



ABORTION - WAR AGAINST CHILD OR WOMEN RIGHTS

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“There is no such thing as an Unwanted child , there are only Unwanting parents”

-Mother Teresa

INTRODUCTION:

Abortion is an issue which is difficult to speak on, yet impossible to remain silent on .Since the act has “ death of a vulnerable member” as its object. Abortion has been a topic of debate all over the world. India even in its 69th republic year is still debating upon abortion. Medical advancements, inter-generational gaps, technical advancement, dynamic change of society calls ‘abortion debates’ to be the need of the hour.

DEFNITION:

The Black’s Law dictionary had defined abortion as the artificial or spontaneous termination of pregnancy before embryo/fetus can survive on its own outside a women’s uterus¹. In simple terms abortion is deliberate termination of human pregnancy. Miscarriage and abortion are words that had been interchangeable for centuries.

Miscarriage is a natural or spontaneous termination of pregnancy meaning the body

expels the embryo/fetus on its own without any medical aid. On the other hand Abortion is a procedure done with a purpose of terminating a pregnancy.

TYPES OF ABORTION:

Abortion can be classified into two broad categories:

- Medical abortion
- Surgical abortion

The types of abortion contracted will be in accordance to the trimester the mother is in. Both types of abortions are available in first trimester. Medical abortion is a procedure that uses medication to end a pregnancy. A Medical abortion doesn't require surgery or anesthesia. Two surgical abortion options are available to women during the first trimester.

- D&A (dilation and aspiration)
- D&C (dilation and curettage)

Second-trimester abortions must take place in a hospital setting .Medical abortion is not available during the second trimester. Surgical abortion options that are available to women during the second trimester.

- D&E (dilation and evacuation)
- D&X (dilation and extraction)

CONTEXT OF RELIGIOUS AND ETHICAL VALUES AND RATIONALE BEHIND ABORTION:

According to hindu mythology the most important thing for each soul is the unfolding of its karmic destiny toward this goal. Abortion can obstruct this unfolding, and therefore it is condemned². The practice

¹ [Black's Law Dictionary Free](https://thelawdictionary.org/abortion/) 2nd Ed. and [The Law Dictionary](https://thelawdictionary.org/abortion/) ABORTION

² Lipner, Julius J. "On Abortion and the Moral Status of the Unborn", in *Hindu Ethics*, edited by Coward, Lipner, and Young. State University of New York, Albany. 1989.



of abortion is negatively referred to in the earliest Hindu scriptures, the Vedas and the later *smṛti* texts also contain injunctions against abortion, as well as protections for pregnant women. “In the *Viṣṇudharmasūtra*, killing either fetus or mother is equated to the worst crime possible in Hindu society. The *Gautamadharmasūtra* tells us that two crimes that call for a woman to have her caste revoked are adultery and abortion.³ Even the people who perform abortions are condemned in various texts such as the “*Satapatha Brahmana*” compares the reputation of those who eat beef with those who perform abortions, while in the Upanisads they are placed in a category with thieves and outcasts⁴.

The word "abortion" is not mentioned in the Bible, but much in the Bible speaks to the issue. Its opposites to abortion follows from a belief that human life begins at conception and that “Human life must be respected and protected absolutely from the moment of conception”.⁵

ABORTION LAW ALL OVER THE WORLD:

Law regarding abortion are diverse and vary from country to country. In some countries it is available to women on request with or without exceptions while in others it is totally outlawed. Most states restrict abortion after specific point during pregnancy, known as gestational limit. In countries where abortion is illegal, exceptions may be made for a variety of cases, ranging from the victims of rape, contraceptive failures to no exceptions at all. Women in several countries were

abortion is outlawed travel to other countries to get abortions done. Countries are categorised based on their legal regime on abortions.

CATEGORY A

Countries which permits abortion on request. According to World Health Organisation 50 countries including United states allow abortion on women’s request with no requirement for justification however access & procedures varies.

CATEGORY B

Countries in which abortion is totally outlawed. In countries such as Brunei, Guatemala, Libya, Syria and Alabama (US) abortions are totally outlawed and only available to save the women’s life. Even exceptions for cases of rape and incest are not available to women in countries like Brunei, Guatemala, Libya, Syria, Alabama (US), Qatar, Mexico and Niger.

