-life supporters condemn abortions believing that the death of an unborn child is a social death, whereas the pro-choice supporters believe that the women must have the total control of her reproductive life and nobody, not even the state should have the control over it.

J.S Mill once noted that “women as having complementary talents should be equally valued. It maintains that equality will follow once the differential treatment of women is removed”. We believe that protecting access to abortion effectuates vital constitutional values, including dignity, autonomy, equality, and bodily integrity.⁴ It would not be difficult to digest that every year, millions of women around the world decide to end a pregnancy through abortion (defined as removal of a foetus or embryo from the uterus before the stage of viability)⁵. The global abortion rate can be estimated at 28 per 1000 women of childbearing age but varies by and within regions.⁶

¹ Dworkin, Ronald. “Feminism and Abortion”. The New York Review of Books, June 10, 1993, 27-29.

² Berer, Marge,(2017), “Abortion Law and Policy Around the World: In Search of Decriminalization.” Health and Human Rights, vol. 19, no. 1, pp. 13–27.

³ Ravi Singh Chhikara and Karman Kaur, (2020), The Conflicting Jurisprudence Behind the Laws on Abortion, International Journal of Law and Jurisprudence, Vol 3, No 2, pp-13-27.

⁴ Berer, Marge, (2017), “Abortion Law and Policy Around the World: In Search of Decriminalization.” Health and Human Rights, vol. 19, no. 1, pp. 13–27.

⁵ Grimes DA, Stuart G. Abortion jabberwocky: “The Need for Better Terminology. Contraception”.

⁶ Sedgh G, Singh S, Shah IH, Åhman E, Henshaw SK, Bankole A: “Induced abortion: Incidence and Trends

It has been observed that just under half of all pregnancies are unintended and half of these end in abortion.⁷

Even though the legal standing of abortion contrasts significantly by region, almost every nation allows abortion at least under certain circumstances. Universally, only six countries prohibit abortions completely. Most developed nations allow the practice deprived of any significant constraints. About 125 countries have some restrictions, typically permitting abortion only under special circumstances, together with for socio-economic whys and wherefores, jeopardizes the bodily or mental well-being of the woman, or the occurrence of terminal incongruities. In this paper the researcher will discuss about the abortion laws and policies in India from jurisprudential aspect.

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Worldwide from 1995 To 2008”

⁷ Bankole A, Singh S, Haas T: “Reasons why women have induced abortions: evidence from 27 countries.

ABORTION AS A HUMAN RIGHT

The Preamble of the Universal Declaration of Human Rights describes the Declaration as, “a common standard of achievement for all peoples and nations” and states that “the peoples of the United Nations have . . . reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women.”⁸ The second article stresses further that these rights and freedoms belong to everyone, without discrimination, by virtue of being a human being: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”⁹ In the third article, explains the first of the rights belonging to everyone, “Everyone has the right to life.” The right to life is the foundation of all other human rights.¹⁰ Though the declaration states the understanding of the international community regarding human rights, it does not create legal obligations.

International Covenant on Civil and Political Rights (ICCPR) echoes and enforces the right to life of the declaration. The Covenant proclaims, “Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life.”¹¹ Notably, the covenant articulates the right as applying to every human being. “human being” is a scientific term for a living human organism. Thus, one view lies that the basic human-rights documents are against abortion; they certainly do not create a right for abortion.¹² Article 1 of ICCPR, declares that, ‘every human being’ has the inherent right to life, while in respect to other rights the expressions used are ‘everyone’ and ‘every person’. This use of different terminology raises the question whether ‘every human being’ has a wider connotation than ‘everyone’ and could therefore be understood to include the unborn child.¹³ There is an absence of authoritative literature on the above contention however it is a well understood fact that the criminalization of abortion can have implications regarding the right to life. This can be backed by the instances of suicides; which young females commit as a result of failure to perform an abortion due to its criminalisation by the state which is a direct violation of right to life. Failure to prevent unnecessary deaths due to anti-abortion laws would raise issues pertaining to the obligation to

⁸ Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc.A/810 (1948), available at: <http://www.un.org/Overview/rights> (last visited on Dec 16, 2020).

