



Comparative Studies of Socio-Legal Aspects of Adoption Law

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Abstract

The term 'abortion' is derived from the Latin word 'aboriri', which means "to get separated from the proper site". In medical term, 'abortion' means the termination of pregnancy before the period of viability or expulsion or extraction of all or any part of the placenta or membranes, without an identifiable fetus. Since time immemorial, abortion has been an area of controversy in the realm of ethics and law. Abortion is one such area wherein two important rights, one of pregnant woman and the other right of that child in the womb are found at crossroads. Due to this, the pro-abortion groups contend on the basis of physical autonomy of the pregnant woman, and the anti-abortion groups equally against it with the weapon of right of the life in the womb to take birth. It is understandable that neither of the rights can be strike an equilibrium in the zeal to promote either of them. This essential requirement is delicate balance to be struck between the inconsistent interests of child in the womb and pregnant woman.

You should recapitulate this discussion in two terms-Pro Selection and Pro Life. Abortion is multi-faced due to the convergence of many things such as faith, ethics, medicine, and law. Abortion is a social issue which gives women empowerment and power to make their own choices. But India's abortion debate would be meaningless if it failed to take into consideration the crucial issue of female foeticide. Women's liberation therefore needs to be balanced against unborn children's rights.¹

¹Bhavish Gupta and Meenu Gupta, "THE SOCIO-CULTURAL ASPECT OF ABORTION IN INDIA: LAW, ETHICS AND PRACTISE", ILI Law Review, Winter Issue, 2016, pp. 140-150 available at: http://ili.ac.in/pdf/p10_bhavish.pdf (Last visited on November 9, 2019).

Introduction

Abortion is common throughout the world to avoid the unwanted pregnancies that results from the failure or non-use of contraception. Many unplanned pregnancies are the result of incest or rape. The other reasons for abortion is change in circumstances in life after pregnancy has occurred or not to terminate the pregnancy would have negative effects on the health and well-being of the mother. Consequently, abortion appears to be the part of decision on the part of women and couples control their fertility and their lives in every way regardless of the laws in their country. So there will always be a need for safe abortion facilities. There are significant differences exist about abortion information. To fill these gaps, researchers are developing and applying novel methods to better record the incidence of abortion and better understand its causes, circumstances and implications.

This study draws on this growing evidence base to analyze the current state of abortion in legal socio and economic contexts, and considers abortion in light of known factors influencing its protection and incidence. Through offering a comprehensive overview of key aspects of abortion—incidence, legal status, provision of services and health—and how these have been changed in recent years, the study aims to inform future programs and policies.² American feminist writer and activist Betty Friedan said that

*“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process. The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned”*³

History of Medical Termination of Pregnancy Act in India

Sometime in the Ancient Around 200 B.C. around A.D 200. Manu wrote the well-known law manual, the *Manusmrti*, in which he refers around abortion using the term *Garbhasriiva* (the flow or problem of the prenatal organism). In past, abortion was to be considered as sin. On August 25, 1964, The Central Committee on Family Planning recommended that the Ministry of Health should establish a committee to review abortion laws. The recommendation was adopted in late 1964 and a committee comprised members from a variety of public and private agencies was established named *Shantilal Shah Committee*, on 30 December 1966 issued its report. The government decided to liberalize the laws on abortion and passed the Medical Termination of Pregnancy Act (hereinafter ‘MTP Act’). Before the enactment of the MTP Act, the same was governed by the Indian Penal Code (hereinafter ‘IPC’). Section 312⁴criminalized abortion exceptin case where it was done in ‘good faith’ to protect the life of mother. Any person who has committed an offence under section 312⁵ will be punished by life imprisonment by virtue of section 313⁶. Section 314⁷ describes punishment, where woman's death if occurs due to miscarriage, up to 10 years that may be up to life imprisonment in

² Susheela Singh, Lisa Reme z et al. (eds) , Abortion Worldwide 2017, Uneven Progress and Unequal Access, New York: G macher Institute, 2018.

³ Betty F riedan, Abortion: A Woman's Civil Right, 39 (reprinted in Lind a Greenhouse and Reva B. Siegel, 1st edn 1999).

⁴ Indian Penal Code, 1860, Section 312.

⁵/bid.

⁶ Indian Penal Code, 1860, Section 313.

⁷ Indian Penal Code, 1860, Section 314.

case the death occurs due to result of an induced miscarriage without the consent of the woman. Section 315⁸& 316⁹ prescribes the punishment for more abortion related offences.¹⁰Therefore, IPC found deliberately terminated pregnancy with or without the consent of the pregnant woman a crime, except in cases where the pregnant woman's life was to be protected.

In 1967 the report of the Shah committee was sent to all States for their comments. Most of the states either opted it peacefully but only DMK Government of Karnataka opposed the report. Due to the political uncertainty Government introduced the Bill in Rajya Sabha instead of Lok sabha. On the recommendations of Rajya Sabha the bill was referred to Joint Committee of both the Houses. On December 24, 2019 the then minister of health Sh. Chandrashekhar moved the bill in the Lok Sabha alongwith the recommendations of the Rajya sabha. The motion was adopted by the Lok Sabha but no action was taken. When the Congress Party headed by Indira Gandhi, returned with a majority in 1971, Sh. D.P. Chattopadhyaya the then Deputy Health Minister, reintroduced the Bill in House of the people on August 28, 1971. This time Bill was swiftly passed in both Houses, and it became 'law'.¹¹It is notable that the MTP Act came into force in the month of April 1972 and amended again in the year 1975 to reduce time-consuming processes for the place's approval and make facilities more readily available. In 2002 this Act was revised and further in 2005. The Preamble of the Act states "*An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto*"¹². Section 3¹³ provides the restrictions on abortion after certain period in order to reduce the misuse of such mechanism.