CATEGORY C

Countries in which abortion is permitted for protecting life of women and fetal impairments alone. In Qatar and Niger abortion is also permitted in cases of fetal impairment.

CATEGORY D

Countries with liberal law towards abortion. Abortion is looked upon with modern liberal approach in countries with liberal laws like United Kingdom, Finland, India and Japan where

³Eubios Journal of Asian and International Bioethics 14 (2004), 149-50. <https://www.eubios.info/EJ144/ej144j.htm#_ftn4>

⁴Whitney, William Dwight, trns. *Atharva-Veda Samhita*. Harvard Oriental Series, vol. VII. Harvard University. Cambridge, MA. 1905.

⁵ [Catechism of the Catholic Church, 2270](#) (Oct. 19, 2019, 10:04 AM) [Wayback Machine](#)



abortion based on socio-economic grounds are also permitted.

CONTROVERSIAL DEBATES SURROUNDING ABORTION

Abortion debate can be recapitulated in two terms- Pro Choice and Pro Life.

“No uterus, No opinion” famous dialogue by Rachel Green, a character on the popular American sitcom Friends clearly express the thoughts and ideology of Pro choice proponents. Proponents, contend that choosing abortion is a right that should not be limited by governmental or religious authority, and which outweighs any right claimed for an embryo or fetus.

“I am just the oven” is also a famous dialogue by Pheobe Buffay a character from the sitcom Friends depict the ideology of Pro life people as they argue that the cake doesn’t belong to the oven just because it is baked in there. Opponents, identifying themselves as pro-life, contend that individual human life begins at fertilization, and therefore abortion is the immoral killing of an innocent human being.

ARGUMENTS FOR BAN ON ABORTION

“If a mother can kill her own child - what is left for me to kill you and you to kill me - there is nothing between.”

— **Mother Teresa**

Anti-abortionist and Pro life people opposes abortion as they consider abortion akin to murder. They fear that legalizing abortions may lead to gene selection and sex determined abortions. They argue with the quote of Dr. Sues “A person is a person no matter how small” stating that abortions are death penalty promulgated to innocent fetus

.They also propose approving abortions would result in irresponsible behaviour . Legitimising of abortions traumatize its opponents as they fear abortions would replace contraception. They argue that abortions disregard the sanctity of life and curb the right to life of the fetus that starts at its conception. They express their care for women cause abortions have deteriorating effect on the psychological and mental health of women and repeated abortions may have detrimental effect on women health. Selective abortion based on genitic abnormalities is overt discrimination. Abortion is opposed as it increases death rates as it did in Canada, i.e., 115 years of warfare has killed only 117,504 people in Canada while abortions has killed 2 million .Hence they contend that abortion is a inhuman practice and immoral killing of fetus that inflicts sufferings on them.

ARGUMENTS AGAINST BAN ON ABORTION:

“No woman can call herself free until she can choose consciously whether she will or will not be a mother.” —

Margaret Sanger

Pro choice people argue that ban on abortion deprives right to privacy and bodily autonomy of a women. Bodily autonomy is defined as the right to self governance over one’s body without external influence or coercion which is considered to be a human right. They state that criminalizing abortions will lead to increase in child labour, increase the number of orphaned children, maternal death and feminisation of poverty. They reinstate that forcing abortion will only create single parents who cannot provide proper care to the children. It is proposed that criminalisation of abortion doesn’t ban abortion but only makes it less safe as women



will start preferring abortions done by quacks without any medical supervision which might be injurious to her life in certain situations. Pro choice people disregard the contention that abortion is murder by arguing that if abortion is murder then ultra sound scan is child pornography. Hence they oppose abortion since they consider right to abortion as their moral right and a vital step towards gender equality.

