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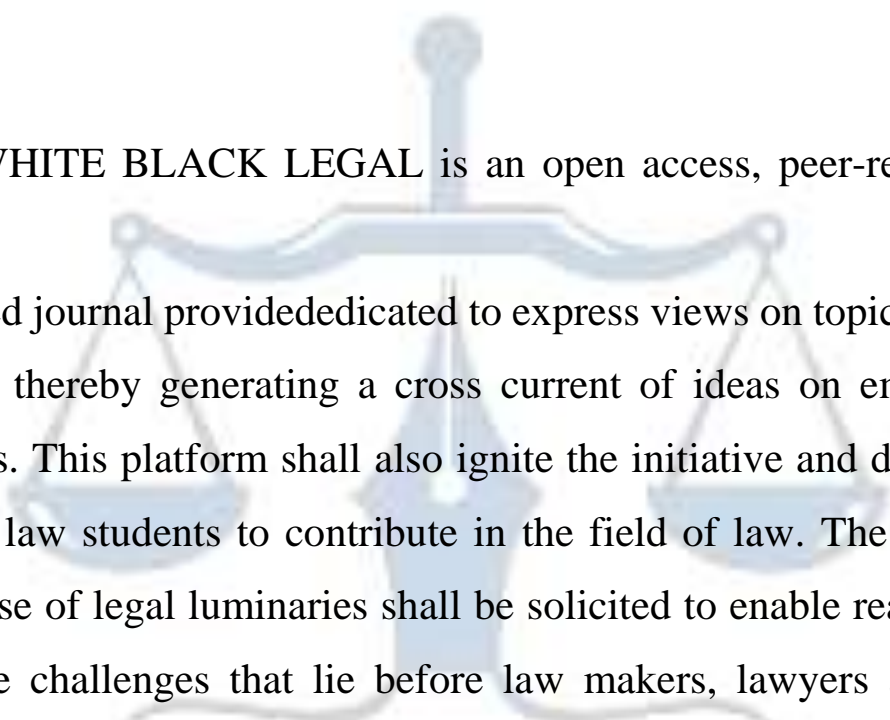


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **A TUSSLE OF HUMAN RIGHTS-REPRODUCTIVE CHOICE v. FETUS RIGHT**

AUTHORED BY - RISHABH GUPTA<sup>1</sup>

## **ABSTRACT**

Health of the people is an attribute which make people to enjoy their other human rights. The idea of reproductive rights as human rights is new and challenging as it create the old debate of the conflicts in rights of the women of her choice and right of the unborn. If women want to live a healthiest and prosperous life she must has control over her basic human right to make her own decision in her reproductive choices on the other hand human life is also treated as scared and many law and religion value the life of unborn.

The idea of the paper is to make aware women about their existing human rights since approximately there are around 80 percentages of women are unaware of the existing law and thus feared seeking in safe abortion services and safe abortion service is a still a dream for many. The paper highlights the issue of personal liberty, bodily integrity and equality and the human rights to a future human (Fetus) and laws governing these rights.

**KEYWORDS:** Health, Human right, Abortion, Fetus, Personal Liberty, Bodily Integrity, Reproductive choice.

## **INTRODUCTION**

The public health of a country is not a running race between people; it is the integral part of the nation's development. As also the right to health as human right was declared first time by the World Health Organization in 1946. The same text which was later present in the preamble to WHO's constitution as "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition"<sup>2</sup> and thus by making health as a human right create

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<sup>2</sup> World Health Organization Constitution. <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>.



obligation on the nation to ensure access to affordable and appropriate health care as well as providing the safe environment and certain choice over body. The idea of reproductive rights as human rights is new and challenging. The Right to reproductive choice means that women have a right to choose whether to reproduce or not, right to decide to carry or to terminate an unwanted pregnancy which can cause mental trauma to her. Reproductive rights embrace certain human rights that are already recognized in national laws, international laws and international human rights documents and other mutual documents of the world. But on the other hand there are proponents who supports that life begins with the conception and thus the status of the fetus and the right to the unborn baby came into the picture. As many pro-life believers suggest killing of the fetus is a sin. Aristotle in his potentiality principle argued that, 'All living things, including mindless plants, have a good or an end proper to their species toward which they naturally tend to develop from a formless or potential state.'<sup>3</sup> The supporters also argue that the fetus has potential of personhood which will more likely to grow into a human with all human rights.

