



## **Women's Absolute Right to Give Birth**

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### **Abstract**

This subject again grabs my attention and inspire me to write this paper, recently when I heard the news of rape survivor of a ten-year-old girl and the court did not allow an abortion because she was 28 weeks pregnant, compelling her to proceed with the pregnancy<sup>1</sup>. Human Rights are those rights, which should be available to every individual without any kind of discrimination. Recognition of the inherent dignity, of the equal and inalienable rights for all members of the human family is the foundation of freedom. The most important right for a Human is the Right to Life and Personal Liberty provided under Art. 21 of the Constitution of India. Article 6(1) of the International Convention on Civil and Political Rights prohibit the arbitrary deprivation of life. There are some controversial issues related to this supreme right which need a special mention. One such issue is the Women's Right to Give Birth.

Among all other available rights of a women, this is the most important one and should not be subject to the right of a fetus or any other restriction. An unwanted child who forcefully or unwillingly come in this world has to face many mental, emotional and physical abuses. The MTP Act 1971 does not permit termination of pregnancy after 20 weeks although exceptions are there, but we have witness many cases were after having genuine ground, sufferer failed to obtain the permission of the court. According to a report in every two hours one woman is killed due to the unsafe abortion.<sup>2</sup> Such legal rigidity is encouraging number of unsafe abortion and proliferation of

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<sup>1</sup> Shubhangi Kulshrestha, "Need for favor of supreme court for the rape victims and assaulted women" available at: <http://jurip.org/wp-content/uploads/2017/12/Shubhangi-Kulshrestha.pdf>

<sup>2</sup> 'Unsafe abortions killing a woman every two hours' available at: <http://www.thehindu.com/news/national/unsafe-abortions-killing-a-woman-every-two-hours/article4686897.ece>, retrieve on: 02 Jan 18.



illegal abortion market practices. This is the high time to assess and review this law. Women are not a baby making machines and right to procreation of children should be an absolute right of every pregnant woman.

Historically, reproductive rights of women are an especially controversial subject due to the moral, ethical, and religious considerations. This issue is inextricably linked to the numerous questions that surround women's procreative freedom.

The ability to reproduce seems to be the key distinguishing factor between men and women. But the key question is whether women have control over their own reproduction i.e. do women have the freedom to choose whether, when, and how many children to have or have access to safe birth control methods including the right to safe abortion. The answer is not in positive in majority of the cases. Recently there has been a reemergence of the women's health movement in different parts of the world asking for separation of sexuality from reproduction.

Control over women's bodies and sexuality is a crucial aspect of procreation of children. When a woman does not have bodily integrity, when her body is invaded against her will, when her choices are determined by social norms rather than personal preference, it is unlikely that she can play an active role in decision making. In an attempt to reclaim women's control over their own fertility, and open avenues for autonomy and decision making in other aspects of life, the women's health movement all over the world has defended women's right to voluntary maternity through access to safe contraception and abortion services. Yet even today, these services are denied to women in many other parts of the world. Nevertheless, thirty years after it began, the struggle for women's control over their own fertility has led to a separation between sexuality and procreation of children, where women are able to experience their sexuality without pregnancy being the inevitable result.

### **Abortion**

An abortion is the removal or expulsion of an embryo or foetus from the uterus, resulting in, or



caused by, its death. This can occur spontaneously as a miscarriage, or be artificially induced through chemical, surgical or other means. Generally, "abortion" is an induced procedure at any point in the pregnancy; medically defined as a miscarriage or induced termination (before twenty weeks gestation, which is considered nonviable).

### **Abortion as a Human Right**

Induced abortions have historically been a source of considerable debate and controversy. An individual's personal stance on the complex moral ethical or legal issues stems from the given individual's value system. A person's position on abortion may be described as a combination of their personal beliefs on the ethicality of induced abortion and the limit of the government's legitimate authority.

It is a woman's individual rights, right to her life, liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. A woman's reproductive and sexual health molds her reproductive choices. All over the world Right to procreation of children are recognized as essential both to advancing women's human rights and to promoting development. In recent years, governments from all over the world have recognized and vowed to advance reproductive rights by formulating laws and policies which are indicators of government commitment to promoting reproductive rights.