REPRODUCTIVE RIGHTS IN INDIA:

“The Morality of a society depends on how it treats its most vulnerable members”

-Dietrich Bonhoeffer

The key aspect of personal autonomy is reproductive rights which can be defined as the right to make sexual and reproductive decisions, as recognised by the 1994 United Nations International Conference on Population and Development (UNPIN 1994)⁶ On 24th August 2017, a nine bench judge bench of supreme court unanimously affirmed that privacy as a fundamental right under The Constitution of India, in *Justice K S Puttaswamy v. Union of India*⁷. The bench unanimously held privacy covers personal autonomy relating to the body, mind, and to making choices, as well as informational privacy. In *Suchita Srivatsava v. Chandigarh Administration*⁸ which held that reproductive right of a woman include woman’s entitlement to carry a pregnancy to its full term, to give birth and subsequently raise children and that these rights form a part of a woman’s right to privacy, dignity, bodily integrity. The case arose in the context of the

Medical Termination of Pregnancy Act, 1971, which governs abortions in India. The MTP Act allows for legal abortions only if certain conditions are met. In 2012, the High court of Madhya Pradesh in *Sandesh Bansal v. Union of India*⁹, a public interest litigation seeking accountability of increasing maternal deaths, recognizing that “the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21 of the Indian Constitution and it is the primary duty of the government to ensure that every woman survives pregnancy and child birth”. However, the right of the unborn child cannot be ignored. An NGO based out of Tamil Nadu, also contend that an unborn child does not have the capacity to defend itself from “harm that could be inflicted by its mother”

“Personal freedom or an choice of an individuals cannot curtail the freedom of or choice of another individuals, especially the most vulnerable and persons who are defenseless. While most activists are emphasizing on the rights of the mother over her body, but it must be noted that it is not only the body of the mother entailed in case of an abortion but also the body of the unborn child(fetus). So it has its own legal rights which is known as **Fetal Rights** under natural or civil law, similar to woman having reproductive rights. The term Fetal rights came into wide usage after the landmark case *Roe v. Wade*¹⁰ which legalized abortion in United States in 1973. The **American convention on Human rights** is the only

⁶ ["Report of the International Conference on Population and Development"](#), UNFPA, 1995

⁷ *Justice K S Puttaswamy v Union of India* (2012a): Writ Petition (Civil) No 494 of 2012 (majority

opinion), Supreme Court judgment dated 24 August 2017 (India)

⁸ S.L.P. (C) No. 17985 of 2009 (India).

⁹ Writ Petition No.9061/2008 (India) .

¹⁰ *Roe v. Wade*, 410 U.S. 113 (1973)



international treaty which envisages the right to life of the fetus. While international human rights lacks the inclusion of fetus as a person for the purpose of human rights. Many legal experts believe that there is an increasing need to settle the legal status of the fetus.

The Unborn Victims of Violence Act, 2004 of USA defines the term 'Unborn child' as a child in utero and the term 'child in utero' means a member of homo sapiens at any state of development who is carried in the womb. In India, despite there not being any statutes or legislation that specifically defines the legal status of an unborn child, several statutes recognize and mention the unborn child and defined it to be a legal person by fiction (Sec.20 of the Hindu succession Act,1956 and Section 13,14 &18 of the Transfer of Property Act,1882), but they also mention that rights of unborn would only be acquired only after the child is born. And it is more on the government to protect the life of its citizens and also the members who are to be born.

The abortion conditions and laws are more liberal and it certainly does not invade the Right to Life of women. Moreover it cannot be claimed to be infringing Right to Privacy and Right to Life because there is the body of the third person involved(fetus) who cannot advocate for themselves.

INDIA'S LEGAL REGIME ON ABORTION:

Abortion is multi faceted because it involves the culmination of many aspects such as religion, ethics, medicine and law.Hence framing law for this particular social issue

has been a tedious task.India affirmed it stand on abortion laws by enforcement of Medical Termination of Pregnancy Act, 1971 .It is highly commendable that though Indian abortion laws are 50 years old are constructed liberally compared to many countries in the world.The pro-life/pro-choice binary has not gained currency in India.

