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Abortion: An Exploration of Women's Rights

Rajri Patel^a Abhishek Nenuji^b

^aSymbiosis International University, Pune, India ^aNirma University, Ahmedabad, India

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Abortion, an issue that is both complex and hotly contended, poses many difficulties because of its complexity and wide range of opinions. Pro-Choice and Pro-Life are two terms, which are coined for a better understanding of the debate over abortion by rectifying the two camps.¹ The Pro-Choice camp favour decriminalization of “abortion and the Pro-Life camp argues for restrictions that limit a women’s right to choose to one extent.² Women who find themselves in circumstances that either make them want to lead a mothering position or would endanger their health and well-being, find social liberation in abortion. It is counterintuitive to claim that there is a continual balancing act between the rights of the unborn child and women's liberation that must be taken into consideration. Bodily autonomy is the right of every human being to be in control of their own body. Just as pregnancy termination is performed within each individual's body, abortion is the process of terminating a pregnancy from a woman's body.

Keywords: *abortion, human rights, termination of pregnancy, fetus, discrimination, bodily autonomy.*

¹ Bhavish Gupta & Meenu Gupta, ‘The Socio-cultural aspect in India: Law, Ethics and Practise’ [2016] ILJ Law Review 140

² *Ibid*

INTRODUCTION

There has been intense moral, ethical, and legal debate around abortion as it is not only a techno-medical issue but rather a socio/cultural and political issue.³ The relevance and importance of issues that go along with women's rights, health, sexuality, and reproductive rights are important issues and ones that need to be addressed since the consequences of these actions extend beyond the welfare of the women, as they are also peerless to society at large.⁴ There are a lot of facts to the topic of abortion, such as illiteracy, unawareness, a lack of strict laws, and others. This article addresses the impact of abortion on women and presents a favourable picture of the law. Women and their rights to choose what issues arrive with the decision of their sexuality fertility, or reproduction is considered to be subjects that have seldom if ever been in the fray of policymaking surrounding abortion.

While traditional legal, religious, and philosophical arguments have been drawing opposite arguments, it has become apparent that they have both drawn arguments related to their opposing positions. When it comes to those people who advocate for abortion tend to focus on the argument that abortion portrays a woman's right to have control over whether to continue her pregnancy or to terminate" pregnancy rather it is an integral facet of women's rights. The most common arguments given against abortion are centred virtually wholly on the concept of religion, with opposition coming from opponents who cite this as the main reason for their collective belief in that act.⁵

Abortion is a woman's safe and essential reproductive healthcare services to ensure her right to autonomy, equality, and physical and mental health are adequately fulfilled. Restricting women's right to abortion does not do anything to deter the reproductive rights movement, instead resulting in women resorting to clandestine abortions. Furthermore, most of the time, the mere perception that abortion is unlawful or immoral overshadows the views of women and

³ Nimrah Ali & Aparna Raju, 'Reproductive Autonomy and Abortion- A cynical Myth' (2020) 1 Lex Humanitariae: Journal for a change 303

⁴ Chitra Subramaniam, 'India's new abortion law is progressive and has a human face' (*Health Express, Observer Research Foundation*, 7 Mar 2020) <<https://www.orfonline.org/expert-speak/india-new-abortion-law-progressive-human-face-62023/>> accessed 11 December 2022

⁵ Bhavish Gupta & Meenu Gupta (n 1)

girls to the point where doctors, family members, and the judiciary criticize them for their actions.⁶

WHAT IS ABORTION?

The word Abortion has been derived from the Latin word “Abortus”. The word abortion is scarcely used in legal terminology but in a general sense, the word “Abortion” refers to the product of conception being expelled from the uterus and the abdomen. It involves the removal of the fetus or embryo from the body unintentionally with the help of medicines or various medical procedures. The removal of the fetus or embryo is generally done in the gestation period (it begins to develop in humans in the 20th week of gestation). Abortion can be categorized into two types namely: spontaneous abortion and induced abortion.⁷ Spontaneous abortion is said when an abortion takes place due to natural circumstances without any intervention, also known as a miscarriage. On the other hand, the removal of the fetus or embryo when done intentionally and carefully amounts to induced abortion

IS ABORTION CONSIDERED A HUMAN RIGHT?

