TERMINATION OF PREGNANCY: LAW AND MORALITY.

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“The touch of children is the delight of the body; the delight of the ear is the hearing of their speech. Bearing a child is one of the most valuable pleasures of womanhood, and it is most agonizing for a woman to decide to abort her child. Various societal sanctions that exist in the form of catholic principles and grounds of morality, termination has been considered a taboo. However, with the development of time, the law allowing termination has evolved in the form of limited rights granted to the mother under the special law. The right has also been acknowledged under right to privacy in the Constitution of India. The article analyses the catholic principles of Abortion in light of moral sanctions and philosophies. The penal and special laws in India on this regard have also been covered. The article also focusses on the right as a part of law of privacy with the help of American and Indian case laws.”

Cowardice asks the question, ‘is it safe?’; expediency asks the question, ‘is it politic?’; vanity asks the question, ‘is it popular?’; but conscience asks the question, ‘is it right?’; and there comes a time when one must take a position that is neither safe, nor politic, nor popular, but because conscience tells one it is right.²

The perpetuating debate over medical termination of pregnancy, on grounds of human care, its condemnation in the catholic principles of preservation of life has been at its exigency. Where the fifth commandment states “You shall not kill: and whoever kills shall be liable to judgment” the Christians believe that human life is sacred because it involves the creative action of God and it remains for ever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being.

WHEN DOES LIFE BEGIN?

The central wringer that exists is when does life begin? In literal sense, ‘abortion is the destruction of life after conception and before birth.’ Between these terminus’ in the absence

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² Rev. Dr. Martin Luther King, Jr. (1929-1968)
of such an act, life must have blossomed. However, life sciences have left these questions unanswered. Some non-medical jurists who have opinionated on the squabble stating "life begins at the moment of conception, and to suggest otherwise seems to be casuistry" another view states: 'I do not believe a fertilized ovum is human life in the common sense meaning of the term, I believe human life begins at birth. Or more technically, when a foetus is sufficiently developed to be capable of living if removed from the mother’s womb. That human life begins at the moment of conception is a religious tenet that makes no claim whatsoever to scientific truth'.

Each of the extreme views create a dilemma for the legislators. If one was to follow the view that life begins at conception, then interference with the foetus at any stage of its foetal existence could be seen as unrighteous, if right to life was unrecognized. "Even the unborn child is entitled to protection by the law from the moment of its conception". This is logically apt, but realistically erroneous. At the other end of the scale is the second view, the other that life begins only on birth. If this was to be believed, that there was no life before birth, then all legal stipulation and sanctions dealing with the inference of the foetus become void and worthless except to prevent such interference in the good interest of the mother’s health. On this logic whether or not a mother should be free to abort belongs almost entirely to the category of the individual therapeutic questions. It ceases to have any ethical or legal relevance. No country gives absolute choice to terminate pregnancy to the women throughout the period. Almost all countries restrict the exercise of the right during the second or third trimester, except on medical grounds implies that they regard interference with the foetus as deserving of ridicule and condemnation. Such legal condemnation could only be on the ground that some kind of life exists within the womb, which deserves protection.

The dilemma of the debate rests over issues of morality and righteousness. Even if abortion were to be legal, the string of virtue would always be attached to the act by the “pro-life propagators.” The progression of Indian Law on abortion has not been as fierce as that in the west. From being a criminal offence under the penal statues to legitimizing it through a special enactment MTP has been moderately painless. Before the special law, IPC drafted on contemporaneous British principles, classified the act as an act against the human body and penalised induced abortion.

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3 John Grigg in “The Guardian, 29th October, 1973
4 De Wells in “The Guardian, 29th October, 1973
The most reliable and pragmatic conclusion of the altercation would be accepting that the child is born when his brain first becomes active. One needs to understand that the process of abortion is as painful for the foetus inside as for the mother, emotionally and physically. Brain activity is an essential characteristic of a ‘moral person’. Brain activity not only implies further development in the foetus, but also that the foetus becomes more vulnerable and susceptible to pain and emotions. Removing the foetus after brain activity begins, would be more distressing to both. This rationale is also scientifically sound.

PENAL PROVISION

Abortion can be classified into two types: Spontaneous and Induced.

1) Spontaneous: which is technically miscarriage; caused due to complications in pregnancy, unintentional in nature.
2) Induced Abortion is voluntary abortion, further classified into:
   i) Therapeutic Abortion: An abortion induced to preserve the health of the mother.
   ii) Elective Abortion: An abortion induced for any other reason

Section 312 states that “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 woman, 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 was quick with child5, shall be punished with imprisonment of either 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”.6

Section 312 punishes the person who causes the miscarriage to women. Explanation appended to provision also clears the air that a woman has no right to miscarry herself. Section 312 stands paradoxical as it protects the women’s right to motherhood over her right to abortion. Nonetheless, the act allows abortion in good faith. Section 313 penalises any person who

5 “Quick with child” denotes the time when the foetus first moves in the womb. This happens about 16 to 17 weeks after fertilisation. It is that stage of pregnancy where the movement of the foetus can be felt.
6 Termination of pregnancy after this stage becomes a bigger health hazard.

