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REPRODUCTIVE RIGHT OF A WOMAN AND A JUDICIAL RESPONSE

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Introduction

Medical termination of Pregnancy is a controversial topic under medical law. Foreign Judiciary and our Indian Judiciary have enunciated many rights and vital role play just like Right to Abortion, Reproductive rights and Right to Privacy. The Judiciary has explained that what the social and moral value of Fetus. Famous and leading Case in ***Roe v. Wade***[2], the Supreme Court said that a fetus is not a person but 'potential life' and so does not have constitutional rights of its own. The Supreme Court and Foreign court have declared that the right to privacy. It's Right enshrine in Article 21 of the Indian Constitution and the right to abortion can be read from this right also.

JUDICIAL RESPONSE

In this famous ***Case Rex v. Bourne3 ,***indicated that "an abortion carried out in good faith to preserve the mother's life was lawful". In ***Suchita Srivastava v. State (UT of Chandigarh)***[3], the Apex Court has expressed the view that a woman's right to have a reproductive option is an inseparable part of her personal freedom, as envisaged under Article 21 of the Constitution.

In ***Colautti v. Franklin***[4], the Apex Court repealed a Pennsylvania statute that would require doctors to protect the life of a fetus "both before and after an abortion". It ruled that only the doctor allowed abortion, not the court or legislature, is able to determine the probability. The

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[2] 1973) 410 U.S. 113.
[3] (2009) 14 SCR 989.
[4] (1979) 439 U.S. 379.

legislative definitions were unclear. In ***Webster v. Reproductive Health Services***[5], the Apex Court upheld a Missouri statute that denied state funding and state employee involvement, counseling for or counseling for abortions, but a fetus at 20th weeks of gestation or older before aborting refused to uphold the provision of the Doctor stow test for feasibility. In Webster, Four In***justice Roe v. Wade***[6], the Apex Court urges reconsideration. The Supreme Court of America upheld a Missouri Statute which declared that the life of each human being begins at conception and that unborn children have protectable interest in life, health and wellbeing.

Vo v. France[7], the European Court of Human Rights in Strasbourg has confirmed that 'everyone' in Article 2 ECHR does not include the unborn child. Remarkable though, is that this case was not about whether abortion is compatible with the right to life. In ***Tagore v. Tagore***[8], the Supreme Court observed that an infant in womb is a person in existence for the purpose of making a gift to unborn person. In another case, 'the court observed that the term 'person' would include an unborn child in the mother's womb after seven months of pregnancy, that means it is capable of being spoken of as a person, if its body is developed sufficiently. Though in these two cases, the status of personhood granted on the fetus by the court is restricted. In USA, fetus has been considered as a living person in cases of unlawful death and unlawful life cases. In ***Commonwealth v. Cass***[9], the Massachusetts Supreme Judicial Court held that fetus was person within the meaning of State vehicular homicide statute. The word 'person' under Article 21 of the Constitution has the same meaning as under Indian Penal Code and General Clauses Act. That means fetus is not included under Article 21, so the right to life is not made available to the fetus under our Indian Constitution which has complicated the position of legal status of fetus. Right to life is a right which is available to all persons whether citizens or non-citizens, but what about the fetus? Now, we have discussed the legal status of personhood is not granted to the fetus directly, but some protection is given to an unborn child under certain legislations.

[5] (1989) 492 U.S. 490.
[6] Supra note 2 at 2.
[7] 2004) ECHR (Appl.No.53924).
[8] (1872) I l A Suppl.47.
[9] (1984) 467 NE 2d 1324 (Mass).

In the case of ***Nand Kishore Sharma v. Union of India***[10] the Apex Court had to decide the validity of the Medical Termination of Pregnancy Act and the time for the fetus to enter life? In this case the court refused to comment on the cause of the "person" status to the fetus; however, it declared that the Act was valid. In ***Mrs. X v.. Union of India***[11], the Supreme Court allowed the termination of a 22-week pregnancy. This was done after being determined by a 7-member medical board that allowing the pregnancy to continue could threaten a woman's physical and mental health. The Court stated that "a woman's right to make reproductive choices is also a dimension of her 'personal freedom' under Article 21 of the Constitution and her right to physical honesty allows her to terminate her pregnancy". Similar decisions were passed by the Supreme Court in other cases where the conception was over 20 weeks and the fetus. In ***Mamta Verma***[12], there was no threat to the expectant mother's life. Nevertheless, the termination of pregnancy was permitted primarily on the grounds that the fetus was unlikely to survive and was causing severe mental injury to the expectant mother. This means that the termination of pregnancy was allowed under section 5 of the MTP Act by reading into the provisions of section 5 of the MTP Act, the contingencies referred to in clause (i) of sections 3(2) and 3(ii) (b) of the MTP Act.20 In ***Meera Santosh Pal***[13], the Supreme Court allowed an MTP of approximately 24 weeks based on medical pregnancy that the fetus was without a skull and would not be able to survive outside the uterus. The Medical Board was formed specifically for the purpose that continuation of pregnancy could endanger the physical and mental health of the mother. In such circumstances, the Supreme Court, noting that the critical consideration was that 'the right to physical integrity asks her to allow her pregnancy to be terminated allowed the termination of the pregnancy, although it advanced until the 24th week. Mr. Vagyani and Ms. Kantharia, the learned governmental party, based on the instructions, have assured this Court that a medical board will be established on a permanent basis in hospitals established or maintained by the Government to the extent possible. In relation to the escalation of such cases and the fact that resolution of such cases is not delayed, we direct the state to permanently establish a medical board in at least one major city in each district of the state of Maharashtra. Such medical boards should be established as soon as possible, if not already established, but in any case, within a period