⁹ *Id.*, art. 2.

¹⁰ William Saunders, “The ABC of International Right to Abortion”, available at: <http://www.humanlifereview.com/index.php/archives/52-2010-summer/113-the-abcs-of-an-international-right-to-abortion> (last visited on Dec 16, 2020).

¹¹ International Covenant on Civil and Political Rights, art. 6.

¹² *Ibid.*

¹³ International Covenant on Civil and Political Rights, art. 1.

ensure that everyone enjoys the right to life.¹⁴ Another interpretation can be drawn from article 12 of the CEDAW Convention that provides that, “States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”¹⁵

ABORTION FROM CONSTITUTIONAL AND LEGAL STAND POINTS IN INDIA

Abortion has been one of the most contentious subjects in the field of medical science. The Right to Abortion undoubtedly falls under the horizon of Article 21 of the Indian Constitution as does the Right to live with self-respect and make free options till the time they don't interfere with the contemporary procedure of law.¹⁶ Article 21 of the Indian Constitution guarantees that every individual in the interior the national territory of the India is definite with the Right to life and Personal. In the case of abortion, the women similarly are accustomed to the Right to life and make unrestricted choices upon what she desires to do with her body, as any other citizen of India.¹⁷

Abortion or the termination of pregnancy as it is addressed in the legal jargon, was prohibited in India up until 1971, as Section 312-316 of the Indian Penal code, 1861 made it a felonious act.¹⁸ Abortion can be spontaneous or induced. Spontaneous abortion is when a pregnancy comes to a termination on its own, generally known as miscarriage; whereas an induced abortion is when a pregnancy is terminated by intervention using medical or clinical measures and it is clear that the Indian penal code made induced abortions unlawful, bearing in mind the socio-religious fabric of the Indian social order during the period prior to 1971.¹⁹

¹⁴ Bhavish Gupta Meenu Gupta, (2016), Socio Cultural Aspect of Abortion in India: Law, Ethics and Practices, IJI law Review, pg-140-150.

¹⁵ Convention on Elimination of All Forms of Discrimination Against Women, Article 12.

¹⁶ Article 21- Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁷ Garima Tripathi, “Legacy and Legality of Abortion in India and in USA”, Available at: <https://ssrn.com/abstract=3636238>, (last visited, 16 Dec, 202)

¹⁸ Section 312-Causing miscarriage,

Section 313-Causing miscarriage without the consent of the woman, Section 314 -Death caused with an intent to cause miscarriage,

Section 315 -Act done with intent to prevent a child being born alive or to cause it to die after birth, Section 316(IPC): Causing death of a quick born child by act amounting to culpable homicide.

¹⁹ Supra at 17.

However, in 1971, the Medical Termination of Pregnancy Act, 1971(MTP Act) was enacted, making induced abortion permissible in certain settings based on sanctions of the Shanti Lal Shah Committee. Under the Indian Penal Code and the Code of Criminal Procedure, both the woman and the abortionist could be penalized, unless the pregnancy posed a severe hazard to the life of the woman. After a thorough evaluation of national and international evidence, the committee submitted its sanctions in 1966 for legalising abortion, giving rise to the present day MTP Act.²⁰

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

After the **Roe v. Wade**²¹ case, European and American countries started to legalise abortion. During the last thirty years, since 1970s many countries have liberalized their abortion laws. Roe case has been subsequently modified by the US Supreme Court in **Planned Parenthood v. Casey**²² where the legality of the abortion law is now linked to the viability of the foetus rather than the rigid third trimester test laid down in Roe case. In India The concept of a liberal and inclusive enactment pertaining to the laws of abortion was initially proposed by the Central Planning Board of the Government of India in 1964 as a family planning measure²³ The Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The recommendation was adopted in the latter half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee – called Shantilal Shah Committee. After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.²⁴ On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and liberalised abortion laws in India.

