

RIGHT TO ABORT AND WOMEN HEALTH

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I. Introduction

Right to life is the most precious and sacrosanct of all fundamental human rights. The Article 21 of the Indian Constitution provides right to life and the Article 6(1) of the International Covenant on Civil and Political Rights prohibit the arbitrary deprivation of life. As right to life includes right to enjoy life with all limbs and faculties, it implies therefore that right to procreation and right to have control over reproductive organs are included in the broader concept of right to life. Abortion is one of the most controversial issues because it concerns the taking of a human life. The very word abortion denotes deliberate ending of pregnancy at an early stage. According to Wikipedia, an abortion is removal or expulsion of an embryo or fetus from the uterus, resulting in or caused by its death. Abortion is sometimes medically defined as either miscarriage or induced termination before the point of viability. Abortion represents a woman's right to choose whether to continue her pregnancy or terminate it. There are various categories of abortion such as natural, accidental, spontaneous and induced. The natural, accidental and spontaneous abortions are not punishable in the eye of law. But, the induced abortion unless exempted is punishable.

Now, the question is as the women have the right to motherhood whether they should have the right to abort or not. It is the subject of strong public debate in the United States of America though the U.S. law legalizes abortion at the first stages of pregnancy. The Supreme Court of America in the case *Roe Et. Al. Vs. Wade, District Attorney of Dallas Country*² through Mr. Justice Harry A. Blackmun delivered the opinion of the Court that a State must allow any woman, if she wishes, to have an abortion within the first three months after she becomes pregnant. The termination of pregnancy take place when the greater risk involved in the context of mental or physical condition and when the immediate necessity take place for life of women. *Roe vs. Wade* was argued on behalf of all women of the State of Texas. It was a class action suit. Thirty-six abortion reform groups filed briefs with the Court on Roe's behalf. Roe, an unmarried pregnant woman from Texas, wanted to have abortion. But, the existing statute of Texas regarding abortion prevented her from doing so. The Texas Statute of Abortion of 1857 outlawed abortion except to save the mother's life. *Roe* filed a law suit in Federal District Court on behalf of herself and all other pregnant women. She sought

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² No. 70-18, Supreme Court of the United States, 410 U.S., 113, January 22, 1973, decided.

to have the abortion statute declared unconstitutional as an invasion of her right to privacy as was protected by U.S. Constitution. She also sought to have an injunction or Court Order issued against the Statute's enforcement so that she might go forward with abortion. The Federal District Court agreed with *Roe* that the law was unconstitutional and violated her right to privacy. But, the Court refused to grant injunction allowing her to go ahead with the abortion. Roe then appealed the denial of injunction to the U.S. Supreme Court. The Supreme Court, on 7-2 votes, found the Texas Abortion Statute unconstitutional. The Court held that the law violated the right to privacy guaranteed by the *Due Process* clause of the Fourteenth Amendment of the U.S. Constitution. The Court also observed that the State has legitimate interests in protecting both the pregnant woman's health and the life of the fetus. To specify when the State's interests emerge, the U.S. Supreme Court divided pregnancy into twelve-week trimesters. In the first trimester (weeks 1-12), the State cannot regulate abortion or prevent a woman's access to it. It can only require that abortions be performed by a licensed physician and under safe medical conditions. During the second trimester (weeks 13-27), the State can regulate abortion procedures as long as the regulations are reasonably related to the promotion of the mother's health. In the third trimester (weeks 28-42), The State has a dominant interest in protecting the fetus life. A State may prohibit abortions during the third trimester except in cases where the preservation of life and health of mother are the prime concerns. Further, in the case *Doe vs. Bolton*³ the Court found Georgia Statute regarding Abortion to be unconstitutional and observed that the Statute infringed on privacy and personal liberty by permitting abortion only in restricted cases. The Court ruled that the Statute's four procedural requirements – hospital accreditation, hospital committee approval, and two doctors' agreement and State residency – violated the provisions of the Constitution of United States of America. The State could not for example require that abortions be performed only at certain hospitals. Such a requirement interfered with a woman's right to have an abortion in the first trimester of pregnancy which the Court in the case *Roe vs. Wade* had declared was outside the scope of State regulation.