[10] 1984) 467 NE 2d 1324 (Mass).
[11] (2017) W.P. (Civil) No.81.
[12] (2006) WLC Raj UC 411.
[13] (2017) W.P. (Civil) No.17.

of two to three months from today. To set up such medical boards on a permanent basis, the state will have to constitute a medical board on an ad-hoc basis to examine pregnant mothers. Affidavit of compliance to be filed by Secretary (Health), Government of Maharashtra, on the aspect of establishment of permanent medical boards in each district of Maharashtra State. In the context of this Court, the Medical Board should examine the pregnant mother as soon as possible and in any case within 72 hours from the date of referral. Thereafter, within a period of 48 hours, the Medical Board should submit a report to this Court in a sealed cover indicating the interim status with reference to the fetal status in the pregnant mother's womb her pregnancy. However, in ***Savita Sachin Patil v. Union of India***[14], the Apex Court terminated the 27th week pregnancy. The medical board found that there was no physical danger to the mother, but the fetus had severe physical anomalies. The court then did not allow the land to be terminated based on the medical board report. ***In Davis v. Davis23 the*** Judge concluded that as a matter of law, human life begins at conception. In Circulate this Judgment in the Subordinate Judiciary v. State of Gujrat24, the High Court observe that:

1. Everyone in the Article 21 of Indian Constitution, 1950.

2. Human life exists in Embryo from the fourteenth day of the Conception.

3. It is the duty of the state to protect and promote the life of the fetus and defend it from unlawful interference by other person.

In Ms. ***Chanchala Kumari v. Union of India & Others***[15], the Apex Court ordered multiple medical examinations of the petitioner after the first was not clear, explaining, “The initial report was not specific and thereafter this Court on 18th September 2017 passed the following order…” The Court order for the medical board stated, “When we say medical termination of pregnancy, we mean to convey all the factors including the factor of life of the fetus.” In Maher v. Roe26 , the Supreme Court held that a woman has at least an equal right to choose to carry her fetus to term as to choose to abort it. In X v United Kingdom27case, the European Court of Human Rights held that the right to life begins at conception, but itis subject to the implied restriction to permit abortion in order to protect s mother's life of

[14] Supra note 15 at 2.
[15] (2017) W.P.(C) 871

health. In ***XYZ v. Union of India and Others***[16], the apex Court held that "If a child is born alive despite attempts at the medical termination of pregnancy, the parents as well as the doctors owe a duty of care to such child. The best interest of the child must be the central consideration in determining how to treat the child. The extreme vulnerability of such child is reason enough to ensure that everything, which is reasonably possible and feasible in the circumstances, must be offered to such child so that it develop into a healthy child." In ***Doe v. Bolton***[17], Roe case was adapted from another case decided on the same day: Doe v. Bolton. The Court said that if the right to abortion cannot be limited by the female state Abortion was done for reasons of maternal health. The Court defined health as "all factors emotional, emotional, psychological, family, and woman's age that are relevant to well-being Patient." This health exception extended the right to abortion to all for whatever reason three trimesters of pregnancy. In ***H. v. Norway***[18], the Supreme Court held that a woman has as much special right to abortion as any other drug. The prospective father has no right to consult for the same. In the case of ***Babla Rai v State of Chattisgarh***[19], the Apex Court stated that in the result, the case law states that a woman has full right to abortion, and no one can take away this right from her. The judiciary is playing an important role in giving women these rights. The right to abortion is a fundamental right to privacy. The Supreme Court thereafter cited its decision in ***Meera Santosh Pal v. Union of India***[20]and the petitioners could undergo medical termination of their pregnancies. In the case of S***hri Bhagwan Katariya and Others v. State of M.P.*** [21], the woman was married to Navneet. The applicant is the younger brother of Navneet. After the complainant conceived, the husband and other family members made an exception, took her for an abortion and had an abortion without her consent. According to us, there is no basis for such doubt. In the first place, none of the decisions, including the decision in austerity grounds, makes any specific reference to the exercise of powers under Article 142 of the Indian Constitution. Secondly, the reference to rulings also does not indicate that the powers under Article 142 of the Constitution were being exercised. Third, the Supreme Court in Sonali Gaikwad issued the following important clarifications in its closing paragraph.