Every woman has an absolute right to have control over her body, most often known as bodily rights. Human Rights are the basic rights available to every individual without any discrimination of any kind. The foundation of freedom and equality is invariably based on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. Out of human these rights the most basic and important right is the Right to Life. Arbitrary deprivation of life is prohibited under the Article 6(1) of the International Covenant on Civil and Political Rights. In India, right to life has been recognized under Article 21 of the Constitution which says that "No person shall be deprived of his life and personal liberty except according to procedure established by law". Person here includes both man and woman.

Among various rights which are available to a woman, the right to abortion is believed to be one of the most essential and fundamental right. Right to procreation of children has been recognized

under right to privacy which is a part of right to personal liberty and which emanates from right to life. But the rights of the mother are to be balanced with the rights of the unborn and the dilemma is that whether a mother has a right to terminate her pregnancy at any time she wishes or an unborn child has a right to life.

Earlier the right to abortion was not permitted and it was strongly opposed in the society and severely condemned in all religions due to various aspects such as religious, ethics, moral and legal values that rule over the aspect of right to abortion. The termination of pregnancy was termed to be a murder of the fetus. But the question always arises whether an unborn child should be considered as a human being and be given the status of a person or not.

Ronald Dworkin<sup>3</sup> has made a detailed study on the issue of abortion. He did not accept the extreme position taken by the derivative claimers of prohibition of abortion that, the fetus is a complete moral person from the moment of conception. Therefore, the unborn has the right to live and abortion is nearly as wrong as a murder.

As per Dworkin a fetus has no interest before the third trimester. A fetus is devoid of any feeling of pain until late in pregnancy, because its brain is not sufficiently developed before then. The scientists have invariably agreed that the brain of the fetus will be sufficiently developed to feel pain from approximately the twenty sixth weeks. Therefore, if the abortion is against the interest of a fetus must depend on whether the fetus itself has interests at that moment, not on whether interests will develop if no abortion takes place. Something which is not alive cannot not have interests and merely because something can develop into a person does not mean it has interests either. Only once a fetus can live on its own it may have interests which can happen only after the third trimester.

### **International Cases**

Roe v. Wade<sup>4</sup> became one of the most politically significant Supreme Court decisions in history. It reshaped national politics, dividing the nation into camps of "pro-choice" and "pro-life", and

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<sup>3</sup> Ronald Dworkin's Views on Abortion F.M. Kamm; DOI:10.1093/acprof:oso/9780199971985.003.0011

<sup>4</sup> Roe v. Wade, 410 U.S. 113 (1973)



rousing grassroots activism. ‘Pro-life’ advocates, i.e. those against women’s right to abortion, say that ‘life’ begins at conception, and aborting a foetus is tantamount to murder. ‘Pro-choice’ advocates, i.e. those campaigning for women’s right to abortion, say that ‘life’ begins only after the foetus is ‘viable’ i.e. it can survive outside the mother’s body.

This landmark decision of the Supreme Court of United States categorically established that most of the laws against abortion were in contradiction with constitutional right to privacy, and overturned all state laws, which outlawed or restricted abortion, that were deemed to be inconsistent with the decision. The plaintiff Jone Roe, wanted to terminate her pregnancy because she claimed that it was resultant of rape. In light of the current state of medical knowledge, the decision devised a system of trimesters to balance the state's interests with the individual's constitutional rights. It was ruled by the Court that a woman's right to an abortion cannot be restricted by the state during the first trimester. The state can regulate the abortion procedure only during the second trimester "in ways that are reasonably related to maternal health,". In the third trimester, delineating the viability of the fetus, a state can choose to restrict or even to proscribe abortion as it sees fit.

Responding to the decision made in the case of Roe v. Wade by the Supreme Court, several states of US enacted laws limiting abortion, including laws which required parental consent for minors, parental notification laws, spousal consent and spousal notification laws. The Supreme Court struck down most of the state restrictions on abortions in a long series of cases stretching over a decade till 1980s.

The Supreme Court of Canada, in the leading case of **R v Morgentaler**<sup>5</sup>, interpreted Article 7 of the Canadian Charter which guarantees an individual's right to life, liberty and freedom and security of a person, the Court focused on the bodily security of the pregnant women. The Criminal Code of Canada required a pregnant woman seeking an abortion to apply to a medical committee, resulting in long delays. The Supreme Court observed that this procedure infringed the guarantee of security of a person and subjected the pregnant woman to psychological stress.