Abortion as a Human Right

Preamble of the Universal Declaration of Human Rights defines the declaration as a common standard of accomplishment for all cultures 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 in the equal rights of men and women.' Article 2¹⁴ further emphasizes that these rights and freedoms belongs to all, without prejudice, because they are human being. Article 3¹⁵ provides right to life that is one of the basic rights of each and every human being and the same forms the base for each and every right. The declaration is of a guiding nature and not creating any legal requirement so that it becomes mandatory for the states. International Covenant on Civil and Political Rights, 1966 (hereinafter 'ICCPR') supports, confirms and binds the law for the protection of the right to life that has been confirmed in declaration earlier. Judicial interpretation in the United States of the term "human being" is restricted to the living human being. Thus the unborn child is not treated as human, thus human rights will not be applicable to that.

⁸ Indian Penal Code, 1860, Section 315.

⁹ Indian Penal Code, 1860, Section 316.

¹⁰Setu G ta, be reyo/ and Philosophical Study of Abortion 3 (Thomson Reuters, Legal, Gurgaon, 1 ed. 2019).

¹¹ Savitri Chattopadhyay, "Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process" J6J/L/ 549-550 (1974).

¹²Medical Termination of Pregnancy Act, 1971, Preamble.

¹³Medical Termination of Pregnancy Act, 1971, Section 3.

¹⁴ Universal Declaration of Human Rights, 1948, Article 2.

¹⁵ Universal Declaration of Human Rights, 1948, Article 3.

So it can be said that foundational documents on human rights are against abortion; they definitely do not provide a right of abortion¹⁶.

Illegal Abortion - Providers and Methods

Females procure abortion from unregistered, uncertified providers because of the barriers preventing women from obtaining MTP. Abortion services offered by unregistered providers those are neither skilled nor having facility as compare to licensed doctors those are having appropriate facilities to protect life. Vaginal and oral approaches commonly used to induce abortion. Dais adopts methods such as inserting sticks, herbs, roots, and foreign bodies into the uterus to induce abortion. Other vaginal methods include pins, laininaria tents, and Fetex Paste. Rural Medical Providers (RMPs or “quacks”) sell medicines for oral use to induce abortion. ANMs and ISMPs (Indian System of Medical Practitioners) use intramniotic injections such as intramniotic saline and intramniotic glycerinwith iodine to induce abortion. Orally ingested abortifacients include indigenous and homeopathic medicines, chloroquine tablets, prostaglandins, high dose progesterone and estrogens, papaya seeds with high dose progesterone’s and estrogens, liquor before distillation, seeds of custard apple and carrots.¹⁷

Reasons behind Abortion

There are many and varied reasons why Indian women terminate unwanted pregnancies. Conditions which may lead to unwanted pregnancies are experiencing health problems during pregnancy, becoming pregnant at a younger age, becoming pregnant soon after marriage, financial reasons, already having too many children, becoming pregnant after too short a birth interval, having an extra-marital pregnancy, lack of awareness to use contraceptives or women can’t access a method of contraception that suits them. Contraceptive failure and user failure can lead to unwanted pregnancies that the Indian medical system can legitimately abort.¹⁸

MTP Act: Brief

The MTP Act was promulgated in 1971. Since then too many socio-economic changes have taken place within the nation since its implementation. The lifestyle of the people has changed considerably, so. In addition, medical science technology has greatly improved, and new techniques have been introduced, with the help of these technology, foetal abnormalities can be detected in the advanced stage of pregnancy also. When the Act was enacted in 1971 these techniques were not known or available in our country. Abortion is legal only under specific conditions and circumstances for up to 20 weeks of pregnancy, broadly defined as the continuation of the pregnancy would entail a risk to the life of the pregnant woman or serious injury to physical or mental health, or there is a substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Sometimes, a defective child in the womb may cause substantial damage to the mother or child. So it would be better

¹⁶/bid.

¹⁷Savitri Chattopadhyay, “Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process“ J6J/L/ 549-550 (1974).

¹⁸/bid.

to detect and abort the abnormalities with the help of new technologies within time.

In a writ petition filled by *Human rights Law Network, Mrs. X v. Union of India*¹⁹, the Constitutional validity of the ceiling up to twenty weeks was challenged. It was argued on behalf of the petitioner that ceiling might be appropriate when MTP Act was enacted. But now the medical technology is in advance stage so it is safe for a pregnant woman to undergo the pregnancy termination procedure for up to twenty-six weeks. It was also argued that in many cases foetal abnormality can be detected after twenty week, and in that situation forcing a woman for delivery of child with serious abnormality after suffering extreme pain is unacceptable. The ceiling is unreasonable, arbitrary and infringes the right provided for in Articles 14 and 21 of the Indian Constitution, The statement of the Obstetrics Federation and the Gynecological Society of India (FOGSI) cited in their support that the risk to the mother in case of termination of pregnancy at 25 weeks is not significantly higher that the risk at 20 weeks. In the case fetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such fetus should be allowed to be terminated, even after twenty weeks of pregnancy.