Section 312, IPC
commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, who shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**RIGHT TO PRIVACY**

The US Supreme Court was the precursor to include right to abortion under Right to privacy. The premier decision bringing abortion under the scope of Right to Privacy, was Roe v Wade in which the court ruled that a right to privacy under the Due Process Clause of the 14th Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's two legitimate interests in regulating abortions: protecting women's health and protecting the potentiality of human life. Since the Court in Roe found that abortion fell under the fundamental right to privacy, it applied a strict scrutiny analysis, requiring that regulations be narrowly tailored to achieve a compelling state interest. The Roe court decided that the government had two compelling interests: “preserving and protecting the health of the pregnant woman” and “protecting the potentiality of human life.” These interests, however, became compelling at different times during a woman’s pregnancy. While the first trimester was to remain free of government interference, a woman’s health became a compelling state interest in the second trimester, and potential life became a compelling state interest at viability.

In *Planned Parenthood v. Casey*, the Supreme Court gave a new dimension to the right to abortion. Reaffirming the Ratio in Roe V Wade the court held that matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal

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7. Christina M. Akrivopoulou, Protecting the Genetic Self from Biometric Threats: Autonomy, Identity and Genetic Privacy. (Hellenic Open University, Greece)
11. Id. at 162-63.
12. Id. at 163.
13. Id. at 163-64. The Roe Court explained that viability is the point at which the foetus can potentially sustain life outside the mother’s womb, which generally occurs somewhere between twenty-four to twenty-eight weeks of pregnancy. Id. at 160. This definition may prove problematic in the future with advances in medical technology used to keep increasingly premature infant’s alive outside of the womb. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting).
dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. The court laid down the undue burden test. The test states that provision of law is invalid if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the foetus attains viability.\textsuperscript{14}

Article 21 of the Constitution of India protects every person from deprivation of the right to Life and Personal Liberty.

The Supreme Court\textsuperscript{15} of India has interpreted Article 21 to include right to privacy, stating ‘It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security’ implying that every person has complete rights of control over his body organs and his ‘person’.

There is no doubt that a woman's right to make reproductive choices is also a dimension of ‘personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected\textsuperscript{16}

**MEDICAL TERMINATION OF PREGNANCY ACT**

Medical Termination of Pregnancy (MTP) Act, which was enacted by the Indian Parliament in the year 1971 with the intention of reducing the incidence of illegal abortion and consequent maternal mortality and morbidity. The MTP Act came into effect from 1 April 1972 and was amended in the years 1975 and 2002.

The intention of the legislators as depicted in the Statement of Objects and Reasons of the Act, the relevant portion of which reads as under:

“There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalize certain existing provisions relating to termination

\textsuperscript{14} The Supreme Court’s Just Application of the Undue-Burden Standard for Abortion by Margaret Talbot June, 27, 2016 The New Yorker

\textsuperscript{15} In Kharak Singh vs. State of U.P AIR 1963 SC 1295

\textsuperscript{16} Suchita Srivastava v Chandigarh Administration; AIR 2010 SC 235
of pregnancy has been conceived (1) as a health measure - When there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds - Such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; (3) eugenic grounds - Where there is substantial risk that the child, if born, would suffer from deformities and diseases.”

The preamble of the act states the object the statute aims to fulfil: To provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. “Certain Pregnancies” denotes that the right the act is not an absolute one, but limited to certain pregnancies. Termination is also allowed only by Registered Medical Practitioners\(^\text{17}\).

The Grounds for termination are also limited to the ones mentioned in Section 3. Non-Obstante clause in the Section also overrides the effect of other penal statues such as IPC. \(^\text{18}\) The provision divides the period of pregnancy into two:

1. Less than 12 weeks
2. More than 12 weeks, but less than 20 weeks.

In the second case, where the period exceeds 12 weeks but is less than 20 weeks, not less than two registered medical practitioners shall certify by their opinion, formed in good faith that

(i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or
(ii) 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.

The act also states that Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman and 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

\(^{17}\) "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in Cl.(h) of Sec. 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

\(^{18}\) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
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.

Therefore, under the act, pregnancy can be terminated only on health, humanitarian and eugenic grounds only. Also no pregnancy shall be terminated without the consent of the women.