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<sup>5</sup> R v Morgentaler, [1988] 1 SCR 30

In United Kingdom, in Article 2 of The Abortion Act, 1967 does not provide an absolute right to life to the unborn. In **Paton Vs. United Kingdom**<sup>6</sup>, it was held that abortion is permitted if the continuance of the pregnancy involves risk. The right to life of fetus is limited impliedly till the termination of pregnancy is necessary to protect the life of a mother. The same was upheld in **H vs. Norway**<sup>7</sup>. The Supreme Court in 1992 also held that a woman has the same exclusive right to abortion as to any to any other medical treatment and the prospective fathers have no right to be consulted for the same.

**Savita Halappanavar's case**<sup>8</sup>, October 28, 2012 witnessed the death of a 31 year old Indian woman, Savita Halappanavar, in Ireland, after doctors refused to give her an abortion 17 weeks into pregnancy, which created quite a huge furor in the Indian and Irish media. The reason for such a hue and cry was the reason that the doctors cited for their inability to perform an abortion – that Ireland, being a Catholic country, they are obligated not to take the life of a fetus. It is the growing perception that Ireland is being governed by a legal regime that encourages doctors to consider the repercussions of taking the life of a fetus even if it at the cost of the life of the mother, thereby keeping in tune with the ideals of the largely Catholic constitution of the country. It is saturated by a religious dogma that is disrespectful to non-believers and demonstrates utter disregard for the life of a mother as opposed to the 'life' of a yet-to-be-born baby.

### **Abortion Laws in India**

There are many statutes in India, which deal with termination of pregnancy. Following are enumerated Indian laws to ascertain stance from sides of both mother and unborn child. **Section 312 of the Indian penal code, 1860**<sup>9</sup> deals with miscarriage and says:

*S. 312. Causing miscarriage. - whoever causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the women, be punished with imprisonment of either description for a term which may be extend to three years, or with fine, or with both; and if the woman quick with child, shall be punished with imprisonment of either*

<sup>6</sup> Paton v United Kingdom 3 EHRR 408 1980

<sup>7</sup> H vs. Norway: ECHR 1992

<sup>8</sup> [https://en.wikipedia.org/wiki/Death\\_of\\_Savita\\_Halappanavar](https://en.wikipedia.org/wiki/Death_of_Savita_Halappanavar)

<sup>9</sup> <https://indiankanoon.org/doc/1990693/>



*description for a term which may extend to seven years, and shall also be liable to fine.*

Explanation: - A woman who causes herself to miscarry is within the meaning of this section. Section 312 punishes the person who causes the miscarriage to women. Explanation appended to provision clarifies that women has no right to miscarry herself. The word miscarriage is used synonymously with the word abortion. Section 312 gives ample protection to woman's right of motherhood but at the same time takes away the right of abortion to the woman. It's not just about the right of woman over her body but also a question of right to life of child in woman's womb. There is a clear conflict between right to life of unborn child and right of women over her body i.e. right of abortion. This issue also raises one more issue when life begins- it could be immediately after the egg is fertilized; when the fetus gets a soul; when the fetus can be independently outside the mother or when the mother delivers the baby. As mentioned above, abortion at the beginning of pregnancy is not punishable in US but no such distinction is there in India on such basis except in quantum of punishment. Section 312 prescribes up to three years imprisonment or fine or both for causing the miscarriage a woman with child and up to seven years and also liable to fine for causing miscarriage to women quick with child. The meaning of the term woman with child simply means pregnant woman. The moment a woman conceives and the gestation period or the pregnancy begins, then a woman is said to be with child. The phrase 'quick with child' ascribes to a more advanced stage of pregnancy. Quickening is the perception by a mother that the movement of the fetus has taken place or the embryo has taken place or the embryo has taken a fetal form.

But question arises about the right of unborn child when life of woman is in peril due to that pregnancy as section allows abortion in good faith for the purpose of saving the life of the woman. Right of abortion is further extended by **Medical Termination of Pregnancy Act, 1972**<sup>10</sup>. The Statement of Objects and Reasons of The Medical Termination of Pregnancy Act are: The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was considered a crime for which the mother as well as the person carrying out the abortion, could be punished except where it had to be

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<sup>10</sup> <http://lawmin.nic.in/ld/P-ACT/1971/A1971-34.pdf>



induced to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Further, most of these pregnant women are married women, and are under no necessity to conceal their pregnancy.

In India, abortion was legalized by the Medical Termination of Pregnancy Act, 1972. But still, a majority of women do not have access to safe abortion services. Legal abortion services are not easily accessible, and women continue to resort to unsafe practices and self-induced abortions, making a mockery of the legalization of abortion. Moreover, legalizing abortion has, and continues to clearly be a tool for coercive population control. Women who approach government facilities for abortions are forced to ‘accept’ contraception/sterilization after the abortion is performed.