Issue with the Explanation 2 of section 3 (2) (ii)²⁰ states that 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".

Now, there are major issues with the Explanation are (i). That the pregnant woman should be married and that the Registered Medical Practitioner should be satisfied that pregnancy resulted in contraceptive device failure, methods used to limit the number of children. (ii). The other problem is that the clarification to the married couple alone, and silence about unmarried women or widows who might become pregnant with their live partner or by sexual encounters. The MTP Act has been introduced with a goal of population control and eliminating illegal abortions resulting in an unusual number of maternal deaths. The social consequences of such a restrictive abortion law were wide and varied. An unprecedented rise in illegal abortions caused untold suffering, disease and death to individual women who were forced to seek sheltering the care of unqualified abortionists under "desperate circumstances." Each year, there are estimated to be four to five million induced abortions in India, of which more than three million are illegal. According to credible figures, one-seventh of the women who become pregnant in India each year succumb to illegal abortions by the hands of unqualified persons with all the resulting Morbidity implications. The restrictive abortion law is also perceived to be responsible for a large number of suicides, infanticides, abandonment and child abuse.

Prioritize Women's Rights over Protections for Prenatal Life

International human rights standards maintain that human rights begin at birth. While states may have a legitimate interest in protecting prenatal life, such interests cannot be prioritized over the legal rights granted to women under human rights law. The Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights." The document's history of negotiations suggests that the word "born" was used specifically for the

¹⁹Human rights Law Network, Mrs. X v. Union of India W.P. NO. 308/2014.

²⁰Medical Termination of Pregnancy Act, 1971, Section 3(2)(ii).

purpose of excluding a prenatal application of the rights protected in the Declaration. The history of negotiations of the right to life provision of the International Covenant on Civil and Political Rights as well as the definition of child under the Convention on the Rights of the Child also makes clear that human rights begin at birth.²¹

Legal and Procedural Framework that Respects Women's Reproductive Decisions

Women are deprived of dignity and autonomy when they are restricted from decision-making in their sexual and reproductive health. UN experts have called for laws to recognize “the superior ability of women to make a judgment call regarding their reasons for not being able to continue the pregnancy.” The rights to health, freedom from slavery and ill-treatment and privacy require that governments take appropriate action to ensure that women have the knowledge and ability to make crucial decisions about their reproductive lives. States parties must “adopt legal and policy measures to liberalize restrictive abortion laws, guarantee women and girls access to safe abortion service and respect women’s right to make autonomous decisions about their sexual and reproductive health.” The Committee on Human Rights found that failure to act in compliance with a woman's decision to perform a legal abortion constitutes a violation of her right to privacy, including when the court interferes with such a decision. To prevent “arbitrary interferences” in women’s reproductive decision making, and resulting violations of their right to privacy, international human rights law requires clear legal and procedural frameworks for abortion, including guidelines to determine whether legal conditions for abortion are met and mechanisms to challenge physicians’ refusal to perform the procedure. Such frameworks must allow for “rapid decision-making, with a view to limiting to the extent possible risks to the health of the pregnant mother, and ensure that her opinion be taken into account, that the decision be well-founded and that there is a right to appeal.” In cases on abortion for health risks from fetal impairment, the European Court of Human Rights has stated that “it is not the court’s function to question the doctors’ clinical judgment as regards the seriousness of the applicant’s condition” and has found that states with fetal impairment exceptions have an obligation to set in place “an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the fetus’s health is available to pregnant women.”²²

In the case of *Tapashya umesh v. Union of India*²³ the petitioner moved to Apex court in her twenty four weeks of pregnancy, under article 32 of the Constitution, apprehending danger to her life, when it was diagnosed that fetus has severe cardiac anomaly. It was determined that if the fetus permitted to be born, will not grow as an adult. The Apex court in the interest of justice allowed the petitioner to undergo the medical procedure of abortion.

But in the case of *Dr. Nikhil D Dattar v. Union of India*²⁴ (popularly known as Nikita Mehta case), Niketa Mehta, “a well-educated middle-class woman with a supportive husband and longing for first child, was arguably better placed to make a decision about her pregnancy than most women. She was provided with enough knowledge about the health

²¹Reform to address women and need for abortion after 20 weeks in India, Post -20-Week-Access-to-Abortion-India (November 28, 2019, 7:55 PM).

²²Supra at 20.

²³Tapashya umesh v. Union of India, AIR 2017 SC 3931.

