



ORIGINAL RESEARCH PAPER

Law

REPRODUCTIVE RIGHT OF WOMEN V/S RIGHTS OF UNBORN: A CRITICAL ANALYSIS

KEY WORDS: abortion, maternity, pro life, pro choice

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ABSTRACT

In this intellectually rich environment, each one of us acquires and progressively refines our unique and heterogeneous matrix of attitudes. Among the most significant of issues and concerns, is the dilemma posed by choices associated with termination of pregnancy. Abortion, a small word, but with a big emotion of both the unborn and the female producing the fetus. It is regardless of any theory, a point of heated discussion in the recent times. Article 21 of the Indian Constitution clearly says that no person shall be deprived of his/her life or personal liberty, which is not limited to physical act of breathing, in other words, it can be simply defined as Right to life. Now here arises the question for the right of the unborn child? In the article, an attempt has been made to analyze both sides of pro life and pro choice perspectives.

I. INTRODUCTION

In this era of modern civilization, where everyone has been talking about their rights and duties as an individual, "Right of an unborn child verses abortion" seems to be a topic of hot debate and discussion. The right to life is a fundamental human right; an emerging trend to extend a right to life for an unborn child or a fetus poses a significant threat to women's human right in theory and in practice. Many instances can be seen where countries have overruled the right of an unborn over the right of women's will to terminate the pregnancy. There are nations where legal framework protects life before birth e.g. Guatemala¹, Chile², Ireland³, Philippines⁴ and Poland⁵. Generally, if we look on the deeper prospective, it divides the whole issue into two separate segment of viewpoint, one: Pro-life, who are against the abortion and consider the fetus as a human being. The main claim of this pro-life movement is that it consider fetus as a person right from the conception, thus holds right to life. The other one are Pro- choice, who supports the women's right to take decisions for her body and terminate the unwanted pregnancy. It gives more importance to the right of woman as a mother over right of an unborn child or fetus.

There is a controversy all over the world on this issue whether the pregnant women should have personal right to destroy any fetus of her own if she finds it "intolerable". To force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her or at least to infringe her sense of self respect and dignity.⁶ Similarly it is also argued that the fetus may have a right to life, but not a right to be kept in a woman's body against her will. Perhaps this is the right time for the legislature and judiciary to resolve the conflict between these two contrary rights, i.e. pregnant women's right to destroy fetus in her womb under any circumstances at any time and the claim of the State to protect the right of the unborn child on the basis of the growth of the scientific knowledge and recognition of the fetus as a living person within the womb.⁷

International Position

Reproductive rights are internationally recognized as critical both to advancing women's human rights and to promoting development. In recent years, Governments from all over the world has acknowledged and pledged to advance reproductive rights to an unprecedented degree. Reproductive rights were clarified and endorsed internationally in the Cairo Consensus that emerged from the 1994 International Conference on population and development. Generally safe abortion is accepted as part of the reproductive rights of the women⁸. The Preamble of the Universal Declaration of Human Rights, explains the right belonging to everyone, "Everyone has the right to life. Thus, the right to life is the foundation of all other human rights."⁹ However, it is noteworthy to mention that this

declaration states an understanding of the international community on human rights and not forms a legal obligation for the nations. International Covenant on Civil and Political Rights (ICCPR) echoes and enforces the right to life.¹⁰ The Covenant proclaims, "Every human being has the inherent right to life. Notably, the covenant articulates the right as applying to every human being. This use of terminology raises the question that term every human being could be understood to include the unborn child.¹¹ It was only after a landmark decision made by the Supreme Court of United States in *Roe v/s Wade Case*¹² that European and American countries started to legalize abortion and extended the women right to have an abortion. This case promotes a national debate that continues till today about issues for the extension of abortion legalization. It also raises concerns about who should decide the legality of abortion. Discussions are also made on the methods Supreme Court should use in Constitutional adjudication, while taking decisions on abortion. It is this case that divided the United States politics into two groups of claim: Pro-life and Pro-choice and activating debates on both the forefronts.

