

UNDERSTANDING OF RIGHT TO ABORTION UNDER INDIAN CONSTITUTION

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CHAPTER I

1.1 INTRODUCTION

Abortion¹ is one of the subjects that have been discussed extensively in both national and international level. It has become a controversial issue all over the world. Everybody is in dilemma whether a mother has a right to terminate her pregnancy at any time she wishes or an unborn child has a right to life.

The right to life is a very broad concept and is the most fundamental of all. In India, right to life has been recognized under Article 21 of the Constitution which says that “No person shall be deprived of his life and personal liberty except according to procedure established by law”. Person here includes both man and woman. Among various rights which are available to a woman, the right to abortion is also believed to be one of the most essential and fundamental right. Right to abortion has been recognized under right to privacy which is a part of right to personal liberty and which emanates from right to life². But the question always arises whether an unborn child should be considered as a human being and be given the status of a person or not. There are various aspects such as religious, ethics, moral and

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¹ Abortion is the termination of a pregnancy by the removal or expulsion from the uterus a fetus or embryo resulting in or causing its death. Abortion can be classified into two types which are the following:

1. Spontaneous Abortion – An abortion which results due to the complications during pregnancy and which occur unintentionally is called spontaneous abortion. It is also termed as miscarriages.
2. Induced abortion has also been divided into two types:
 - a. Therapeutic abortion – An abortion which is induced to preserve the health of the mother when her life is in danger or when it is found that the child if born will be a disabled one at time it is termed as therapeutic abortion.
 - b. Elective abortion – An abortion induced for any other reason is known as elective abortion.

Both embryo and fetus mean unborn child.

² Roe V. Wade 410US 113(1973)

legal values that rule over the aspect of right to abortion. Abortion is severely condemned in all religions. But in spite of that always the question arises whether the mother has a right to abortion or the child has a right to life. Ronald Dworkin has made a detailed study on the issue of abortion. He did not accept the extreme position taken by the derivative claimers of prohibition of abortion that, the fetus is a complete moral person from the moment of conception³. Hence the unborn has the right to live and abortion is a murder or nearly a wrong as murder.

According to Dworkin a fetus has no interest before the third trimester⁴. A fetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before then. The scientists have agreed that fetal brain will be sufficiently developed to feel pain from approximately the twenty sixth weeks⁵. Thus, whether abortion is against the interest of a fetus must depend on whether the fetus itself has interests, not on whether interests will develop if no abortion takes place. Something that is not alive does not have interests. Also, just because something can develop into a person does not mean it has interests either. Once a fetus can live on its own it may have interests. This is only after the third trimester⁶.

This paper has been divided into five chapters. Chapter II will examine Indian abortion laws. Chapter III will look at the abortion laws in America will deal with the comparative analysis and understanding of abortion. Chapter IV deals with conclusion and suggestions.

1.2 RESEARCH OBJECTIVE :

HYPOTHESIS:

The hypothesis is that the mother's right should prevail over the right of unborn.

RESEARCH QUESTION:

To verify the hypothesis I adopted the following research questions:-

³ Ronald Dworkin, Freedom's Law: The moral reading of the American constitution, 90 (Oxford University Press ed., 1999)

⁴ ibid He says that 'not everything that can be destroyed has an interest in not being destroyed'

⁵ See Clifford Grobstein, Science and the unborn: choosing Human futures (Basic Books, 1988) p.13

⁶ Ronald Dworkin, Freedom's Law: The moral reading of the American constitution, 90 (Oxford University Press ed., 1999)

1. Meaning of abortion and philosophical background on abortion issues.
2. Abortion laws in India.
3. Comparative study with USA
4. Comparative analysis between India and USA

RESEARCH METHODOLOGY

The methodology adopted for the purpose of this research is a doctrinal method. 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 and a comparative study with the system of a liberal abortion laws and its understanding in USA.

CHAPTER II

ABORTION AND THE LAW IN INDIA

2.1 EXAMINE THE INDIAN PENAL CODE 1860.

The Indian Penal Code 1860 which is the basic criminal law of the country keeping in view the religious, moral, social and ethical background of the Indian community has made induced abortion a criminal offence under sections 312 to 316 of IPC 1860.

Sec 312 of IPC 1860 relates to unlawful termination of pregnancy⁷. Here under IPC 1860, the framers of the code have not used the word 'abortion'. The 'miscarriage' and 'unborn child' has also not been defined in the code. But by legal interpretation we will find that voluntary

⁷ S.312 defines the offence of causing miscarriage as follows "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 3 yrs, or with fine or with both and if the woman be quick with child shall be punished either imprisonment of either description for a term which may extend to 7 yrs, and shall be liable to fine"⁷.

Explanation- A woman who causes herself to miscarry is within the meaning of this section

causing miscarriage stands for criminal abortion and which is an offence under the code⁸. Sec 312 make voluntary causing miscarriage an offence in two circumstances when a woman is 'with child' (which means as soon as gestation begins) and when she is 'quick with child' (motion of the fetus is felt by the mother). Sec 312 permits termination of pregnancy in order to protect the life of the mother. The unborn child must not be destroyed unless the destruction of the child is for the purpose of preserving the life of the woman. The provision criminalizes abortion and permits abortion only on medical grounds in order to protect the life of the mother.