²⁴Dr. Nikhil D Dattar v. Union of India, 2008 (110) BOMLR 3293.

condition of the fetus, so she obviously faced no pressure from her relatives. She wanted to end a pregnancy with a high likelihood of giving birth to a child with a serious heart defect. This could have been a routine decision if Niketa's pregnancy had not progressed beyond the twenty weeks during which medical termination of pregnancy in India was approved. Rather than resort to an illegal abortion, Niketa and her husband, along with the specialist who diagnosed a congenital anomaly in the fetus, filed a petition in the Mumbai High Court asking for permission for an abortion in the 23rd week, which was when the problem was detected. The argument supposing them is that in several countries including the United Kingdom, there is no gestational age limit set for abortion in the case of fetal abnormalities. Niketa's personal reason for wanting an abortion was that she did not want to give birth to a severely disabled infant and witness its suffering; the trauma caused to her and her family was an additional reason. While Niketa did not obtain a favorable judgment from the trial, her case prompted the government to declare that it would consider reviewing the law. Further, this case raises several ethical dilemmas related to abortion, and also to disability and the role of medical intervention.²⁵

The Indian Judiciary recently adopted a much more pragmatic stance on the issue of abortion. In the recent case of **K S Puttuswamy v. Union of India**²⁶, it was held by the Apex court that

‘the statutory recognition of a woman's right to terminate her pregnancy or not, is related to the Constitutional right to terminate her pregnancy or not, is related to the Constitutional right to make reproductive choice, which in turn has been held to be an essential ingredient of personal liberty under Article 21 of the Constitution. The court further added that, a woman's freedom of choice, whether to bear a child or abort her pregnancy are areas which fall in realm of privacy’²⁷.

In another case **Ms. Z v. State of Bihar**²⁸, the Supreme Court bench rejected the petitioner's plea for abortion because she was pregnant for 26 weeks and because of the recommendation received from a court-appointed medical panel that indicated that abortion at this stage of pregnancy posed a risk to the woman's and fetus' lives. After significant delays, her plea for legal abortion care was rejected by both the government hospital and the Bihar High Court, resulting in her appeal to the Supreme Court. In this case, when the petitioner went to the government hospital for an abortion, the doctor asked her to give her the consent or her husband and rather, despite the fact that there is no such provision under the law and the pregnancy was the result of the rape. The hospital did not terminate the pregnancy even her father consented. She later appealed to Bihar's high court which rejected her submission. In its decision, the Supreme Court asked the government of Bihar to provide monetary compensation for the delays they caused, which ultimately led her to be denied an abortion even if she had demanded it within the legal limit.²⁹In the case of **Savita Sachin Patil v. Union of India**, while deciding this case division bench of the Supreme Court, petitioner asking for granting permission to terminate her pregnancy in the twenty six week of pregnancy as the

²⁵Neha Madhiwalla, “The Niketa Mehta Case. Does right to abortion threaten disability rights”, Indian Journal of Medical Ethics. Vol. 5 (2008).

²⁶K S Puttuswamy v. Union of India, AIR 2017 SC 4161.

²⁷Supra at 9.

²⁸Ms. Z v. State of Bihar, AIR 2017 SC 3931.

²⁹ Indian Supreme Court Denies Abortion To Rape Survivor Living With HIV, https://reprexjuctiveri_uhts.erm/India-Supre-rue-Court-Denies-Abortion-Rape-Survivor-Living-With-Hiv (November 27, 2019, 7:54 PM).

medical diagnosed of the fetus would be born with Down Syndrome, was rejected the permission to do so by the Supreme Court and observed that:

“Everybody knows that children with Down Syndrome are undoubtedly less intelligent, but they are fine people. We don’t think that we are going to allow the termination of pregnancy. We have a life in our hand.”

Sex-selective abortion

Sex determination methods have been available in India since 1975, with amniocentesis being implemented to detect anomalies in the fetus. The expansion of the facilities providing sonography in the mid- 1980's made sex determination testing widely and easily available. Though the government attempted to curb the increase in sexual abortions by implementing the 1994 Pre-Conception & Pre-Natal Diagnostic Techniques (PC PNDT) Act, the Act proved ineffective in preventing the abortions. Sex selective abortion is performed for “son” preference. It is claimed that sex-selective abortion is a family building technique to accomplish conflicting goals of reducing family size and achieving the desired sex composition. The prevalence of sex-selective abortion among women with one or more living daughters but without living sons is found to be higher. Nonetheless, some studies report sex selective abortion by couples who already have a living son or no children. Additionally, evidence from qualitative studies show that sex-selective abortion is seen and expected as an easy alternative to female infanticide, a way to save girl children from an unhappy life, and a means to prevent future dowry payments. The MTP amendment bill introduced in the parliament in the year 2014, 2017, and 2018 but all were lapsed.

Comparative Study of Abortion Laws

When it applies to the field of law, the comparative study becomes essential. The fact that every country in the world is analyzing each other's laws and international treaties before adopting or enacting their own local laws. The comparative study of abortion laws such as Ireland, the United States, the United Kingdom and Malaysia is important because the abortion laws are investigated from different angles by these specific nations.

Ireland

Abortion had been *malum prohibitum*. In the Irish society abortion is a deeply contentious issue. Because it is Roman Catholic majority state and Catholicism prohibits abortion. In the decision of *Attorney General v. X³⁰, A, B and C v. Ireland³¹* and infamous case of *Savita Hallapanavarall* has seen great turmoil in the light of decision. These cases led up the development of Protection of Life during Pregnancy Act, 2013. This Statute provided abortion as lawful act in the first time of Irish history.”

The Important part of sections of the Protection of Life during Pregnancy Act, 2013 are as follow:

³⁰ Attorney General v. X, (1992) 2 IR 1.

³¹ A, B and C v. Ireland, 2010 CHR 2032.