It is noteworthy that the MTP Act was implemented in the month of April, 1972 and again revised in the year of 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. This Act was amended in the year 2002 and again in 2005. The Preamble of the Act states, “An Act to provide for the termination of certain pregnancies by

²⁰ Amar Jesani and Aditi Iyer, (1993) “Women and Abortion”, Economic and Political Weekly, 27.

²¹ 410 U.S. 113 (1973).

²² 505 U.S. 833 (1992)

²³ Supra at 20.

²⁴ Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966).

registered medical practitioners and for matters connected therewith or incidental thereto”.²⁵ The Act, consisting of just 8 sections, deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. It legalizes abortion in case where there is a failure of contraceptives or where the pregnancy will adversely affect the physical or mental termination of pregnancy, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian’s consent is required.²⁶ The Act permits abortion only in certain circumstances. It Act allows medical termination of pregnancy up to Twenty weeks’ gestation.

In an expansion that may have far-reaching consequences, the Supreme Court of India have decided that severe foetal abnormality can be a valid ground for the medical termination of pregnancy, even if the foetus is more than twenty weeks old. The Supreme Court granted a twenty four week pregnant woman and rape survivor the permission to go for an abortion in **Ms. X v. Union of India**.²⁷ Here it is pertinent to specify that the International Federation of Gynaecology and Obstetrics (FIGO) recognises an ethical obligation to allow women to terminate a severely malformed foetus.²⁸ FIGO emphasises that in such cases, “The decision to terminate a pregnancy should rest primarily with the parents.”²⁹ It is evident that many countries permit the legal abortion procedure throughout pregnancy in cases of fetal impairment to protect a pregnant woman’s health.

India, as of 2020, is leading the path of setting an example for the world in terms of abortions. In an across-the-board move, the Union cabinet officially sanctioned the Medical Termination of Pregnancy (Amendment) Bill, 2020, to upsurge the limit for pregnancy from 20 weeks to 24. It also prolonged the contraceptive-failure provision for abortion to include “any woman or her partner” instead of the previous clause that specified “only married woman or her husband”. This change is expected to be responsible for providing women the reproductive privileges over their physical being.³⁰

²⁵ Medical Termination of Pregnancy Act, 1972 (Act of 1971), Preamble.

²⁶ Medical Termination of Pregnancy Act, 1972 (Act of 1971), s. 3.

²⁷ Writ Petition (C) No. 593 of 2016 (Supreme Court of India), decided on July 25, 2016, available at: http://supremecourtindia.nic.in/FileServer/2016-07-25_1469453114.pdf (last visited on Dec 16, 2020)

²⁸ International Federation of Obstetricians and Gynaecologists, Recommendations on Ethical Issues in Obstetrics and Gynaecology 58 (Committee for the Study of Ethical Aspects of Human Reproduction and Women’s Health, Oct. 2009), available at: <http://www.figo.org/docs/Ethics%20Guidelines%20%20English%20version%202006%20-2009.pdf> (last visited on Dec 16, 2020).

²⁹ Id. at 75

³⁰ Supra at 17.

ABORTION FROM JURISTS STAND POINT AND MORALITY

The natural law argument is proposed by **John Finnis**, who although derives his theory from Catholic ethics, does not make use of religion and metaphysics.³¹ Finnis, similarly to the Catholics, argues that from the moment of conception, the foetus is on a par with an adult human being. He supports his argument with medical evidence. He justifies it presuming that the foetus forms a person at conception, because the only elements that differentiate a foetus and a full-grown person are growth and development.³²

