

Abortion Vis-À-Vis Rights of An Unborn Child: A Critical Study

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“There are two victims in every abortion: a dead baby and a dead conscience”

– Mother Teresa

Abstract- The basic fundamental building block of every nation is its citizens and thus the population plays a very crucial role in the development of each and every nation in the world. The increasing population does not in any way reflects the growth of the nation since if it is the case India and China became the most developed nations in the world since the former is having the largest population in the whole world which is followed by the latter nation. Thus, the total amount of productive population is actually important and not the number of citizens. In the past century, there was a huge transition in the mindset of the people with respect to the demographic population as well as the measures to control the same. One such important aspect is the legalization of abortion in many of the western countries after the mid-twentieth century and later on the said practice was being adopted in many countries across various continents. The most alarming factor is that at one point of time, everyone was against the pre-natal diagnostic techniques as well as the killing of unborn child while in the contemporary world, the same people are claiming for the right to abort the child in womb. This research paper intends to identify the ambit of abortion as the basic right of a women and how the said right affects the inherent rights of an unborn child who is in the womb of mother. The recent decision by the Supreme Court of the United States with respect to the right to abortion as unconstitutional is currently the debatable topic and the world is looking at what is going to happen in other nations with respect to their abortion laws in the mere future.

Keywords: *Abortion, Unborn Child, Reproductive Rights, Fundamental Rights, Maternity Benefits, Human Rights*

INTRODUCTION

From time immemorial, the basic element of every society is considered to be the family and the said

family will be consisting of so many members who will guide the society in the mere future. The age-old sacred books like Vedas and Upanishads as well as the modern-day books on societal ethics and human conducts all accepts the fact that the family is considered to be the basic building block of every nation. As per the theory of dharma also, our deed will be reflected to us through the act of our children and it is hereby evident that the importance of family and children were discussed in a very elaborated manner from the ancient time onwards. Thus, if the nation is having a good and sound population who follows several ethics and values, it will surely reflect in the growth of the nation in an overall manner.

The right to life is considered to be one among the most basic fundamental right of every citizen of the nation and Constitution of the nation clearly mentions the importance of the same in a very elaborated manner as well through the wider and liberal interpretation of Article 21 of the Constitution by the judiciary through various judicial pronouncements, it clearly states that no one shall be curtailed from the right to life and no one including the state is having the right to abridge or curtail the said fundamental right which is entrusted upon the citizens of the nation. The conflicting fact which may arise with respect to the law of abortion is that whether the child in womb is also having such a right enshrined under the Constitution of India and whether the said unborn child can claim for the same.²

As per the law, Article 21 is not only limited to the citizens of India but is extended to whole sections of the society whereas through a liberal interpretation, the unborn child will also come under the ambit of right to

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² K D Gaur, *Abortion and the Law in India*, Journal of the Indian Law Institute, July-September 1986, Vol. 28, No. 3, Indian Law Institute, pp. 348-363

life. Thus, this is a constant conflicting debate among the political thinkers, legal philosophers and eminent jurists as well medical practitioners as to whether the abortion is a legal right or by the commission of the said abortion, whether the fundamental right of an unborn child is being curtailed or not. As per the application of doctrine of waiver in India, one cannot waive their fundamental rights which is entrusted upon him which is actually exactly opposite to what is being provided under the laws in the United States of America. So, if we are considering the right to life of an unborn child as a fundamental right, it cannot be curtailed or abridged by anyone and if the same is happened, then it is violation of law under the existing laws of the nation. That is the sole reason why there is a never-ending conflict upon the issue of abortion and the abortion laws existing in the nation and to determine whether it is unconstitutional or not. The recent decision made by the Supreme Court of the United States overruled the earlier decision which makes the abortion a valid one but as per the new judicial pronouncement, the abortion is unconstitutional and it cannot be legalized unless and until the situation demands.³

ABORTION: A RIGHT OR DENIAL OF A RIGHT?