Section 7 (1)³² Risk of loss of life from physical illness:

“It shall be lawful to carry out a medical procedure in respect of a pregnant woman in accordance with this section in the course of which, or as a result of which, an unborn human life is ended where subject to section 19, two medical practitioners, having examined the pregnant woman, have jointly certified in good faith that”—

(i) “there is a real and substantial risk of loss of the woman’s life from a physical illness, and (ii) in their reasonable opinion (being an opinion formed in good faith which has regard to the need to preserve unborn human life as far as practicable) that risk can only be averted by carrying out the medical procedure, and (b) that medical procedure is carried out by an obstetrician at an appropriate institution”

Section 8 (1)³³ Risk of loss of life from physical illness in emergency

(1) Notwithstanding the generality of section 7, or any determination made or pending pursuant to section 13³⁴ of an application under section 10(2)³⁵, it shall be lawful to carry out a medical procedure in respect of a pregnant woman in accordance with this section in the course of which, or as a result of which, an unborn human life is ended where—

(a) A medical practitioner, having examined the pregnant woman, believes in good faith that there is an immediate risk of loss of the woman’s life from a physical illness,

(b) The medical procedure is, in his or her reasonable opinion (being an opinion formed in good faith which has regard to the need to preserve unborn human life as far as practicable) immediately necessary in order to save the life of the woman, and

(c) The medical procedure is carried out by the medical practitioner.

Section 9 (1)³⁶ Risk of loss of life from suicide:

(1) It shall be lawful to carry out a medical procedure in respect of a pregnant woman in accordance with this section in the course of which, or as a result of which, an unborn human life is ended where—

(a) Subject to section 19³⁷, three medical practitioners, having examined the pregnant woman, have jointly certified in good faith that—

(i) There is a real and substantial risk of loss of the woman’s life by way of suicide, and

(ii) In their reasonable opinion (being an opinion formed in good faith which has regard to the need to preserve unborn human life as far as practicable) that risk can only be averted by carrying out the medical procedure, and

(b) That medical procedure is carried out by an obstetrician at an appropriate institution.

In the famous case *Attorney General v. X*³⁸, A 14 year old girl became pregnant as a result of rape. “The victim and her family wanted to go to the United Kingdom to get abortion and also get DNA from the aborted fetus as proof to give it to the police to prosecute the accused. Police consulted with the Director of public prosecution, who in turn consulted with Ireland’s Attorney General. Victim X threatened to commit suicide if forced to bear the boy, the matter

³²Protection of Life During Pregnancy Act, 2013, Section 7(1).

³³Protection of Life During Pregnancy Act, 2013, Section 8(1).

³⁴Protection of Life During Pregnancy Act, 2013, Section 13.

³⁵Protection of Life During Pregnancy Act, 2013, Section 10(2).

³⁶Protection of Life During Pregnancy Act, 2013, Section 9(1).

³⁷Protection of Life During Pregnancy Act, 2013, Section 19.

³⁸Supra at 29.

was brought before the High Court. The High Court disregarded and released the injunction order against the family, interfering with the right of unborn to life. The Supreme Court challenged the decision, and the High Court order set aside and allowed the family to travel and have an abortion.

In 2014, case of *Ms. Y v. HSE*³⁹, The woman was an asylum seeker in Ireland and found herself pregnant resulting from rape in her own country soon after her arrival. She told to get an abortion or allow her to go. The authority could not allow her because her status to be determined. During the period of her counseling time limit for abortion exceeded, Finally she give up liquids and fluid and said she don't want to live anymore. The High Court gave an order to force feeding. She was forced to give birth to child by caesarean method. She could not get right under the 2013 act.⁴⁰

Now the Government of Ireland has published a Bill named Health (Regulation of Termination of pregnancy) Bill, 2018.

USA

Around 1967 and 1973 one third of States liberalized or abrogated their rules on illegal abortion. Nevertheless, the right to abortion in all states was only made available to American women in 1973 when the Supreme Court with its decision in *Roe v. Wade*⁴¹ repealed the most restrictive state laws

“The 1973 Supreme Court decision in *Roe v. Wade*⁴² made it possible for women to get safe, legal abortions from well-trained medical practitioners. This led to dramatic decreases in pregnancy related injury and death. The *Roe* case arose out of a Texas law that prohibited legal abortion except to save a woman's life. At that time, most other states had laws similar to the one in Texas. Those laws forced large numbers of women to resort to illegal abortions. Jane Roe, a 21yearold pregnant woman, represented all women who wanted abortions but could not get them legally and safely. Henry Wade was the Texas Attorney General who championed the law making abortions illegal. Upon hearing the case, the Supreme Court ruled that the right to privacy of Americans included a woman's right to determine whether to have children, and a woman and her doctor's right to make that decision without State interference.⁴³

Abortion before *Roe v. Wade*⁴⁴

Until the late nineteenth century, abortion was legal in the United States before "quickening," the point at which a woman was first able to feel fetus movements, typically around the fourth month of pregnancy. Some of the early regulations concerning abortion were implemented in the 1820s and 1830s and discussed the selling of dangerous drugs used by women to induce abortion. These continued to be marketed and sold despite these restrictions, and the fact that the drugs often proved fatal to women. The newly established American Medical Association began to call for the criminalization of abortion in the late 1850s, partially in an effort to eliminate rivals of doctors such as midwives

³⁹ *Ms. Y v. HSE*,

⁴⁰ *MS. Y'S CASE: DENIED A LAWFUL ABORTION IN IRELAND* available at : <https://www.amnesty.ie/ms-ys-case/#> (November 28,2019 8:56 PM).