JOURNEY OF ABORTION LAWS:

Until October 6, 1860 abortion was criminalised by Section 312 of Indian Penal Code,, dubbing it as intentionally "causing miscarriage." . On seeing the growing need of abortion laws and development of abortion laws in many parts of the world and increased maternal deaths India formed Shantilal Shah Committee. The committee was set up in 1964 after 15 countries legalised abortions in the 1960s.After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.¹¹ On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and legalised abortion laws in India.The act was a fore-runner and was way ahead of its time.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. On October 29, 2014 the Union Ministry of Health and Family Welfare proposed a draft bill to amend the existing MTP bill. This came after the National Commission for Women had recommended that the 20-week gestation limit for abortion be raised to 24 weeks and urged that women,

¹¹ Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966).



irrespective of their marital status should be given abortion rights. The bill was never placed in Parliament. On August 2, 2019, The government assured Delhi High Court in an affidavit that it was working on a draft legislation to amend the Medical Termination of Pregnancy (MTP) Act, 1971. The bill had been sent for inter-ministerial consultation.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

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. Under sec.3 of the act, only registered medical practitioners can terminate woman's pregnancy if they believe in good faith that continuing pregnancy would involve a risk to woman's life or gravely injure her physical or mental health; or that the child would be seriously impaired by physical or mental abnormalities. If the woman has been pregnant for under 12 weeks, the permission of one medical practitioner is enough and if the pregnancy is between 12 to 20 weeks, the permission of two medical practitioners is mandatory. Beyond 20 weeks, Section 5 of the act applies, which permits abortion only in situations where the medical practitioners believes that abortion is immediately necessary to save the woman's life. The law does not recognize other than medical grounds such as social, economical or personal opinions of the parents.

CONSTITUTIONAL VALIDITY OF MTP ACT

The constitutional validity of the act was challenged in several cases including *Nikhil D. Dattar v. Union of India*¹² on grounds that invades privacies and doesn't include eventualities. The state can, of course, place limitations on fundamental rights, but these limitations must pass tests outlined in constitutional jurisprudence. Since the MTP act limit the right to privacy of women by curbing the right to privacy, it must pass the "just, reasonable, and fair" test entailed in *Maneka Gandhi v Union of India*¹⁴ that any law restricting Article 21 must be "just, reasonable, and fair" to remain constitutionally valid. Justice Chandrachud described this test as comprising of three prongs: the privacy restriction should exist as a valid law; there must be a "legitimate state interest" behind it; and the restriction should be "proportional" to its aim. Since there is a rational nexus between its interests in protecting women's health and potential human life and preventing women from deciding on abortions on their own the MTP act is deemed to be just fair and constitutional and constitutionally valid.

AMENDMENTS SOUGHT:

In India, a country with immense social baggage the act cannot be expected to be scrupulously followed. Even it is liberal the young generation and activists think it is not absent of fallacies. The Medical Termination of Pregnancy (Amendment) Bill seeks to expand reproductive rights under the act. Most crucially for privacy concerns, the bill

¹² *Nikhil D. Dattar v. Union of India S.L.P. (Civ.) No. XXXX of 2008 (India).*

¹³ *Justice K S Puttaswamy v Union of India (2012a): Writ Petition (Civil) No 494 of 2012 (majority*

opinion), Supreme Court judgment dated 24 August 2017 (India).

¹⁴ *Maneka Gandhi v Union of India (1978): SCC, SC, 1, p 248 (India).*



allows abortion on “request” of a woman up to 12 weeks of pregnancy. Through Section 2(d), the bill also seeks to improve access to abortions by allowing “registered healthcare providers,” including 7yurveda and homeopathy practitioners to authorise abortions, and nurses and auxiliary midwives to perform them (though additional regulation of such providers is necessary). Protecting a key aspect of “informational privacy,” Section 5A of the bill also mandates that no registered healthcare provider shall reveal the name and other particulars of a woman whose pregnancy has been terminated as per the provisions of the act. The bill is yet to be passed.

CONCLUSION:

“I certainly supported a woman’s right to choose, but to my mind the time to choose was before, not after the fact”

-Ann B. Ross

In this globalisation era, where the rights are conferred even to robots and Artificial Intelligence etc, the time demands that we consider rights of an unborn person at this critical juncture.

The abortion laws, should not only concentrate on gender equality and woman rights . It must emphasize right of women interalia with rights of unborn child. Abortion affects the mother in equal proportion as the fetus. In an liberal view anti-abortion upholds rights of women , Pro-abortion upholds rights of unborn child in their own way. Words of statute will only be a piece of paper if it is not followed with conscience. Abortion laws must not only make abortions safe and legal but also rare!