### **BRINGING HUMAN RIGHTS IN REPRODUCTIVE CHOICE.**

If women want to live a healthiest and prosperous life she must has control over her basic human right to make her own decision in her reproductive choices. Abortion is legal in India since the medical termination of pregnancy Act, 1971 but the law which was advanced of its time when passed had certain limitations and absence of human right approach in it as the exclusion of pregnancies beyond the period of 20 weeks cannot find a reasonable justification in the present day and age. The medical termination of pregnancy act was drafted before in 1971 considering the technology at that time within the rapid advancement in the medical field, but today due to more technological advancement, the pregnancy can be terminated safely up to 24 weeks also there are instances where abnormality in the fetus can be detected only after 20 weeks if the abnormality in the fetus is discovered post 20 weeks of pregnancy and the woman wishes to abortion she is subject to the only way of petitioning higher Courts. The requirement of a medical practitioner forming and opinion even as to the mental health of a woman is also an unjust as it gives room to subjective interpretation. Women should be regarded as the best judge of her mental wellbeing.

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(05.05.2020).

<sup>3</sup> Lynn M. Morgan (2013) "The Potentiality Principal from Aristotle to Abortion", *in Current Anthropology*, Vol. 54, No. 7, 15; L. W. Sumner (1981) *Abortion and Moral Theory*. Princeton University Press: Princeton, New Jersey, 169

And this contention has been rectified through various judgments of the courts in India. The landmark judgment in this regard is *Suchita Srivastava v. Chandigarh Administration*<sup>4</sup> in which the court said that Right to make reproductive choices is also dimension of personal liberty of woman. Reproductive choices can be exercise to procreate as well as to obtain from procreating. Right to privacy, dignity and bodily integrity of women should be respected. In another case of *Sarmistha Chakarborty v. Union of India*<sup>5</sup> it was held that permissibility of right of women to have reproductive choice is inseparable part of her personal liberty under article 21 of the Constitution of India and she has sacrosanct and it right to her bodily integrity. Thus making Indian judiciary more progressive in the term of this humanitarian law.

The judiciary of other small country like Nepal has also evolved the humanitarian law at a certain extent which values the basic human rights as the supreme court of Nepal in the case of *Lakshmi Dhikta v. Government of Nepal*<sup>6</sup> held that fetus is able to exist only because of the mother if we grant the fetus right that go against mother's health or wellbeing it could create a conflict between the interest of the mother and the fetus and even compel us to recognize the superiority of the fetus a situation that would be against the mother, it is not possible to put the Mother's life at risk to protect the fetus. And in the famous case of *Roe v. Wade*<sup>7</sup> the US supreme court has also laid down the time period that the state cannot interfere in the matters of reproductive choices of women between 1 to 12 weeks of fetus.

The nation like India which has ratified various treaties respecting the human rights in India has also under international obligation to ensure that the right of a women in her reproductive choices is protected,<sup>8</sup> as a signatory to the International Conference on Population and Development, India also has committed itself to ethical and professional standards in family planning services, including the right to personal reproductive autonomy and collective gender equality and in other major International conferences like Beijing Conference it was also declared that the explicit recognition and reaffirmation of the right of all woman to control all aspects of their health, in particular their own Fertility is basic to their empowerment<sup>9</sup>.

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<sup>4</sup> *Suchitha Srivastava v. Chandigarh Admn.* (2009) 9 SCC 1

<sup>5</sup> *Sarmistha Chakarborty v. Union of India* (2018) 13 SCC 339.