The abortion is actually an age-old concept which exists from time immemorial. The only difference is that at earlier times, the practice of abortion was entirely different from the current scenario and without the use of any sophisticated technologies and advanced medical equipments, the practice of abortion was taking place in the nation. But these sort of practices without taking adequate and proper care will negatively affects not only the unborn child but also the health of the mother as well. It is a concrete fact that abortion cannot be raised as the sole right of a woman since through the process of abortion, the right of another person over here is denied as well, that is, the unborn child who is in the womb of the mother is also having certain rights and the said rights including

the right to life enshrined under the Constitution of India is actually being getting violated due to the practice of abortion.⁴

The practice of abortion is actually oriented upon two factors, the first one is more legally acceptable and it is actually practiced as to ensure the health of the mother, that is, if the medical condition of either the mother or that of the unborn child is in danger, then the practice of abortion is actually valid under the eyes of law and as per the law of the Medical Termination of Pregnancy Act, such sort of practices of abortion can easily be done which is purely lawful under the eyes of law. The other ambit of abortion is actually more vague and ambiguous since it solely depends upon the woman as to whether to carry out the abortion or not and here as per the law, it does not clearly specifies that the married woman can only opt for abortion and that is the reason why many of the unmarried woman out of the marital ties are opting for adoption after they gets pregnant out of a legal wedlock and thereby the conservative Indian society wholeheartedly opposes the practice of abortion because as per the statements from the religious leaders as well as other conservative groups, these sort of practices of abortion not only shatters the religious beliefs but it also adversely affects the morality and ethics which must need to be followed in a traditional society like that of in India where the religious philosophies plays a very crucial role in the proper governance of the nation in all aspects including that of the overall social and economic development.

Another major criticism with that of the abortion law in India is that the said Medical Termination of Pregnancy Act only specifies about the right of a woman to carry out the practice of abortion and the right of the unborn child is nowhere expressly or impliedly mentioned anywhere in the said legislation. Thus, the never-ending debate as to whether the said practice for abortion can be considered as a legal right of the woman who carries a child in her womb or as to whether through the evil practices like that of the abortion, the right of an unborn child including his right to life is being curtailed or not.⁵ The woman thus

³ Dobbs v/s Jackson Women's Health Organization, 945 F. 3d 265

⁴ Asit K Bose, *Abortion in India: A Legal Study*, Journal of the Indian Law Institute, October-

December 1974, Vol. 16, No. 4, Indian Law Institute, pp. 535-548, <https://www.jstor.org/stable/43950391>

⁵ Marge Berer, *Why Medical Abortion Is Important for Women*, Reproductive Health Matters, November, 2005, Vol. 13, No. 26, The Abortion Pill, Taylor &

needs to take proper care and due diligence while opting for adoption since even now also, the social stigma on abortion has not yet been changed in a society like India and the practice of abortion, even though legalized in the nation, is not at all wholeheartedly accepted by many of the citizens of the nation.

ABORTION VIS-À-VIS RIGHT OF A WOMAN

There is a constant debate in between the political thinkers, legal philosophers as well as with that of the medical practitioners as to whether abortion can be considered as the basic right of a woman and whether the abortion will come under the ambit of the wider reproductive rights which is made by the liberal interpretation of court from time to time through various landmark judicial decisions. Almost all countries are having certain laws in order to regulate, legalize or prevent the practice of abortion but it is nowhere mentioned as to whether the abortion is actually against the ethical code of conduct or not. As per most of the religious philosophies, abortion is considered to be a sin even now and there are no cocreate provisions in order to delimit the practice of abortion.⁶ Even in the western countries as well, the abortion is considered to be a sin as per the morales and values of particular religions.

Many countries have move forward rather than these religious beliefs and implemented certain laws and regulations in order to properly implement and regulate the abortion laws in the nation. The first major initiative was taken by the United States of America in the year 1973 where the Supreme Court of the United States pronounced that the woman are independent and is having the right to abort the child in her womb if certain criterions are being fulfilled including the time limit that should need to be taken care before conducting the abortion.⁷ This was a landmark decision in the history of the United States and many

other nations considered the said judgement as a very forward thinking pronouncement and by following the guidelines mentioned in the said judicial decision, many other countries also makes certain laws relating to the abortion and other allied practices of married woman.