After the Supreme Court decisions in *Roe vs. Wade* and *Doe vs. Bolton*, United States of America began to liberalize their abortion laws. A number of International Bodies have upheld the right of a woman to have an abortion as the basis of her right to private life. The right to freedom of expression and access to information has been used to argue for the right of women to receive information about abortion options. The right to access abortion may also base on the right of a woman to decide freely and responsibly on the number and spacing of her children. The effect of the decision in *Roe*

3 410 US 179, 93 S. Ct. 739, 35 L. Ed. 2nd 201 (1973).

vs. Wade has been diluted by the American Supreme Court in subsequent decisions and the right to abortion was no more a constitutional right, although the above decision has not been overruled expressly.⁴

II. Abortion Laws and Indian Scenario

In India we have many laws to deal with the issue. Sections 312-314 of the Indian Penal Code, 1860, the Medical Termination of Pregnancy Act, 1971 and the Pre-Natal Diagnostic Techniques (regulation and Prevention of Misuse) Act, 1994 are related to the debate of right to abortion and women health in India. The Indian Penal Code, 1860 declared abortion as a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. Section 312 of the Indian Penal Code provides that causing miscarriage is an offence if it is not done in good faith and for the purpose of saving the life of woman.⁵ In the India penal code the framers have not use the word abortion in the section 312. This section says about miscarriage only which in its popular sense is synonymous with abortion and consists in the expulsion of embryo-fetus at any time before it reaches full growth. Here, the section 312 allows abortion only in good faith for saving the life of women. But, sometimes, it is argued that section 312 provides the right of mother hood to woman and takes away the right of abortion i.e the right of woman over her body. Further, under section 313 of the Indian Penal Code if the act of miscarriage has been done without the consent of the pregnant woman, the person procuring abortion is alone punishable under the section with imprisonment extending to 10 years and fine.⁶ Again, causing death of a pregnant woman by an act done with intent to cause miscarriage is punishable under section 314 with imprisonment up to 10 years⁷ and fine and if such act is done without the consent of the woman the punishment is harder.

4 B. P. Dwivedi, "The Changing Dimension of Personal Liberty in India", Wadhwa & Company, Allahabad, 1998 at 221.

5 Sec. 312 of I.P.C.: "Causing miscarriage-Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

6 Sec. 313 of I.P.C.: "Causing miscarriage without woman's consent – Whoever commits the offence defined in the last preceeding section without the consent of woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for s term which may extend to ten years, and shall also be liable to fine."

7 Sec. 314 of I.P.C.: "Death caused by the act done with intent to cause miscarriage – Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of

In the year 1966 the Shantilal Shah Committee (1964) recommended liberalization of abortion laws to reduce maternal morbidity and mortality associated with the illegal abortion in India. On that recommendation, in 1969 the Medical Termination of Pregnancy Bill was introduced in Rajya Sabha and Lok Sabha and in the year 1971 the Parliament of India passed Medical Termination of Pregnancy Act, 1971 which was implemented from April, 1972. But, after passing the Medical Termination of Pregnancy Act, 1971 abortion is not punishable not only to save the woman's life but also to prevent serious risk to physical or mental health of woman. The preamble of the Act is clearly states that termination of pregnancy would be permitted in certain cases. The cases in which the termination is permitted are described in the Act.⁸ Again,

either description for a term may extend to ten years and shall also be liable to fine; If the act done without woman's consent – And if the act done without the consent of woman, shall be punished either with the imprisonment for life, or with the punishment above mentioned.

Explanation – It is not essential to this offence that the offender should know that the act is likely to cause death.”

8 Section 3 of MTP Act, 1971 says:

“(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if he terminates any pregnancy in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, -

(a) Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-

(i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I - Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II - Where any pregnancy, occurs; as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably' foreseeable environment.

(4) (a) No pregnancy of a 'woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

Save as otherwise provided in clause (a), no pregnancy shall be terminated except

only a registered medical practitioner who is defined in section 2(d) of the Act and who possess any recognize medical qualification experience or having training in gynecology and obstetrics as may be prescribed by rules made under this Act is permitted to conduct the termination of pregnancy. Also other matters connected there with the incidental thereto are incorporated for example the question of consent of termination of pregnancy, the place where the pregnancy could be terminated, the power to make rules and regulations in this behalf. Further, in this Act a heavy burden is thrown on the doctor to decide whether he should advise a woman for abortion or not. Some serious problems arise before a doctor while dealing with the cases of abortion:⁹

- (a). What should he do when the woman seeking abortion is an unmarried one?
- (b). If a minor girl seeks abortion and her parents are against it, what should doctor do?
- (c). If the girl refuses to undergo abortion and if her parents insists on it because the girl is unmarried, what advise should be tendered?
- (d). If the girl is raped and still however refuses to under go abortion though her parents insist on abortion, what should a doctor advise?
- (e). If a married woman though pregnant does not want the child but her husband or her parents desire her to carry through the pregnancy, what is way out?
- (f). If the husband of a woman desires her to get rid of the child by abortion but the woman is against it, what should be a doctor's advise?