Unsafe abortion is a major cause of death and health complications for women of child-bearing age. Although it is difficult to get data on illegal abortions, it is estimated that world-wide, one-third of all abortions are illegal. 20 million unsafe abortions are performed annually, and estimates of the number of women who die from unsafe abortions all over the world range from 70,000-200,000 each year. While fighting for the women’s right to safe abortion, the women’s movement has also cautioned women about the dangers of repeated abortions. Making safe and reliable contraceptives available to all women, including adolescents, would go a long way in reducing the need for abortion.

Law in India allows abortion, if the continuance of pregnancy would pose a serious risk to the life of the pregnant woman or cause grave injury to her physical or mental health.

Abortion was being practiced earlier by many and as it was illegal, it was practiced in a clandestine manner. The passing of the MTP Act made medical termination of pregnancy legal, with specific conditions for safeguarding the health of the mother.

Abortion is severely condemned in Vedic, Upanishadic, the later puranic(old) and smriti literature. Paragraph 3 of the Code of Ethics of the Medical Council of India says: I will maintain the utmost respect for human life from the time of conception.

The Supreme Court has said that the right to privacy is implicit in Article 21 of the Constitution and a right to abortion can be read from this right.

The Medical Termination of Pregnancy Bill was passed by both the Houses of the Parliament and



received the assent of the President of India on 10th August, 1971. This law guarantees the Right of Women in India to terminate an unintended pregnancy by a registered medical practitioner in a hospital established or maintained by the Government or a place being approved for the purpose of this Act by the Government. Not all pregnancies could be terminated.

**Section 3<sup>11</sup> of the said Act, says that pregnancy can be terminated:**

- (1) *As a health measure when there is danger to the life or risk to physical or mental health of the women;*
- (2) *On humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc. and*
- (3) *Eugenic grounds - where there is a substantial risk that the child, if born, would suffer from deformities and diseases.*

A woman's right in this respect is doubtful because her right is dependent on certain conditions: proof of risk to her life or grave injury to her physical or mental health, substantial risk of physical or mental abnormalities to the child if born and a situation where abortion could only save her life, all to be arrived at by the medical practitioners. But the question is whether a woman can request a medical practitioner to perform an abortion because she does not want a child at that time. Such questions cannot be said to be just and reasonable where the liberty of the woman is fully dependent on certain other socio-legal factors. The M.T.P. Act also does not specify the period of pregnancy so that the woman's interests and the state's interests could be given prevalence.

It is submitted that a decision as to abortion may be entirely left with woman provided she is sane and attained majority. Her freedom may be curtailed only in those cases where an abortion may critically affect her life. All other restrictions on the right to abortion are unwelcome. It's correct that a woman's decision as to abortion may depend upon her physical and mental health or the potential threat to the health of the child. Apart from these reasons, there are also various important factors. She or the family may not be financially sound to welcome an addition. It may be a time when she wants to change her profession, which requires free time and hard work. Her relationship

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<sup>11</sup> Section 3 Medical Termination of Pregnancy Act 1971, Act no. 34 of 1971

with the husband may virtually be on the verge of collapse and she may prefer not to have a child from him, for it may possibly affect a future marriage. All these factors are quite relevant and the Indian statute on abortion does not pay any respect to them. The law thus is unreasonable and could well be found to be violative of the principles of equality provided under Article 14 of the Constitution. It may be further noted that the M.T.P. Act does not protect the unborn child. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman. The rights provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the mother that protects the unborn.

### **Case Laws**

#### **D. Rajeswari vs. State Of Tamil Nadu And Others<sup>12</sup>**

The case, is of an unmarried girl of 18 years who is praying for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made adverse impact on her mental health making her mentally ill and the continuance of pregnancy would result in a grave injury to her mental health, since the pregnancy was caused by rape. The Court granted the permission to terminate the pregnancy.

#### **Dr. Nisha Malviya and Anr. vs. State of M.P<sup>13</sup>**

The accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that two other co-accused took this girl, and they terminated her pregnancy. So the charge on them is firstly causing miscarriage without consent of girl. The Court held all the three accused guilty of termination of pregnancy which was not consented by the mother or the girl.