Moving on the Indian context, the right of life and personal liberty under Article 21 of the constitution have been guaranteed, which has received the widest possible interpretation. Under the canopy of Article 21 of the constitution, so many rights have shelter, growth of nourishment. Within the ambit of this article consists the right to privacy. Right to "life and personal liberty" is the most sacred fundamental right of all the fundamental rights granted to a citizen of India. In the context of this article, we can say that every women owe an individual right to her life, liberty and happiness, that clearly sanction her act of having a right to terminate pregnancy if not wanted. Forcing a woman to continue pregnancy against her will is oppressive and hence does not come under the ambit of reasonable restriction.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

According to the present legal system a mother cannot miscarry her fetus, except under the provision of Medical termination of Pregnancy Act, 1971. An analysis to this legislation brings out that women's right to abortion is doubtful because it depends on certain conditions. These conditions are Proof of risk, grave injury to her physical or mental health, substantial risk of physical abnormalities to the child if born and a situation where abortion could only save her life, all to be certified by a medical practitioner. For abortion, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian's consent is required.¹³ Indian legislation can be considered most liberal as it allows abortion in case of failure of contraceptives. However in all such cases, the abortion cannot be performed after 20 weeks.

There are various infirmities which can be discovered only with the advancement of pregnancy. But in those cases, the abortions are not allowed. In 2008, Nikita and her husband had filed a writ petition, seeking permission to abort her child, due to heart disorder, but the court rejected her plea, as the period of 20 weeks had passed. Days later Nikita had a miscarriage. After this case, the Government had announced that, this legislation will be reviewed. However no significant changes have been made in this regard. However after this case the judiciary has started playing an imperative role by allowing abortion even beyond the restricted time period. Recently, a 14 years Gujarat rape victim who was refused abortion of 24 weeks fetus by Gujarat High Court (24th July 2015) was permitted (25th week by then) keeping the health of the petitioner in perspective by appointing a clinical psychologist on the bench for assisting fair judgment.¹⁴

Critical Analysis

An analysis to this legislation brings that women's reproductive rights in this respect are doubtful because her right is dependent on certain conditions; proof of risk to her life or grave injury to her physical and mental health; substantial risk of physical or mental abnormalities to the child if born and a situation where abortion could only save her life, all to be certified by a medical practitioner. Indian legislation can be considered most liberal as it allows abortion in case of failure of contraceptives. However in all such situations, the abortion cannot be performed after 20 weeks. There are various deformities which can only be discovered with the advancement of pregnancy. But in those cases abortions are not allowed. In the year 2008 Nikita and her husband had filed a writ petition, seeking permission to abort her child due to heart disorder, but the court rejected her plea, as the period of 20 weeks had expired. After some time the petitioner had a miscarriage. Her case had been prompted the Government to announce that, it will be considering a review of the law. However no significant changes have been made in this regard.

Apart from the health issue, there may be other factors, due to which a woman may not be willing to continue pregnancy. There may be economic reasons, where the mother /parents are not in the position to support the child. In our Indian society it causes social stigma for a unmarried women to become pregnant. If in any such condition she is not willing to continue her pregnancy, she must not be compelled by law to do that. If she is forced to have child by denying abortion, it will bring a mental cruelty affecting her health on the psychological forefront. Above all every women must have a sole right to take decision about her body. She must enjoy her right to life and personal liberty at par with men. No one should force her either to carry or terminate the pregnancy.

CONCLUSION

India as a democratic country should give complete freedom to its individuals. A woman should be left free to decide as to what she has to do to her body and should not be pressurized if she is not interested in giving birth. MTP Act which was introduced to check maternal mortality would rather lead to the increase in the same because of woman being forced by law, having no other option than to go for back street unsafe abortion practices which poses greater risk to her health. Here, Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection), 2003 should be strictly enforced so that providing freedom to abortion nowhere affects the sex-ratio. Therefore, a woman should not be compelled to sacrifice her happiness, reputation in the society for the cost of an unwanted and non-existent being. That would seriously violate her right to dignity and health, right to privacy and surely, right to liberty.

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