<sup>6</sup> <sup>21</sup>*Lakshmi Dhikta v. Government of Nepal* writ no. 0757, 2067 (2007).

<sup>7</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>8</sup> *Convention on Elimination of all forms of Discrimination Against Women*, (1993)

<sup>9</sup> *Ibid* 8

But instead of this, abortion law are still strict as according to some crucial case to case, for instance, a woman who is 28 weeks pregnant when diagnosed with fetal abnormality wants to terminate her pregnancy and went for abortion but the law still won't allow her to termination of her pregnancy as she crossed the upper lint bar and there is no exception to it also thus as this baby if born with abnormality will cause mental trauma as and physical stress to the mother as well as to the child born and here the choice of women matters the most. This freedom of choice lies at the heart of the promise of human dignity, personal liberty and equality and when a woman is denied to her own life, choice this will cause infringement of her basic human rights.

Thus concluding all these cases, convention and facts as hereby mentioned it is clear that unwanted pregnancy of a woman may be presumed to cause Grave injury to her Medical Health and mental health, compelling women or girl to continue a pregnancy against her will violates her fundamental right to bodily integrity privacy and dignity as well as other basic rights such as the right to receive an education, the right to work and in the present circumstances.

The right of an individual to bodily self-determination and integrity forms part of the liberal philosophical tradition in which feminism has its roots. If women are to have equality with men and participate as fully in society, they must have autonomy over their bodies, especially in terms of sexuality, conception and pregnancy.

### **HUMAN RIGHTS OF UNBORN AND RELIGIOUS INTERPRETATION**

The major role and function of the government is to protect the most vulnerable section of society and that includes unborn. Various conventions, laws and statutes protects rights of these vulnerable sections as these rights will also come under the ambit of humanitarian laws and following the human rights. The Convention on the Rights of the Child<sup>10</sup>, the international legal instrument which embodies the recognition of human rights to Children as it clearly mentions suggestive of protection available to an unborn child: “the child needs special safeguards and care, including appropriate legal protection before as well as after birth.” The text of the Preamble to the Convention suggests that a “child” is considered to be child before birth and is therefore, entitled to legal protection. Also in the American Convention on Human

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<sup>10</sup> G.A. Res.44/25, (CRC) U.N. Doc. A/RES/44/25 (September 2, 1990), 1577, U.N.T.S. 3

Rights<sup>11</sup> states that Every person has the right to have life respected, this right shall be protected by law and in general from the moment of conception. When the MTP Act of India was first enacted in 1971 it was largely based on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified right to abortion and the termination of pregnancy has never been recognized as a normal recourse for expecting mother and in The Abortion Act, 1967 of the UK also in its Article 2 does not conform an absolute right to life to the unborn it was so held in *Paton v. United Kingdom*.<sup>12</sup> Abortion is permitted if the continuance of the pregnancy involves risk, the right to life of fetus is subject to an implied limitation allowing the pregnancy to be terminated in order to protect the life of a mother The same was upheld in *H. v. Norway*.<sup>13</sup>

Also the Indian judiciary has recognized the rights of unborn protecting the vulnerable. The Supreme Court in the case of *Dr. Jacob George v. State of Kerala*<sup>14</sup> observed as under: Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that by many religious denominations that human beings cannot take away life, as they cannot give life. Also regards to the right of life available to a fetus, the observations of the Hon'ble Supreme Court<sup>15</sup> relied on the decision of the United States' Supreme Court in *Roe v. Wade*, by recognizing the 'compelling state interest' in protecting the life of the prospective child as well as the health of the pregnant woman after a certain point in the gestation period which approximately begins at the end of first trimester. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.<sup>16</sup> Also, in the case of *R. v. Enoch*<sup>17</sup> the English held that unborn child was held as a person. Also, in India the interests of a fetus have been recognized in the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994. It is also further recognized by the IPC which deals with the offences relating to causing of miscarriage and of offences relating to injuries to unborn child. These provisions that deal with such offences are embodied in Section 312- 316 of the IPC Furthermore, various statutes in India have recognized the unborn fetus as a legal person for subject to the live birth requirement. One such instance is of

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<sup>11</sup> American Convention on Human Rights, Article 4.1 (1978).