The MTP Act provides for three grounds on which the pregnancy can be terminated. These are:

- (1) Health- when there is danger to the life or risk to the physical or mental health of the woman;
- (2) Humanitarian - such as, when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman; and
- (3) Eugenic - where there is substantial risk that the child, if born, would suffer from deformities and diseases.

Apart from above reasons, there are also other important factors which compel women to resort to terminate pregnancy. These are: (i). she or the family may not be financially sound to welcome an addition; (ii). it may be

with the consent of the pregnant woman.”

9 Gandhi, B. M.: Indian Penal Code, Eastern Law House, Lucknow, Second Edition (2006), p. 483.

a time when she wants to change her profession which requires free time and hard work; and (iii). her relationship with the husband may be on the verge of collapse and she may prefer not to have a child from him, for, it may possibly affect a future marriage. The Indian laws on abortions are silent on those points which lead the statute on abortion violative of the principle of equality under Article 14 and right to life leading to livelihood under Article 21 of the Constitution of India. In the case of *Nand Kishore Sharma vs. Union of India*¹⁰ it was argued that section 3(2)(a) and (b) and Explanations I and II to section 3 of the Medical Termination of Pregnancy Act are unethical and violative of Article 21 of the Constitution of India. But, the Court refused to comment on the attribution of the statute of a person to the fetus and declared MTP Act is valid. In *D. Rajeshwari vs. State of Tamilnadu*¹¹, an unmarried girl of 18 years prayed for issuing of a direction to terminate the pregnancy of the child in her womb on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of pregnancy would cause great anguish in her mind, which would result in a grave injury to her mental health, since the pregnancy was caused by rape. Here, the Court granted the permission to terminate the pregnancy. In a recent case as reported in the Telegraph newspaper on July 28, 2010 a minor girl's right to terminate a pregnancy arising out of sexual assault has once again focused attention on the loopholes in the Medical Termination of Pregnancy Act, 1971.¹² A 12 years aged village girl who had no idea what sexual abuse meant after being repeated sexually assaulted by her 40 year old neighbour got pregnant.¹³ But, Doctors refused to abort the fetus, citing prohibition under the Medical Termination of Pregnancy Act. The Lower Court also prohibited the girl from under going abortion on the ground that it could not be proven that the pregnancy was causing grave injury to the health of the mother or that the child to be born is likely to suffer any physical or mental disability. Under the MTP Act, 1971 either of those two clauses needs to be fulfilled for an abortion to be allowed. Finally, more than 12 weeks into her pregnancy the minor girl got justice on 11th May, 2010 when Justice Anant Dave of Gujarat High Court reversed the Lower Court's ruling and directed the civil surgeon of the Government General Hospital to carry out the abortion.¹⁴ Again, it is proved in this case that the MTP Act, 1971 which legalized abortion in India and laid down rules so that the freedom to terminate pregnancy does not get misused, is widely believed to have serious shortcomings. Further, in *V. Krishnan vs. G. Rajan*¹⁵ the Court observed that for an abortion, though the guardian's consent is required, the minors consent is also important and should

10 2005 INDLAW RAJ, 142.

11 1996 CriLJ 3795.

12 http://www.telegraphindia.com/1100728/jsp/opinion/story_12739332.jsp

13 *supra*.

14 *supra*.

15 H.C., M.P., No.264 of 1993.

be taken. In *Dr. Nisha Malviya and another vs. State of Madhya Pradesh*¹⁶ the accused had committed rape on minor girl of 12 year age and made her pregnant. The allegations were that two other co-accused took the girl to terminate her pregnancy. The Charge on them was causing miscarriage without consent of mother. The Court held all the three accused guilty of termination of pregnancy caused without the consent of the mother. This judgment has obliquely strengthened the movement of women's right over their body.