#### **Murari Mohan Koley vs. The State<sup>14</sup>**

In this case a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner for an abortion. And the petitioner agreed to it for a consideration. But somehow the condition of the woman worsened in the hospital and she was shifted to another hospital. But it resulted in her death. The abortion was not done.

<sup>12</sup> Madras High Court D. Rajeswari vs State Of Tamil Nadu And Others 1996 CriLJ 3795

<sup>13</sup> Madhya Pradesh High Court Dr. Nisha Malviya And Anr. vs State Of M.P. 2000 CriLJ 671

<sup>14</sup> Calcutta High Court Murari Mohan Koley vs The State and Anr. (2004) 3 CALLT 609 HC

The petitioner who was a registered medical practitioner had to establish that his action was done in good faith ( includes omission as well ) so that he can get exemption from any criminal liability under section 3 of the MTP Act, 1971.

### **Halo Bi v. State of Madhya Pradesh & Ors<sup>15</sup>.,**

19th January, 2013, INDORE, The High Court of Madhya Pradesh at Indore issued an order allowing Halo Bi, a pregnant female prisoner, to exercise her reproductive rights under the Medical Termination of Pregnancy Act (Act). Halo Bi had been sold into prostitution by her husband and after months of continuous instances of rape, she became pregnant. In the order, the Court wrote, “We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health.”

This is a positive development for Halo Bi and sets an important precedent for similar circumstances by affirming rape victims’ right to lawful termination of pregnancy under the 1971 Act.

### **Abortion of 13-year-old rape survivor<sup>16</sup>**

Last year Supreme Court of India allowed a 13-year-old girl who became pregnant due to rape to abort her 31 weeks old pregnancy. The verdict made by 3 judge bench led by CJI Deepak Misra, took into account a medical board’s recommendation that the medical termination of pregnancy was possible in the last trimester of pregnancy. Medical experts opined that continued pregnancy will cause baby to be pre-term and require intensive neo-natal care. Either way both mother and baby would be at grave risk.

### **Conclusion**

Keeping the legality of the issue aside, we need to ponder over as to why, incidents related to abortion and unwanted pregnancy are rarely regarded as anything other than shameful events, slips

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<sup>15</sup> Smt. Akhtari Bi vs State Of M.P; SC Appeal (crl.) 320 of 2001

<sup>16</sup> <http://www.thehindu.com/news/national/supreme-court-allows-13-year-old-rape-survivor-to-abort-her-31-week-old-foetus/article19629701.ece>



of judgement or symptoms of malaises in the society.

In India, only few sections of the society think on the lines of unwanted pregnancies being a simple biological occurrence, which can be dealt with, safely and quickly, thanks to the bludgeoning medical technology. Rather, they seem to imagine abortion as an undesirable yet inevitable consequence, resulting from lack of moral standards of a woman.

Legislation is not the only effective tool to ensure that women have easy access to their reproductive rights. We have to move beyond the script of the law to address such an issue, which is so central to women's rights. The essence of law can be captured only when women can go for abortions without being branded sluts, without any sort of social reverberations. There should indeed be room for debate on whether primary importance should be given to mother's life to that of the fetus or an unborn baby.

A mother has got a natural duty to provide the maximum best possible to her offspring. However, situations may arise where she indulges in activities, which injuriously affect the fetus. It may be due to ignorance, carelessness or acts done willfully. Abortion should be the sole prerogative of a mother and her choice should be respected. However, taking viability of a legal standard, necessary protection should be provided to the unborn. It is also beneficial to the mother, where the state or voluntary organizations are ready to take care of the unborn. There is no meaning in conferring a right to the mother to destroy the fetus. Her right is limited to have a termination of pregnancy. It is also said that delivering 20 million babies annually would be a greater strain on the nations medical services and economic resources than, say, performing one to five million abortions a year.

The law has to take care of the liberty of the mother as well as the unborn. As a hospitable community we should seek ways of providing support for lonely and frightened mothers, and for lonely and abandoned babies. We need to offer women with unplanned pregnancies as much love and support as they require and to assist them in finding compassionate alternatives to abortion. Right to Give birth should be a absolute right of a Women. An undesirable child who suffers negligence, abuse, sexual assault, pain, social disregard, un-education, financial crisis etc., further violates her fundamental right in every step of life. An Unwanted child will ultimately accuse her mother only "Maa mujhe paal nahi skti thi to ganam hi kyu diya." I believe rather than forcefully



giving someone birth and left her/him in a vegetative state, don't take her into this anti-women world.