In **Life's Dominion**, **Dworkin's** purpose is to present the middle ground that respects both of the contentious values - the woman's right to self-determination and the foetus's potential personhood.³³ In order to settle the abortion controversy, Dworkin provides an interesting and innovative argument that holds that abortion is intractable due to the traditional position that characterizes the debate. According to the traditional view, abortion is about whether or not a foetus is a person.³⁴ Instead of starting his analysis from the standard personhood controversy, Dworkin begins his debate with the premise that the abortion controversy results from intellectual disagreement about what is sacred. Dworkin suggests that 'the antagonists to controversy obscure with needlessly divisive rhetoric how much they share in the way of background conceptual agreement.'³⁵ The majority of the first part of his argument exposes the moral stance on 'abortion that Dworkin believes most people already accepted implicitly.'³⁶

Abortion touches social, religious, economic and political aspects. It has both positive as well as negative impact on society. In India, which is a country with enormous social problems supplemented by societal evils such as illiteracy and poverty, the impact of the MTP Act should be judged in the context of changing social circumstances, values and attitudes.³⁷ The ethical debate about the legal stance of prevention of unwanted pregnancies has been continuing for many years throughout the world, and this established the idea of enacting a legislation that would

³¹ 6 Micheal DA Freeman, Lloyd's Introduction to Jurisprudence (7th edn, Sweet & Maxwell 2001) 132-139.

³² John Finnis, 'The fragile case for euthanasia: a reply to John Harris' in John Keown (eds), Euthanasia Examined (Cambridge University Press 1995).

³³ Emily Jackson, Medical law: texts, cases and materials (OUP 2006) 594; Jonathan Herring, Medical Law and Ethics (OUP 2006) 262.

³⁴ Ronald Dworkin, Life's Dominion (HarperCollins 1993).

³⁵ Steven Ross and Terry F Godlove, 'Books Review' (1994) 25(1) Methaphilosophy 96, p 96.

³⁶ [no author], 'Inside out, Within and Beyond, or Backwards? Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom' (1994) 107(4) Harvard Law Review 943, 943

³⁷ Siddhivinayak Hirve,(2004) "Abortion Policy In India: Lacunae and Future Challenge" Abortion Assessment Project, India Centre for Enquiry into Health and Allied Themes, Bombay

balance the ethical and legal perspective.³⁸ In India, in spite of legislative and judicial control, ethical controversies surrounding medical termination of pregnancy still continues and Though many people believe that medical termination of pregnancy is immoral but today it is a right that cannot be taken away from the women.³⁹

CONCLUSION

The last fifty years have been branded by a unique drift as we are on the road to liberalize abortion laws. The choice to not bring a child to life is a hard-hitting and an emotional call for a mother. Pregnancy is not just physically exhausting but includes a lot of emotional turmoil. Nevertheless, if a woman decides to terminate her pregnancy, she must not be left susceptible to an unfavourable, demoralizing third party judgement. All women should be provided with quality abortion care, which is sensitive to their needs by increasing aspects such as easy accessibility and affordability to safe abortion services. This may be done by mobilising human, financial and material resources for provision of care and safety in abortion procedure and increasing the number of trained persons and equipped abortion centres. The Right to Abortion undoubtedly falls under the horizon of Article 21 of the Indian Constitution as does the Right to live with self-respect and make free options till the time they don't interfere with the contemporary procedure of law. The Medical Termination of Pregnancy Act, 1971(MTP Act) was enacted, making induced abortion permissible in certain settings based on sanctions of the Shanti Lal Shah Committee. In India, in spite of legislative and judicial control, ethical controversies surrounding medical termination of pregnancy still continues. Abortion includes various social, ethical and financial issues. Thus it can be concluded that mother's right is limited to have a termination of pregnancy.⁴⁰ It is on the shoulders of the law to take care of the independence and freedom of the mother as well as the life of unborn. The legal community and society needs to offer love and support to women with unplanned pregnancies.

³⁸ *ibid*

³⁹ Bhavish Gupta Meenu Gupta, (2016), Socio Cultural Aspect of Abortion in India: Law, Ethics and Practices, *ILI law Review*, pg-146.

⁴⁰ Patchesky Rosalind Pollack, *Abortion and Women's Choice: The State, Sexuality and Reproductive Freedom* 13 (Northeastern University Press, 1st edn., 1991).