Nikita Meheta case has given rise to a raging debate on abortion laws in India.¹⁷ Nikita Meheta and her husband Harsh Mehta, a couple from Mumbai had moved the Bombay High Court and had demanded an amendment of the Medical Termination of Pregnancy Act, 1971.¹⁸ The couple also challenged a rule which prevents abortion after 20th week of pregnancy unless it constitutes a health risk for the mother. Nikita wanted to terminate her pregnancy which had a high probability of resulting in a miscarriage or the birth of a child with serious heart defect. She filed a petition in the Mumbai High Court asking permission for an abortion in the 23rd week as she did not want to give birth to a severely disabled infant and witness its suffering. But, dismissing the application, the Bombay High Court opined that medical experts did not express any categorical opinion that if the child is born it would suffer from serious heart disease. The Court had also observed that even if the couple had approached before 20 weeks it would not have been possible to allow abortion. As per the MTP Act, 1971 a pregnancy can be terminated even after 20 weeks only if there was a fatal risk to the mother and not the fetus. The Division Bench of Bombay High Court comprising of R.M.S. Khandeparkar and Amjad Sayed observed that they could not alter the Statutory provision. Nikita case is an eye opener and many mothers must have faced similar problems. Thus the Medical Termination of pregnancy Act, 1971 is required to be amended to this tune. If complications arise to the mother or the child or some rare disease that the child suffers from, then the legal period of termination of pregnancy needs to be increased to 24 weeks and above. Moreover, the women should be given the right to choose to continue her pregnancy or to abort if any disorder is detected in the child.

Further, the philosophy behind the enactment of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is to curb the increasing trend of female feticide. The Act has been strictly enforced in the country. It has made registration of ultra sound and other sex diagnostic techniques compulsory and the pre-natal sex determination has been made a

16 2000 CriLJ 671.

17 <http://blogs.expressindia.com/showblogdetails.php?contentid=394265>

18 Neha Madhiwalla: The Nikita Mehta case: does the right to abortion threaten disability rights?

Source: www.issuesinmedicalethics.org/164ed152.html

punishable offence. But, here we can invite a debate regarding reproductive choice of woman. If each woman's reproductive choices should be honoured as her own – can she be allowed to sex selective abortion; not under pressure or threat but out of her personal desire?¹⁹

III. Concluding Remark

In United Kingdom the British Parliament passed the Abortion Act in the year 1967. According to the Act to save the life of the mother, to protect her physical and mental health, for fetal abnormalities, or for social and economic reasons a woman can under for abortion within first 24 weeks of her pregnancy. The Act also provides that a woman can terminate her pregnancy at any time during her pregnancy if the mother's life or health is gravely threatened or there is significant risk for fetal abnormalities.²⁰ Eugenic Protection Law of Japan, passed in 1948, promoted liberal policies on abortion. The New legislation of 1996 omitted all references to Eugenic Protection Law and established regulations making abortion legal within 24 weeks of pregnancy to save the mother's life or to protect her physical health.²¹

It would be violative of wide range of human rights if the women's rights to make decisions regarding abortion and family planning be denied by imposing to her access to safe and legal abortions. Right to privacy, right to information and access to information on abortion and right of woman to decide the number of her children form the basis of various International Human Rights Instruments. In the International Conference on Population and Development held in Cairo in 1994 a consensus was reached on the fact that population and developments are closely connected.²² The conference adopted a 20-year Programme of Action, which focused on individual needs and rights and specifically focusing on gender equality, eliminating violence against women and ensuring women's ability to control their own reproductive health.

In respect of right to have control over body and right to abortion, the legal regulations have abrogated the women's right to liberty to great extent. Women should be given right to control over their body and the right to abortion should be liberally granted to the women up to three months of the pregnancy unconditionally. On 21st Mach, 2010 the House of the Representatives of U.S. passed New Health Care Bill which will provide 32 million Americans health coverage. It will become compulsory for all Americans to have health insurance.²³ In Indian, it would not be wrong to expect such health bill for the better health of the people and for the better future of the nation.

19 <http://www.ultraviolet.in>

20 Halsbury's Laws of England, 4th Edition, Vol.30, at p.37.

21 <http://pewforum.org/Abortion/Abortion-Laws-Around-the-World.aspx>

22 <http://www.iisd.ca/cairo.html>

23 The Times of India, Mach 23, 2010, p.13.