Human rights are those rights that should be natural rights for everyone without any disparity, in any form. Nobody, not even an individual, can deny that each human has the right to live is one of the highest rights in humans. Such a right can never be taken away, and no one is allowed to derogate from it. But some issues are also controversial in comparison with this apex right. Over the course of history, there has been considerable debate surrounding the subject of abortion, gaining more significance in recent years as a substantial political topic. Abortion as a human right supports the idea of pro-choice while taking into consideration various aspects surrounding a woman thus women being the Centre of the subject.

One of the most vital aspects of our human rights is the right to care and the right to make decisions concerning the one body that we are given rather than decisions about the body belonging solely to ourselves-this is what is referred to as bodily autonomy. A woman has the

⁶ Nimrah Ali & Aparna Raju (n 3)

⁷ KR Azad, ‘Right to Abortion: A liberty of right and choice’ (2020) 19 *Supremo Amicus* 258

right to decide when, to whom, and under what circumstances she will become pregnant. In many cases, where women need to resort to unsafe abortions, those who sometimes have no choice but to do so also risk prosecution and punishment.

The Act that regulates the practice of abortion in India is the medical termination of pregnancy Act, of 1972. The Act legalizes abortion in certain situations, but there are various problems associated with the Act. After various studies regarding the mechanism of abortion, it was found that the act completely refuses reproductive rights and the right of the woman to her own body. Apart from the primary reason, the Act gave rise to expensive and unsafe abortions that could only be affordable by some people in society. This led to insecure and non-medical ways to do abortions. Various sections of the medical termination of the pregnancy Act violate Articles 14 and 21 of the Indian constitution, which results in denying the right to equality, right to life, human dignity, and bodily autonomy.⁸

Section 3(2) of the MTP Act⁹, 2021 states that the duration of the pregnancy should not exceed more than 20 weeks. This section/ provision imposes a rigorous burden on the rights of women for abortion, leading to restrictions on women's right to life, right to equality, and bodily autonomy. Pregnancy occurs when a new life is created inside a woman's body and therefore, she should have the right to control her body, motherhood choices, and fertility. The imposed restriction has a tremendous effect on the mental, and physical health of the woman. In *Suchita Srivastava and Anr. v Chandigarh Administration*¹⁰, the" Supreme Court (three-judge Bench) took this case under consideration, which involved the personal experiences of a woman who was raped and then became pregnant as a result of rape. The Punjab & Haryana High court, without the woman's consent, decided that it would be in the woman's interest to end the woman's pregnancy under Section 3 of the Medical Termination of Pregnancy Act, 1971 (MTP Act) since the inability to take care for" child, not having any parents or guardians to take care is a big indicator that she is not capable of taking care of a child.

⁸ Nimrah Ali & Aparna Raju (n 3) 304

⁹ Medical Termination of Pregnancy Act 2021 s 3(2)

¹⁰ *Suchita Srivastava & Anr v Chandigarh Administration* (2009) 9 SCC 1

The Supreme Court has decided to stay the order handed down by the High Court of Punjab & Haryana and ruled that the right to reproductive choices is about the right to liberty under Article 21¹¹ of the constitution. It was noted quite clearly that a woman's right to decide her own body taking away a woman's choice to make decisions about her own body would be infringed upon if her right to privacy on a "fundamental level was violated anyway. It further provided a differentiation between mental illness and mental retardation and made important observations that no matter the mental retardation of the woman, she still retained the right to make her own decision concerning her reproductive choices. It was declared that termination of her pregnancy" would not be granted without her consent rather she could not have her pregnancy legally terminated. In *Mr. Vijay Sharma and Mrs. Kirti Sharma v Union of India*¹², the court said that the termination of a female fetus is an act for which a person would be sinning. The degradation of women or the offence to the dignity of women is mostly due to such a tendency. Violating the right to life violates Article 39(e)¹³ of India's constitution; also, it infringes the women's right to life. The fetus was also noted to exist within the womb during the mother's pregnancy, which is where life always exists in the fetus. The context of Article 21 of the Indian Constitution applies to a person who has not yet been born or who is still in the womb. Therefore, it can be considered the most significant argument for the MTP act being deemed unconstitutional. In *State of Punjab & Ors v Mohinder Singh Chawla*,¹⁴ when the competent court reviewed the provisions for a decision on the rights of life rather than the rights of the unborn child, it extended its protection over the health of the fetus under the constitution.