During the last few years many countries have liberalized their abortion laws. Many countries are having very restricted abortion laws and there are many countries where abortion is available at the request of woman. Among all those countries India made the abortion laws liberal on 1971 by enacting MTP Act which was designed to create certain exceptions to the strict provisions of IPC which declare that all abortions, miscarriage are criminal unless they are undertaken to save the life of a pregnant woman.

2.2 PROVISIONS UNDER MTP ACT 1971 WHICH GOVERNS ABORTION LAWS IN INDIA:

Under the MTP Act 1971, termination of pregnancy can only be done in good faith by registered medical practitioners and in such places as it is required by this act and it permits the termination of pregnancy up to 12 weeks and the opinion of more than two medical practitioners is required if termination of pregnancy is done between 12 and 20 weeks because of the many reasons⁹.

⁸ Upendra Baxi, Abortion and the law in India, Journal of the Indian Law Institute, 1986-87, Vol-28-29, Alice Jacob, New Delhi

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- I. A risk to life of a pregnant woman, or
- II. A risk of grave injury to her physical or mental health, or
- III. If the pregnancy is caused by rape, or
- IV. There is an existence of substantial risk that if the child is born, it would suffer from some physical or mental abnormalities so as to be seriously handicapped, or

The Act does not permit termination of pregnancy after 20 weeks. The word good faith has not been defined under this Act. It means discretion is in the hand of medical practitioners¹⁰.

In India, Nikita Mehta's case has given rise to an abortion debate relating to statutory time limits to abortion from 20 weeks to 24 weeks. In India abortion is not allowed after 20 weeks and abortion on demand is also not allowed for which women go for illegal abortions. When a child is born deformed it becomes a difficult task for a mother to take care of the child and the child also faces difficulties in every stage of life in relation to health. At that stage both the mother and child faces difficulties. As India is not a developed country it is difficult for poor people to grow abroad for proper medico care. If deformity can be a cause to have abortion within 20 weeks of gestation then there is no problem if abortion is allowed within 24 weeks¹¹. In both the cases the child will born as deformed.

CHAPTER III

3.1 ROE V. WADE

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- V. Failure of any contraceptives
 - VI. Risk to the health of the pregnant woman by reason of her actual or reasonably foreseeable environment.

Before terminating the pregnancy consent of the following persons are required under MTP Act⁹.

- i. If married – her own consent
- ii. If unmarried and above 18yrs – her own consent
- iii. Below 18 yrs – written consent of her guardian
- iv. A mentally ill woman – written consent of her guardian.
- v.

¹⁰ U/S 2(d) of MTP ACT1971defines “registered medical practitioner” means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

¹¹ In medical science the stage of viability arises after 7 months i.e.28 weeks

In 1973, abortion laws in the United States suddenly changed with the Supreme Court's decision in *Roe v. Wade*¹². In *Roe's* case, the United States Supreme court held that the Texa's criminal abortion statute which criminalizes abortion except to save the life of a mother is violative of the Due process clause of the Fourteenth amendment¹³.

The Court held the trimester framework on abortion issue which is the following¹⁴.The USA Supreme court held that the word 'person' in the fourteenth amendment does not include the unborn child and the question when does the life begins cannot be speculated by it¹⁵. It was held that the Constitution does not explicitly recognized the right to privacy but the United States of Supreme court has recognized that 'a right to personal privacy and certain zones of privacy' exists under the constitution¹⁶. The right of privacy to some extent consists of activities like freedom of choice in deciding basic decision of one's life to marriage, procreation, contraception, family relationships and child rearing and education. The right to privacy is founded on the concept of personal liberty under fourteenth amendment is broad

¹² *Roe v. Wade*, 410 US 113 (1973)

¹³ US Supreme Court Reports, Vol 35,The lawyers cooperative publishing co., New York p.147 to199

¹⁴ Firstly it was recognized that during the first trimester of pregnancy there should not be any State interference. It means abortion on demand and the decision is left on the pregnant woman and her physician because in early pregnancy, abortion is safe and mortality is less than the mortality of normal child birth.

Secondly from and after the end of first trimester and until the point of viability, the State may regulate the abortion procedure only when the regulation relates to the maternal health. It means the State promotes the health of the mother.

Thirdly in the third trimester when the viability of fetus (means fetus can survive outside the mother's womb) comes to question, the State's interest in protecting potential human life can be regulated. It means State can prohibit abortion. But cannot prohibit when the health and life of the mother is at stake. It means State can prohibit abortion at the stage subsequent to viability.

¹⁵ US Supreme Court Reports, Vol 35,The lawyers cooperative publishing co., New York p.147 to199

¹⁶ *ibid*

enough to encompass a woman's decision whether or not to terminate her pregnancy and the right to abortion comes under the personal right to privacy.