In India, the abortion laws came into existence in the year 1971, that is, even two years prior to the Roe v/s Wade decision made by the Supreme Court of the United States where the practice of abortion was considered to be the basic right of the woman and it is her wish to either abort or not to abort that child in her womb.⁸ In the year 1971, the Medical Termination of Pregnancy Act was enacted in India which clearly lays down certain guidelines and provisions for regulating the abortion in India. The initial time period for making an abortion as specified in the legislation was up to a time limit of 20 weeks and through the amendment made in the year 2021, the time limit get increased to 24 weeks and now in India, the abortion can be done until the 24 weeks of gestation period gets expired. But the situation in India is also not very acceptable with regard to the adoption procedures since being a very conservative nation like India, the citizens of the nation are not at all in consonance with the practice of abortion and the strong influences of religious philosophies in India will not in any way allow the practice of abortion. The changing government from time to time must need to make proper and adequate legislations in order to regulate the practice of abortion in India and only through making a clear-cut legislation for the same, the misuse of the said practice of abortion can be delimited to an extent. It is an accepted fact that the abortion is actually a threat in one way to the human population since the mother of the child in womb is having the sole discretion as whether to conduct the abortion or not and it may negatively affect the rights of the said unborn child which can also be considered as

Francis, Ltd., pp. 6-10, <https://www.jstor.org/stable/3776469>

⁶ Dorie Giles Williams, *Religion, Beliefs about Human Life, and the Abortion Decision*, Review of Religious Research, September, 1982, Vol. 24, No. 1, Springer, <https://www.jstor.org/stable/3510981>

⁷ Roe v/s Wade, 410 U.S. 113 (1973)

⁸ Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, Law and History Review, Summer 2009, Vol. 27, No. 2, American Society for Legal History, pp. 281- 330, <https://www.jstor.org/stable/40646016>

unconstitutional contrary to provisions of law to an extent.

ABORTION VIS-À-VIS RIGHT OF AN UNBORN CHILD

The unborn child is considered to be a living entity under the eyes of law and certain rights are being vested upon the unborn child even before the child comes into the world from the womb of his mother. The rights relating to succession and inheritance are some of the prominent rights which is being vested upon an unborn child. Likewise, the unborn child is also vested with certain other basic fundamental rights like that of the normal citizens of the nation. The main question arise as to the ambit of abortion with respect to the right of an unborn child is that the unborn child is actually having the right to life mentioned under Article 21 of the Constitution or not. This is actually one among the most constant conflicting debate in the Indian scenario from time immemorial. Many of the forward thinkers and western philosophers stated that the right to have abortion is solely based upon the discretion of the mother and the abortion should need to be legalized as well but nowhere by anyone mentions as to whether the fundamental right of the unborn child to live in the society is actually being curtailed by the practice of abortion or not.⁹ The law is actually silent in matters relating to the right to life of an unborn child and at the same time the law clearly vests certain inherent powers upon the unborn child in matters relating to the inheritance and succession of property and allied matters.

In India, prior to the commencement of the Medical Termination of Pregnancy Act in the year 1973, the practice of abortion is considered to be a criminal offence which curtails the right of a living fetus which is actually having a life in it as well as considered to be a grave offence which may negatively affects the

health of the mother as well.¹⁰ Thus, the commencement of the aforementioned legislation in India brought a tremendous and landmark change in the Indian history with respect to the practice of abortion and other allied matters. India is actually one among the few countries in the world who actually legalizes the practices of abortion as lawful even before the judicial decision of Roe v/s Wade was made by the Supreme Court of the United States in the year 1973 which actually marks a landmark milestone for the enactment of various legislations across the globe in matters relating to the legalization of abortion laws.

The right of the unborn child is actually very much negatively affected even if the abortion took place for a good cause, like that of for the saving of the life of the mother. The legislation of the nation further needs to move ahead in order to protect the rights of the unborn child as well since through the wider and liberal interpretation of law, the child can also be considered as a legal entity who can claim for certain rights which includes the fundamental rights but it clearly lays down that the unborn child is only having the rights and they are not at all entrusted with any of the corresponding duties as that of the other citizens of the nation.¹¹ Thus, the government must need to make proper regulation and guiding principles in order to regulate the practice of abortion in the nation in order to protect the basic human rights as well as the rights of an unborn child as well even if the said legal entity is not physically present in the society.