Article 14 of the Indian constitution amounts to discrimination against unmarried women. Women in live-in relationships should be given equal rights to the lady who has proven her marital status. There should not be grounds based on discrimination. A bench of the Honorable Supreme Court of India led by Justice DY Chandrachud recently issued an ad-interim ruling

¹¹ Constitution of India 1950, art. 21

¹² *Mr. Vijay Sharma & Mrs. Kirti Sharma v Union of India* (2005) (3) MLJ 1131

¹³ Constitution of India 1950, art. 39(e)

¹⁴ *State of Punjab & Ors v Mohinder Singh Chawla* AIR (1997) SC 1225

allowing an unmarried lady to terminate her 24-week pregnancy resulting from a live-in relationship, subject to the approval of a medical board established by the court.

Abortion has also been granted an international status of a fundamental human right under certain "international human rights treaties. Under international human rights law," all humans across the world have the right to protect themselves, they have the right to tackle violence partiality, and they also have the right to avoid the risk of any torture. The philosophical problem of when life begins has been left up to international courts, tribunals, and other decision-making bodies to decide, but the language that they have focused on to make sense of the treaties is the meaning of the relevant treaties. Many people have agreed that there should not be references to an unborn fetus included in the list of people or humans. Some of the treaties that consider Abortion as a human right are given below:

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

It is a document that sets out fundamental human rights to be protected universally." Adoption being one of the fundamental rights that should be granted to women and girls falls under the purview of "universal declaration of human rights. The Preamble of the Universal Declaration of Human Rights describes the Declaration as "a common standard of achievement for all people and nations" and states that "the people of the United Nations have reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and the equal rights of men and women." The second article highlights further all inherent human rights because these rights belong to and are transferred upon being a human, without any division. "Everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind." The third article focuses on the rights of the proletariat and explains the first of the significant rights that every individual has, "Everyone has the right to life." No "other human rights can be fully realized without going over the foundation of the right to life. The Universal declaration of human rights" in its report (updated 2020) highlighted various point which supports the rights of a woman to abortion are:

- States around the world are beginning to make commitments to end disparity against women and guarantee the right of women to have complete control over their bodies. They recognize and uphold other essential human rights.
- “The Committee on the Elimination of Discrimination against Women specifies that “it is problematic for a state-party use their rights as a state party to deny the performance of certain reproductive health services for a woman on the” law”.
- It is not the right of women or girls to be free of disparity, social or political in their fundamental right to equality and privacy rather A woman's or girl's basic human right to be treated with equality and respect for her privacy, which includes sensitive details about her physical and psychological integrity when she interacts with other people. which involves sensitive issues of physical and psychological integrity, depending on her autonomy to make decisions concerning her own body, reproductive functions, and health care.
- The denial of women's access to abortions is thought to constitute “gender-based violence and may be tantamount to torture or any other cruel, inhuman, or degrading treatment.”

MAPUTO PROTOCOL

Maputo Protocol is the first international agreement to acknowledge that, under certain circumstances, women have the right to an abortion, which they should be able to exercise without hindrance or concern for legal repercussions. Women have the human rights to sexual and reproductive health, as laid out in Article 14 of the Maputo Protocol¹⁵. Article 14(2) of the Maputo Protocol states parties are forbidden from taking any actions that would impede, undermine, or otherwise infringe upon women's reproductive rights, and must ensure that the procedures for the medical abortion of sexual assault, rape, and incest continue to be authorized. “Protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and when continuing with a pregnancy endangers the mental and physical health of the mother or endangers the life of the mother or the fetus”.

¹⁵ Maputo Protocol 2003, art. 14

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The Human rights components contained in the International Covenant on Civil and Criminal Rights uphold the Declaration of Human Rights provisions on life, as it expressly obligates states to protect their citizens. Article 6 of the ICCPR¹⁶ states “Every human being is endowed with an inherent right to life”. This right shall be protected by law. Unlawful deprivation of life shall not be sanctioned in any way. Unlike in the United States, where the word person has been interpreted through judicial theory as “to remove an unborn child from the sphere of protection”. Living human organisms that have the characteristics of a human being are referred to as “human beings”.

CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The United Nations General Assembly, or UNGA, has officially supplemented the Convention on the Elimination of all Forms of Discrimination against Women. “Article 12 of the CEDAW¹⁷ states that “States parties shall take all appropriate measures to implement policies and practices that eliminate discrimination against women in the field of health care to ensure, in comparison with men based on equality of men and women, access to health care services, including those associated with family planning”.

In the case of *Morgentaler Smoling and Scott v R*¹⁸,” The most important attribute of the Court focused on pregnant women’s bodily security rather with concerns over their pregnancy, including possible miscarriages and pre-term births. The Supreme Court observed that if the process of submitting applications to the therapeutic committee continues, it would be delayed for a pregnant woman seeking an abortion. The Court found that this procedure offended the assurance of security of a person.” The woman being subjected to this treatment was psychologically stressed.

¹⁶ International Covenant on Civil and Political Rights 1966, art. 6

¹⁷ Convention on the Elimination of all Forms of Discrimination against Women 1979, art. 12

¹⁸ *Morgentaler Smoling and Scott v R* [1988] 1 SCR 30

It was held in *Paton v The United Kingdom*¹⁹, and the continuance of pregnancy carries with it some risk, providing the permit to continue with abortion. Implied limitations are subject to the right to life of a fetus, as it allows for termination when necessary for protecting the life of the mother is concerned. Abortion access is thus fundamentally linked to social and human rights and protections for those who are capable of being pregnant. In other words, it can also be explained about the rights of girls, who have the potential to become pregnant, and other women in vulnerable situations, to achieve social and gender justice.

CONCLUSION

The topic of abortion has been hot-button with an ongoing debate since ancient times rather, and continues to be a controversial topic even today rather is a distressingly controversial issue since time began. Two terms ensure amplification in this debate: Pro-Choice, which is associated with the right to an abortion; and Pro-Life, which is associated with anti-abortion rights. Abortion, in general, is multifaceted in that many aspects of an individual's religious attitudes, ethics, healthcare, and law can all entail the same outcome for a woman's health. It may seem like one subject, but Abortion can provide liberation for women by giving them the power to decide and make their own choices. But it is important to recognize the role of female feticide in the abortion debate in India if the debate is to be meaningful otherwise it would be completely difficult to understand the scenario of the debate in India. Therefore, the gender-based bias of women's liberation must be balanced by ensuring that it is a necessary prerequisite on the path to healthy societies.

Many countries restrict the laws around how the right is exercised on grounds of the health aspects that women suffer in the process. Some of the existing law which says women's request has been said to be universally acceptable and feasible for the purpose. Nevertheless, it can be a long and complicated journey to law reform. The right to choose where and when to give a woman abortion is an extremely important point. It is one of the most distressing points of a situation that if at all can cause the health conditions of a woman. The collective efforts of many

¹⁹ *Paton v The United Kingdom* 8416/78 (1981) 3 EHRR 408

people and women themselves can result in right-based termination of pregnancy, and the inability for an unwanted pregnancy to be terminated quickly, as well. That is why those seeking a termination should be able to have one, "as early as possible and as late as necessary." The solution relies on strong and effective laws and policies striking out all the old thoughts violating the human rights of women. Presenting more effective schemes on abortion rights, reacting to the needs and awareness programs, and addressing the issues.

The Supreme Court's decision of 1973 *Roe v Wade*²⁰ served as one of the most substantial decisions in history has been made. And reshaped the entire national political system afterward and made divisions in the nation by separating the "pro-choice" and "pro-life" camps that have inspired "grassroots activism" across the world. The Supreme Court of United the States has ruled that "people in the majority of the population feel that their right to privacy is breached by laws against abortion and therefore these laws that prevented the abortion from taking place were overturned, allowing the abortion to happen without the interference of law. Plaintiff Roe wished to terminate her pregnancy as she believed that it was the result of her being raped. The Court said a woman's right to an abortion cannot be restricted by the state during the period over which the Court rules, she has a right to choose to agree to the end of a state's regulating of abortion during the second trimester in ways that are reasonably related to maternal health," and in the third trimester, whether or not a state has the right to regulate abortion should be determined by the state, and whether or not the state restricts or prescribes abortion should also be determined by the state.

²⁰ *Roe v Wade* (1973) 410 US 113, (1973) US LEXIS 159