3.2: PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA V. CASEY

In 1992 Supreme Court decided *Planned Parenthood Southeastern Pennsylvania V. Casey*¹⁷. In this case the court did not over rule Roe's case but reaffirmed and tried to give a new dimension to abortion right. The court created a new standard to test the constitutionality of State abortion restriction. The Court held that the 'undue burden test'¹⁸ instead of trimester framework is to be adopted for determining whether State regulations has some purpose of placing substantial obstacles in the path of a woman for seeking abortion before viability.

The court held that 'the constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of Fourteenth Amendment. It declares that no State shall deprive any person of life, liberty, or property, without due process of law. Due process clause of fourteenth amendment is applied to both substantive law and procedural matters'¹⁹.

3.3 UNDERSTANDING OF RIGHT TO ABORTION IN USA

Therefore by analyzing these two cases, it is found that USA recognizes the woman's right to choose to have abortion that comes under right to privacy. State has also the interest of protecting the unborn child only after the stage of viability. Abortion is on demand up to 12 weeks of pregnancy and the decision is completely on the pregnant woman. First priority is given to mother's health and life which is a under fundamental right to life and liberty and State cannot interfere without having the compelling State's interest of its own. The state is having legitimate interest in preserving and protecting the health of the pregnant woman and another legitimate interest in protecting the potentiality of human. Here in this case the Court has given priority to 'liberty' which means the autonomous control over the development and expression of one's intellect, interests, tastes and personality. The Court has given a strict interpretation of the interest. These two cases talks about the interest of woman physically

¹⁷ (1992) 120 L.Ed 2d 67

¹⁸ 'undue burden' is defined as having effect of placing substantial obstacles in the path of a woman's choice.

¹⁹ (1992) 120 L.Ed 2d 6, para 5

and mentally during the pregnancy period and the interest which is going to affect throughout her life in upbringing the child. The Court has given a strict interpretation of the interest.

3.4 UNDERSTANDING OF RIGHT TO ABORTION IN INDIA:

In India, abortion laws are coming under S.312 to 316 of IPC 1860 and MTP ACT 1971. By analyzing the MTP ACT 1971 we will find that this act does not give any right to abortion to a woman for terminating her pregnancy. The complete decision depends upon the medical practitioners. If the medical practitioner in good faith will approve then pregnancy can be terminated. Here IPC and MTP ACT infringes the right to privacy, right to health, and right to dignity of a woman which has been guaranteed by Art.21. If abortion on demand (in case of rape or for other reasons) is not allowed under safe conditions and is restricted then women will go for unsafe abortion which leads to mortality and death of women infringing right to health and right to live with human dignity.

In India, in various statutes²⁰ also an unborn has been defined as a legal person by fiction. An unborn acquires right only after being born alive.

So the state is required to interfere in abortion matters only after the stage of viability.

Every right has two elements. One is material element of interest like reputation, property, money etc. Second one the formal elements like capacity, power to realize the interest. Therefore right are concerned with interest. Interests are the things which are to a man are advantage. When we say that we are having interest in reputation, it means we are having the advantage to enjoy a good name and the state is under an obligation to protect my interest. If

²⁰ S.13 of TP Act 1882 deals with the transfer of property for the benefit of unborn which defines Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.- A transfers property of which he is the owner, to B. in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

we are having an interest in our physical body, then a right is created in favor of us and we go to doctor who is under a duty to give us a medical treatment under safe condition. To protect the right of a human being right to health has emerged under right to life.

In case of rape, a woman loses her dignity in the society. She has an interest to survive in the society as par with other human being. If abortion is not in demand then she may commit suicide or go for illegal abortion which will affect her health.

But unborn has no interest of his own because his right cannot be recognized. Property right is a contingent interest upon unborn. First prior interest is created in favor of a living person and then right is vested to unborn when is born alive. An unborn cannot take decision, so unborn lacks the capacity to choose.

When an unborn is in mother's womb means it is one of the parts of a woman body. If mother does not want to give child then it's her decision. If she considers herself that she cannot take care of child then it's better to have abortion.

CHAPTER IV

CONCLUSION AND SUGGESTION

When does the life begins has not been recognized under any Statute. So by analyzing and comparing the Constitutional provisions of USA and India, I found that a woman has a right to choose to have abortion and her right prevails over the right of an unborn.

India should make the abortion laws liberal and any law relating to abolition of abortion is nothing but a clear violation of a woman's right. It violates women's rights to health, right to dignity, right liberty, and right to privacy. Abortion must be legally permitted in order to protect the most basic rights of women.

State should take steps to protect the maternal health all the time and unborn child after viability.

BIBLIOGRAPHY

1. Dworkin, Ronald. Freedom's Law: The moral reading of the American constitution. 90 (Oxford University Press ed., 1999)
2. Grobstein, Clifford. Science and the unborn: choosing Human futures (Basic Books, 1988)
3. US Supreme Court Reports. Vol 35. The lawyers cooperative publishing co. New York
4. Baxi, Upendra. Abortion and the law in India. Journal of the Indian Law Institute. 1986-87. Vol-28-29. Alice Jacob, New Delhi