⁴¹ *Roe v. Wade*, 43 US 113 (1973).

⁴² *ibid*.

⁴³ National Abortion Federation, available at: <https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/>

⁴⁴ *Supra* at 40.

and homeopaths.⁴⁵

“In 1869, the Catholic Church banned abortion at any stage of pregnancy, while in 1873; Congress passed the Comstock law, which made it illegal to distribute contraceptives and abortion-inducing drugs through the U.S. mail. By the 1880s, abortion was outlawed across most of the country. During the 1960s, during the women’s rights movement, court cases involving contraceptives laid the groundwork for *Roe v. Wade*⁴⁶. In 1965, the U.S. Supreme Court struck down a law banning the distribution of birth control to married couples, ruling that the law violated their implied right to privacy under the U.S. Constitution. And in 1972, the Supreme Court struck down a law prohibiting the distribution of contraceptives to unmarried adults. By the time of *Roe v. Wade*⁴⁷ in 1973, abortion was also legally available in Alaska and Washington⁴⁸.

United Kingdom

In UK, The offences against Person Act, 1861 was passed and it criminalized all abortions by virtue of its sections 58 and 59. These sections are similar to the Indian Penal Code s. 312 to 316. In the year of 1929, Infant Life (preservation) Act, was passed, the aim of this Act was to prevent the child destruction. Abortion was not per se allowed even if it was mandatory to save the life of pregnant woman. Then in the year 1939, famous case *Rex v. Bourne*⁴⁹ changed this position. In this case 14 year girl become pregnant due to rape. Dr. Bourne a famous surgeon performed the surgery on the victim to get the fetus abort, free of cost and justify his act by saying that this surgery was necessary to protect girl from physically and mentally trauma. Later Dr. Bourne was charged under section 58 of the OAPA Act for performing illegal abortion.

Abortion Act, 1967 in United Kingdom

Because of restrictions under OAPA Act, there were so many illegal abortions taking place, those were also caused of maternal death of pregnant woman, who were forced to chose abortion due to rape, desertion by husband, poverty and due to contraceptive failure before enactment of the Abortion Act, 1961. This many provision of this act is similar to the MTP Act 1971 in India.

Section 1 (1)⁵⁰

“Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith”

“(a)that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or”

⁴⁵ *Roe v. Wade*, available at: <https://www.history.com/topics/womens-rights/roe-v-wade>, (November 29, 2019, 10:43 AM).

⁴⁶ *Supra* at 40.

⁴⁷ *Supra* at 40.

⁴⁸ *Supra* at 44.

⁴⁹ *Rex v. Bourne*, [1939] 1 K.B. 687.

⁵⁰ Abortion Act, 1967, Section 1(1).

“(b) That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or”

“(c) That the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) that 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.”

Malaysia

Malaysia has no specific legislation relating to terminating pregnancy or abortion. The status however is regulated by the Malaysian Penal Code. The definition of the Malaysian Penal Code section 91 discusses the cause of miscarriage:⁵¹ Causing miscarriage, unless caused in good faith for the purpose of saving the life of the woman is an offence independently of any harm which it may cause or intended to cause to the woman. Therefore it is not an offence and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Section (312-316)⁵² of the Malaysian Penal Code regulates the cause of miscarriages. Under Section (313-314)⁵³, the consent is meaningless, but if the abortion is performed without the consent of the pregnant woman, the penalty is heavier under section 312⁵⁴, a woman who miscarries would be liable. The denial of consent is justified only when the abortion is carried out in order to save the pregnant woman's life. Under Section 312⁵⁵ of the Malaysian Penal Code, anyone who knowingly mis-carries a woman with children or pregnant women shall be punished with imprisonment for a term of up to three years, or with a fine, or both. Furthermore in the situation where the woman is quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine. The only exception under this section is when a trained medical doctor believe in good faith that the continuance of the pregnancy would endangered the life of the pregnant women or it may result to the injury to the mental and physical health of the pregnant woman” greater than if the pregnancy were terminated.⁵⁶

“In the case of *PP v. Dr. Nadason Kanagalingam*⁵⁷ where the accused was charged and convicted under Section 312⁵⁸ of the Malaysian Penal Code for causing a pregnant woman to miscarry. The evidence show that the accused had not given reasonable consideration and neither had not he come to a reasonable conclusion that he had to cause the woman to miscarry in order to save her life. There also no indication that her life was or would be in danger if pregnancy was allowed to continue. Wan Mohamed J when giving the decision inter alia stated that the procuring an abortion is a serious matter and it should only be done as a last resort to save the life of a woman or to save a woman from becoming a mental wreck. In this case, although it is argued that accused had performed the abortion on

⁵¹ The detrimental crime of abortion: A comparative study between Malaysian law and common law, available at :https://www.researchgate.net/publication/228915567_The_detrimental_crime_of_abortion_A_comparative_study_between_Malaysian_law_and_common_law (last visited on November 29, 2019).

⁵² Malaysian Penal Code, 1936, Section 312-316.

⁵³ Malaysian Penal Code, 1936, Section 313-314.

⁵⁴ Malaysian Penal Code, 1936, Section 312.

⁵⁵ *Ibid.*

⁵⁶ *Supra* at 29.

⁵⁷ *PP v. Dr. Nadason Kanagalingam* [1985] 2 MLJ 122.