ABORTION AND HUMAN RIGHTS: A CRITICAL ANALYSIS

Actually, every law in the nation as well as in the whole world is connected with human rights since human rights are considered to be the very basic fundamental rights of the citizens which cannot be curtailed or abridged by government or any other

⁹ Richard Werner, *Abortion: The Moral Status of the Unborn*, Social Theory and Practice, Fall 1974, Vol. 3, No. 2, Florida State University Department of Philosophy, pp. 201-222, <https://www.jstor.org/stable/23558912>

¹⁰ The Indian Penal Code 1860, Section 312, Chapter XVI

¹¹ Jeannie Ludlow, Sometimes, *It's a Child and a Choice: Toward an Embodied Abortion Praxis*, NWSA Journal, Spring, 2008, Vol. 20, No. 1, The Johns Hopkins University Press, pp. 26-50, <https://www.jstor.org/stable/40071251>

person for any reason unless and until such an extreme contingent situation is being demanded. In India, we does not have an express act which specifies about the aspect of human rights but the Constitution of India clearly states about the fundamental rights which is considered to be the same basic and inalienable rights as that of the human rights all over the world. The ambit of abortion can also be considered with that of the human rights but the perplex situation arise when the question arises as to whether the right to have abortion by a women should need to be considered as the basic fundamental human right or the right to life of an unborn child should need to be given with the said status. There is no doubt regarding the fact that the women is having the right to choose abortion or go ahead with the child in womb but the problem of the right of the unborn child still persists even if the law accepts the practice of abortion at certain conditions.

The abortion cannot be considered as a measure to kill the unwanted babies who were even born either inside or outside the arena of a legally valid wedlock. Every person has the right to have self-dignity and it should not be lowered at any cost by any person, organization or a legal entity. If the abortion is happening in an extensive manner, it will surely affect overall demographic structure of the concerned nation.¹² The practice of abortion cannot be considered as a measure to prevent the increasing rising trend of population since in one way, the abortion is actually considered as a way in which a life even if it is unborn, is being killed in the womb of the mother itself. Thus, if we are considering in a humanitarian perspective as well, the abortion is having certain adverse impacts on the society as well as the established principles of human rights of the mankind as a whole.

ABORTION: THE CONTEMPORARY SCENARIO

The practice of abortion is still prominent in almost all the parts of the world whereas many of the theocratic states or those nations who strictly follows the religious philosophies and principles of religious

¹² Norman C Gillespie, *Abortion and Human Rights*, Ethics, April, 1977, Vol. 87, No. 3, The University of Chicago Press, pp. 237-243, <https://www.jstor.org/stable/2380211>

teachings vehemently opposes the practice of abortion. The recent decision made by the Supreme Court of the United States of America in *Dobbs v/s Jackson Women's Health Organization* clearly reverses the judicial decision which was made in the year 1973 by the same judiciary which allows the practice of abortion. This will surely have a tremendous impact on the whole legal system across the world in matters relating to the abortion and allied laws. Being the superpower of the whole world, a decision from the Supreme Court of the United States is clearly having its own impact across the globe. The basic thing that should need to be kept in mind is that even of the abortion practices in many countries of the world is not criminalized and considered to be unlawful, the rate of abortion should need to be minimized from the current scenario. This is because of the fact that the abortion rate in the whole world is increasing in such an alarming rate which have disastrous effect on the society as a whole since the abortion not only kills the life of an unborn child but it also negatively affects the health of the mother who is supposed to go for an abortion.¹³ Thus, abortion can be done if the medical condition of the unborn child or the pregnant mother demands the same but it should not in acts as a measure to kill the child inside the womb itself for ulterior intentions since there will be a great violation of human rights over there.

CONCLUSION

The family is considered to be the basic fundamental building block of every society and thus we can say that the family is also considered to be the backbone of the nation. The family not only consists of a wife and husband but it is a combination of parents and their children. Thus, the practice of adoption can actually be considered as an antithetical philosophy to the concept of family as the fundamental building block of the society. The abortion is not yet been criminalized in India but to an extent, many sections of the society including religious institutions are actually against the concept of abortion in the contemporary scenario since

¹³ Brent Orrell, *Life After Roe: Supporting Women and Families Facing Unexpected Pregnancies*, Enterprise Institute 2022, <https://www.jstor.org/stable/resrep42743>

it violates the rights of an unborn child who is also having life even if it does not come to the real world.

The abortion should only be considered as an exceptional rule and it should not in any way deemed to be the original rule because the abortion should only need to be practiced in cases of extreme contingent situations like the severe health conditions of the mother or child, victims of rape or even if the child in the womb became a threat to the life of the mother as well. These all circumstances is having a demand to remove the child from the womb through the process of abortion but in almost all other circumstances, the abortion is being done in order to achieve certain ulterior intentions which is not at all good for a welfare society. Thus, the right of an unborn child should also need to be protected and it is to be noted that not only the pregnant mother is having certain rights, but the child who is in the womb is also having certain vested rights including the right to life and it is the duty of the government to protect through proper legislative enactments.