The act under section 4 also specifies the place of termination.\textsuperscript{19} However, Section 5 of Act specifies that termination beyond the period of 20 weeks the medical practitioner is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

In the Haresh Mehta case, where the parents wanted to abort their 26 week old foetus who had been diagnosed with complete congenital heart blockage. Their plea as turned down by the court. Niketa, incidentally, had a miscarriage soon after the verdict. However, after this case, a need for change in the provision was felt.\textsuperscript{20}

Out of the 26 million births that occur in India every year, approximately 2-3% of the foetuses have a severe congenital or chromosomal abnormality. Many suffer Intrauterine Fatal Death (IUFD) or are stillborn. With new 3-D and 4-D sonographic technology, it is possible to detect abnormalities before 20 weeks, while other abnormalities can be detected only after 20 weeks. Many of these defects create risks to a woman’s health during pregnancy and delivery. In India, where many women do not have access to antenatal care, fatal abnormalities may only be detected during the first antenatal check-up late in the pregnancy. Section 3(2)(ii) of the MTP Act allows for termination in the case of fatal “physical or mental abnormalities.” Where women do not have access to adequate antenatal care during the first 20 weeks of pregnancy, they lose the protection of the MTP Act. As a result, the MTP Act causes severe mental anguish and trauma to the mother’s mental health by forcing her to carry a foetus that will not survive.\textsuperscript{21}

\textsuperscript{19} No termination of pregnancy shall be made in accordance with this Act at any place other than, - (a) a hospital established or maintained by Government, or (b) a place for the time being approved for the purpose of this Act by Government

\textsuperscript{20} Dr. Nikhil D. Datar v. Union of India & Ors., [SLP (C) 5334 of 2009]

\textsuperscript{21} Mrs x ad Mrs Y v UOI; Ms X, who was raped and as a consequence of which is now in the 24th week of her pregnancy, has contended in her petition that the ceiling of 20 weeks stipulated in the Act is unreasonable, arbitrary, discriminatory and violative of the right to life and equality. X’s foetus suffers from anencephaly,
In 2006, Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act were challenged as being unethical and violative of Article 21 of the Constitution of India. The court held that: “It would appear that dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of any injury toward physical and mental health or prevent the possible deformities in the child - to be born”

The law was held to be constitutional. However, the court chose not to make any conclusions on whether the Act is in violation of the right to life of the foetus, stating that it would be difficult to pinpoint when the life of the foetus begins.

In a case, recently taken up before the Supreme Court, the judgment questioned the constitutional validity of the Medical Termination of Pregnancy (MTP) Act 1971, which allows abortion only up to the 20th week. In the present case, the foetus suffered from anencephaly, a birth defect in which the child is born without parts of the brain and skull. The applicant also claimed that she isn’t financially well off to rear a special child and that her ex-fiancé raped her after promising marriage.

The Court held: “In view of the clear findings of the medical board whose examination showed that contained pregnancy could endanger the petitioner’s life, we are satisfied that it may be permissible to terminate pregnancy.”

Recent trends in the country have shown that there needs to be drawn a line between two public policy issues-sex selection and safe abortion. Choices along the thin edge separating the two are:

- Restricting access to abortion to prevent sex selection
- Dealing with the two issues separately

which means the absence of a major portion of the brain, skull, and scalp that occurs usually during the first month of pregnancy. The chance of survival of a baby born with the condition are practically nil.

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22 Nand Kishore Sharma v Union of India, AIR 2006 Raj 166
23 In a Landmark Judgement, SC Allows Abortion for 24-Week Abnormal Pregnancy. Available at www.thebetterindia.com/62683/abortion-laws-india-supreme-court-rape-survivor/ (Last accessed on 29/10/2016)
24 Available at www.rajswasthya.nic.in/.../24oct/MTP%20legalupdate_arth%20Ranjana.ppt (Last accessed on 29/10/2016)
• Developing an integrated strategy to address both sex selection and unsafe abortion together.

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."\(^25\)

A mother has got an undented duty to provide the most she can for her child. However, at times, due to unfortunate and unforeseen bearings, her foetus and she herself, are injuriously harmed. It could be due to ignorance, carelessness or done wilfully. Abortion is an issue to be left to the decision of the mother.

However, taking viability of a legal standard, necessary protection should be provided to the unborn. The law has to strike a balance between the liberty of the mother as well as the unborn. As a holistic community there is a dire need to seek ways of providing support for lonely and frightened mothers, and 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.

Although human, and protected by the law in a number of different ways … an unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant."\(^26\)

\(^{25}\) D. Rajeswari vs State of Tamil Nadu and Others; (1996 CriLJ 3795)

\(^{26}\) S v St George’s Healthcare Trust [1999]