⁵⁸ *Supra* at 53.

the woman in good faith in order to save her life or to save her from becoming a mental wreck, the judge find that the argument cannot stand because from evidence produced before him the accused had not given reasonable thought and had not taken enough steps to examine the woman further. His finding that the woman had enlarged or bad varicose veins is no other than the result of his mere clinical examination. Malaysian court gave a serious attention to the crime of abortion. Evidentiary, the court ready to upheld the conviction even to the case where there is an attempt to abort even though the women is not pregnant actually. This decision can be simply found in the case of *Munah bin Ali v. PP*⁵⁹ where the court upheld the conviction of the accused under Section 312 of Malaysian Penal Code operation was not unlawful as if the operation had not been performed, she would have suffered a complete mental collapse. McNaghten J was of the view that not only there is a right but is a duty to perform the operation”⁶⁰

Abortion and Religion

Christianity

As official statements from different religious organizations show, inside Christianity there are multiple moral views on abortion. Catholic critics have shown that the Vatican's unqualified prohibition of abortion in Catholicism is just one of several conservative Catholic views on the issue. It was stated that:

We want to make clear that while people of various faith traditions believe abortion to be a serious moral issue, most religious denominations affirm the moral right of women to decide when abortion is morally justified in light of their circumstances, the teachings of their denomination and the dictates of their conscience.⁶¹

“Many countries identified as predominantly Catholic have adopted abortion legislation that favors women’s rights to health and individual decision-making. Belgium, France and Italy, which have largely Catholic populations, permit abortion upon a woman’s request. In Poland, despite the Polish Catholic Church's fierce anti-abortion stance, abortion is legal to protect the life and physical health of a woman, and in rape, incest, and fetal impairment cases. Public opinion polls have shown that 95% of Poles declare adherence to Catholicism and 58% advocate abortion under certain circumstances. As official statements from various religious organizations show, there are multiple moral views about abortion inside Christianity. Catholic critics have shown that the Vatican's unqualified ban on Catholic abortion is just one of several conservative Catholic views on this issue.⁶²

Hinduism

Commentators have argued that the Hindu concept of dharma, referring to natural law, is inconsistent with an absolutist approach towards abortion, because dharma is characterized by transformation, adaptability and sensitivity to context and person. Where a woman faces a moral conflict over an abortion decision, dharma allows her to consider

⁵⁹Munah bin Ali v. PP [1958] MLJ 159.

⁶⁰Supra at 29.

⁶¹Letter from ad-hoc coalition of religious leaders in support of the ICPD to Colin Powell, Dec. 6, 2002, available at <http://www.catholicsforchoice.org/new/ICPDleadersLetter.htm> (last visited November 28, 2019).

⁶²Religious Voices Worldwide Support Choice, available at: http://reproductiverights.org/sites/crr.civactions.net/files/documents/pub_bp_tk_religious.pdf (November 29, 2019, 1:10 AM)

the decision in the light of the demand of the situation. “In 2002, abortion was legalized in Nepal, the world’s only official Hindu state. Largely in response to the country’s alarmingly high maternal mortality and morbidity rate, the law was reformed to permit abortion upon request for pregnancies of up to 12 weeks; in cases of rape or incest for pregnancies of up to 18 weeks; and at any time where pregnancy poses a risk to the woman’s life or physical or mental health, or if there is a risk of fetal impairment. In India, abortion has been available on broad grounds since 1971.” There was no opposition from the organized Hindu religious community to discuss further liberalization of the abortion law.⁶³

Islam

“There are several different schools of thought within Islam that recommend a number of guidelines on abortion, from allowing abortion without pregnancy qualification under 120 days to banning the practice altogether. These prescriptions are informed by varying interpretations regarding when a fetus is considered a full human being, or ensouled. After ensoulment, all Islamic schools prohibit abortion, but many recognize exceptions in cases where pregnancy poses a risk of harm to the woman’s life or to an already suckling child, or in cases of fetal impairment. Recent statements by Islamic scholars support abortion under certain circumstances, even in countries where it is generally prohibited”. The Grand Shaykh of Al-Azhar, an important Islamic learning center based in Cairo, Egypt, has declared support for a fatwa (a ruling by a recognized authority on a point of Islamic law) that allows abortion in rape cases. In Iran, where abortion is banned, a senior Shiite cleric has issued a fatwa that permits first-trimester abortion on grounds not limited to protecting the woman's health or fetal disability. Iran's supreme leader issued a fatwa for fetal abortion under 10 weeks that tested positive for thalassemia, a genetic disorder in the blood.⁶⁴

“Several predominantly Muslim nations, such as Tunisia and Turkey, have introduced strict abortion laws to protect women's health. In addition, Bangladesh calls for menstrual control during the first 8 weeks of pregnancy. Even predominantly Muslim countries where abortion is severely restricted or prohibited, women's attitudes suggest that abortion is nonetheless a social reality. In Indonesia, where abortion is illegal except to save the woman's life, every year up to two million women commit abortions.⁶⁵”

⁶³/bid.

⁶⁴Supra at 61.

⁶⁵Supra at 61.