LITERATURE REVIEW

- 1) K D Gaur, *Abortion and the Law in India*, Journal of the Indian Law Institute, July-September 1986, Vol. 28, No. 3, Indian Law Institute, pp. 348-363

The author in the said research paper articulates the law of abortion in India and how the abortion is being connected with the laws and regulations of the nation. The author initially draws out the historical aspect of abortion laws in India and thereafter he points out the important landmark milestones which lead to the development of the laws relating to abortion which we can see as of now in the Indian scenario. Before the enactment of the Medical Termination of Pregnancy Act in the year 1971, the abortion was considered to be a penal offence under the provision of the Indian Penal Code enshrined under Section 312 of the said piece of legislation. After the enactment of the Medical Termination of Pregnancy Act in the year 1971, there was a rapid change in the approach of the people towards the abortion and related practices. The decision by the Supreme Court of the United States in *Roe v/s Wade* in the year 1973 also strengthens the ambit of abortion laws in India. The author thus stated that, proper rules and regulations should need to be

implemented by the government in order to prevent the misuse of the provisions relating to the abortion laws in India.

- 2) Marge Berer, *Why Medical Abortion Is Important for Women*, *Reproductive Health Matters*, November, 2005, Vol. 13, No. 26, The Abortion Pill, Taylor & Francis, Ltd., pp. 6-10, <https://www.jstor.org/stable/3776469>

The author in the said research paper elaborated the various facets of abortion which is taking place in the nation and the importance to have medical abortion under various circumstances as the situation demands for the same on pregnant women. At most of the times, the abortion is doing in order to safeguard either the health of the mother or of the child or both. The objective to protect the life of an unborn child is equally important with the protection for the life of the mother. So, at almost all the times, the life of the mother is being protected by doing abortion. Thus, the author mentioned that such forms of abortion should only takes place if contingent situations arise with respect to the health of the mother. The changing government from time to time must need to ensure that the abortion taking place in the nation are lawful and is doing under the prescribed conditions enunciated under the Medical Termination of Pregnancy Act of 1971.

- 3) Asit K Bose, *Abortion in India: A Legal Study*, Journal of the Indian Law Institute, October-December 1974, Vol. 16, No. 4, Indian Law Institute, pp. 535-548, <https://www.jstor.org/stable/43950391>

The author in the said research paper discusses about the laws pertaining in the nation relating to the abortion and allied practices which is actually legalized in India. The Medical Termination of Pregnancy Act which was established in the year 1971 actually lays down clear provisions with respect to the abortion laws in India and condition for having a valid abortion. The aforementioned enactment was actually constituted even before the Supreme Court of the United States in the year 1973 accepted abortion as legally valid and after the said judicial pronouncement, there was a tremendous change in the overall societal approach towards the practice of abortion which is actually evident in India as well.

- 4) Richard Werner, *Abortion: The Moral Status of the Unborn*, *Social Theory and Practice*, Fall 1974, Vol. 3, No. 2, Florida State University Department of Philosophy, pp. 201-222, <https://www.jstor.org/stable/23558912>

The author in the said research paper articulated on the historical growth of abortion and other allied practices in the whole world and how the abortion will affect the right of the woman who carries the child in womb as well as to the unborn child who is in the verge of getting aborted. There is actually a moral as well ethical dilemma in between the same and the government does not provide any clear-cut guideline in order to prevent the misuse of abortion laws in the nation. The government is also having the duty to respect and protect the rights of unborn children as well and thus necessary measures are required in order to restrict the practice of abortion in the nation.

- 5) Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, *Law and History Review*, Summer 2009, Vol. 27, No. 2, American Society for Legal History, pp. 281- 330, <https://www.jstor.org/stable/40646016>

The author in the said research paper discusses about the decision given by the Supreme Court of the United States in the year 1973 whereby the abortion gets legalized in the United States. After the said judicial pronouncement, its reflections were been identified all over the world. In the said case, the court clearly mentions that the right to abortion is solely depends upon the mother or the concerned woman who carries the child in her womb and it is her right to choose either adoption or to continue with the child in her womb. The author also discusses about the impacts which the nation may witness in the mere future with respect to the adoption and the laws relating to regulate and implement the same in an effective manner.