<sup>12</sup> *Paton v. United Kingdom*. 3 EHRR 408 (1980).

<sup>13</sup> *H. v. Norway* 1002 73 DR 155 (1992).

<sup>14</sup> *Dr. Jacob George v. State of Kerala*, (1994) 3 SCC 430.

<sup>15</sup> *Supra* 3.

<sup>16</sup> *Supra* 7.

<sup>17</sup> *R. v. Enoch*, 5 C. & P. 539 (1833).

the Transfer of Property Act<sup>18</sup>, Section 20 of the Hindu Succession Act, 1956<sup>19</sup> has conferred a right to succeed to the father's estate on a child who was in the mother's womb when the father died.

Different religious views suggest that life is sacred and all lives whether in embryo or in person living are manifestations of the Supreme Being and thus practice non-violence in every regard.

### **LAW ON ABORTION IN INDIA AND WORLD: AN OVERVIEW**

As said life and personal liberty are not creation of the Constitution these rights are recognized by the constitution as inherent in each individual and intrinsic and inseparable part of the human element which dwells within<sup>20</sup>.

Since in a democracy the state attitude presumed to reflect the attitude of the people. In India abortion is legal since the Medical Termination of Pregnancy Act 1971, which relying on the foot of the preamble to provide for the termination of certain pregnancies by registered medical practitioners. The Medical termination of pregnancy Act, 1971 provides provisions for abortion up to 20 weeks of pregnancy when pregnancy causes mental or physical illness to the mother or 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. But there are circumstances that fetal abnormality arises or can be diagnosed after the upper limit time period and here the choice, bodily integrity and personal liberty of women came into question infringing the human right to choice. Also due to restrict abortion law and not having the knowing of law, people go for illegal abortions which are many a time are unsafe also. Unsafe abortion is also one of the major causes of the maternal mortality and morbidity and these restrict abortion law, exposes women to the health risk of unsafe abortion, violating their rights to bodily integrity and in many of the time to life of women also.

Since the new law passed by the Indian government made stand India into the line of the progressive countries which at the certain took notice of these basic human rights, the new amendment on the MTP Act here as passes in year 2020 aims to extend legal abortion service on the therapeutic, humanitarian and social grounds by raising upper limit of abortion from 20

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<sup>18</sup> Transfer of property Act, 1882, s. 13.

<sup>19</sup> The Hindu Succession Act, 1956 ,No. 30 of 1956, s. 20.

<sup>20</sup> K.S. Puttaswamy v. union of India (2017) 10 SCC 1.

weeks to 24 weeks for a certain categories of women including rape survivors, victims of incest, minor women, differently-abled women among others.

Since no law of a country can be compared with other country as these laws indicates where these human rights stand, many country in the world like France, Germany, United states, Sri Lanka, Brazil , Canada have now legalized the abortion but there are many conditions and regulations behind it and many country still equate fetus with human life at par with human dignity.

### **CONCLUSION**

In this regard of the abortion rights, women right to reproductive choice, her personal liberty evidently overweigh the possible or future rights of the fetus and it is not correct to value the potential person's right over the real women with real choices and rights. On the other hand it is also evident that the state is morally and duty bound as the guardian of the citizen and has parents patriate power to safeguard the life of the child in the womb after it has attended the stage of viability and this can be viewed as a reasonable restrictions on the fundamental rights available to a woman under Article 21 of the Constitution.

Rights empowers people and human rights are aspiration of full participation, equal involvement and interest in the society and there can be conflict in these existing rights also which have to be balanced and this lens needs to be adopted in all future law making around this issue of abortion laws.

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