Abortion and Eugenics

*“In the Supreme Court's decision in *Box v. Planned Parenthood of Indiana and Kentucky*⁶⁶, the Court declined to review an Indiana law prohibiting abortions on the basis of race, sex, or disability. Justice Clarence Thomas's concurring opinion, excerpted below, describes the connections between abortion advocacy and eugenics, and the ways in which abortion is a tool of modern-day eugenicists.⁶⁷*

Also predominantly Muslim countries where abortion is severely restricted or forbidden, attitudes among women indicate that abortion is a social reality. In Indonesia, where abortion is illegal except to save the woman's life, up to 2 million women commit abortions every year. These arguments about the eugenic potential for birth control apply with even greater force to abortion, which can be used to target specific children with unwanted characteristics. Former Planned Parenthood President Alan Guttmacher and other supporters of abortion, even after World War II, supported and encouraged abortion for eugenic purposes as a means of controlling the population and enhancing its education. A growing collection of evidence suggests, as discussed below, that eugenic aims are already being achieved through abortion.

“That birth control was an important part of the solution to these societal ills. Birth Control is really the greatest and most truly eugenic method of human generation, and its adoption as part of the program of Eugenics would immediately give a concrete and realistic power to that science.” Sanger even argued that “eugenicists and others who are laboring for racial betterment” could not succeed unless they first cleared the way for Birth Control. If the masses were given practical education in Birth Control for which there was almost universal demand then the "Eugenic educator could use the propaganda of" Birth Control "to" direct a thorough education in Eugenics "and control the unfit's reproductive decisions.” In this way, the Birth Control campaign was not merely of eugenic value, but was almost identical in ideal with Eugenics ' ultimate aims. The abortion rate for children born with Down syndrome in utero in Iceland is reaching 100 per cent. Other European countries have similarly high rates, with a rate of about two-thirds in the United States.⁶⁸

⁶⁶587 U.S. (2019).

⁶⁷ ABORTION AND EUGENICS available at: <https://www.firstthings.com/web-exclusives/2019/05/abortion-and-eugenics>, (last visited on November 29, 2019).

⁶⁸Supra at 66.

Conclusion

“Based on the results of the report, we propose the following measures to improve the abortion decision-making process among young women: First, interventions to enhance women's autonomy in decision-making should be implemented: the research highlighted that gender and power differences obstructed young women to make autonomous decisions. There is a need to discuss gender and power differences in the society. Addressing gender inequality and fostering more balanced structures of influence leads to better health outcomes. Interventions aimed at promoting gender-equitable and power relations and human rights must be essential to all future programming and policies.⁶⁹

Second, Patients and the entire population should be better informed about national laws on abortion, approved and legal procedures and the location of abortion services, because, given the decision to terminate pregnancy, if well informed, they may have been able to decide on safe and legal abortion, thereby avoiding double deprivation of autonomy. At the same time, clinicians need to be updated on the status of abortion laws around national level. They should also be educated in communication skills to promote joint decision-making and patient orientation in abortion counseling.⁷⁰

Third, The number of health-care facilities offering abortion services should be increased, especially in remote areas. Eventually, health care providers should be educated in communication skills to promote shared decision-making and patient recognition in abortion counseling young women's abortion decision making is an important topic since it relates to the decision made during the transitional period from childhood to adulthood. The decision may have lifelong consequences, threatening individual health, career, psychological well-being, and acceptance of society. This paper, on abortion decision-making, calls attention to some attitudes that lead to the illegality of abortion despite it was done” at a health facility.⁷¹

Actually, the MTP Act provides references to section 3 specifying that terminations for rape and contraceptive failure are appropriate because the pain incurred by each is a "grave injury to their physical or mental condition."It must be understood in the MTP Act that a diagnosis of fetal disorder may result in distress resulting in serious mental health injury and that such an exception may occur during the entire pregnancy period, as certain fetal abnormalities can not be identified within the 20th week of pregnancy defined. The great Tamil Saint Thiruvalluvar said,

"The touch of children is the delight of the body; the delight of the ear is the hearing of their speech. It is a natural duty of the mother to provide the best to her children. However, sometimes she involves in such activities that affect the fetus injuriously. It may occur due to lack of knowledge, negligence or sometimes due to willful acts. It is on the shoulders of the law to take care of the independence and freedom of the mother as well as the life of unborn. The medical community and society needs to offer love and support to women with unplanned pregnancies and to assist them in finding empathetic alternatives to abortion.⁷²

⁶⁹ Factors Influencing Abortion Decision-Making Processes among Young Women, *available at:file:///C:/Users/user/Downloads/ijerph-15-00329.pdf* (last visited on November 30, 2019).

⁷⁰*Ibid.*

⁷¹ *Supra* at 68.

⁷² *Bhavish Gupta and Meenu Gupta, "THE SOCIO-CULTURAL ASPECT OF ABORTION IN IIA: LAW.*

Recommendations

“Over recent years, abortion has risen but significant gaps exist over our perception of the multiple dimensions of abortion-seeking behavior. There is limited evidence on the prevalence and trends of abortion and even the latest available figures of induced abortion are over a decade old. Abortion-related needs and service seeking trends for many vulnerable groups, including youth, and single, divorced or separated women remain less studied and future studies are therefore needed to focus on these sub-populations. The analysis highlights the increasing frequency of the practice of sex-selective abortion in many parts of the country. The limit of twenty week for abortion should be increase to twenty four weeks, and in case of pregnancy resulted from rape, abortion should be allowed up to twenty seven weeks or as per recommendation of medical health practitioner advice.”