[16] (2019) 3 Bom.(CR) 400.
[17] (1973) 410 U.S. 179.
[18] (1992) 73 DR 155.
[19] (1999) Criminal Appeal No.1156.
[20] (2017) 3 SCC 462.
[21] 2001) 4 MPHT 20 CG.

In ***R (Quintavalle) v. Secretary of State for Health***[22], Lord Bingham of Cornhill stated that "the basic function of the court is to find out what law the Parliament has made that makes sense. But this is not to say that attention should be limited, and a literal interpretation should be given to particular provisions that give rise to difficulty." Such an approach not only promotes excessive probability in drafting, as the draftsman would feel obliged to provide explicitly for every contingency that could possibly arise. This under the banner of allegiance to the will of the Parliament can also lead to desperation of that will, as unjust concentration may lead to the court ignore the purpose which Parliament enacted when it enacted the law. Every statute, other than a pure consolidated statute, is, after all, enacted to make some changes, or to address some problem, or to remove some defect, or to affect some improvement in national life. The function of the court, within the permissible limits of interpretation, is to give effect to the purpose of Parliament. So, the controversial provisions should be read in the context of the statute, and the statute as a whole should be read in the historical context of the situation due to which it was enacted.

In ***Seaford Court Estates Ltd. v. Asher***[23], Lord Denning considered that "a judge, himself believed by the rule that he should look at the language and nothing else, laughed that the draftsman had not provided for this or that, or something or the other is guilty of ambiguity. This would certainly save the judges trouble if the Acts of Parliament were drafted with divine presence and perfect clarity." In the absence of this, when a defect appears a judge cannot simply twist his hands and blame the draftsman. He must work on the constructive task of ascertaining the intent of Parliament, and he must consider not only the language of the law, but also the social conditions which gave rise to it, and the legends were passed to remedy this was, and then he should supplement the written word to give "force and life" to the intent of the legislature. "The mere literal construction of the statute", Lord Selborne in ***Caledonian Railway v. North British Railway***[24], said that "if the intentions of the legislature were opposed, it should not apply and if the term was sufficiently flexible to be accepted some other constructions by which that intention may be better influenced." One of the rules of interpretation is that the courts are competent, in exceptional circumstances, to give full effect, the meaning of the expression in the statute may be enlarged. The intent of that statute,

[22] (2003) UKHL 13.
[23] (1949) 2 KB 481 (CA).
[24] (1881) 6 AC 114, 122.

as manifested by the various provisions contained therein, if the purpose for which the statute is invoked is brought Tit may be prank to him or impose restrictions on it with the intention to curb this.

In ***Abhiram Singh v. C.D. Commachen***[25], the Supreme Court has held that a conflict between a literal interpretation or a purposeful interpretation of a statute or a provision in a statute is perennial. This can only be dealt with when the draftsman makes a lengthy interpretation of drafting legislation, but this will lead to a strange draft that may well turn out unknowingly. The interpreter has, therefore, to consider not only the text of the law, but also the context in which the law was made and the social context in which the law should be interpreted. The Supreme Court has a sanctioned R (Quintavel) case, which observed that the pendulum has moved towards purposeful methods of construction. To put it in Lord Millet's words, "Now we are all purposeful builders". In Abhiram Singh, the Supreme Court has held that another aspect of purposeful interpretation of a statute is related to social contexts. It has been the subject of consideration and encouragement by the Constitution Bench of this Court in ***Union Court of India v. Raghubir Singh in***[26]that decision, this Court approved the idea proposed by the justices. Julius Stone and Dean Roscoe Pound are of the view that "the law should not remain static but should move with time, keeping in mind the social context." It was said that like all theories developed by man for the regulation of social order, the principle of binding precedent is a restitution of legal, perceptual boundaries in its governance, boundaries that arise in the context of the need for oppression in a changing society. The norms sought by a changed social context. The need to adopt law to new urges in society brings home the truth of Holmesian aphrodisiacs that 'the life of the law has not been the argument, it has been the experience', and then when he declared in another study that "the law Always adopting new principles from life" at one end, and "old off" at the other. Clarifying the conceptual import of what Holmes had said, Julius Stone elaborated "that this was the beginning of new extra-legal proposals emerging from experience to serve on campus, or import competing arguments between existing legal proposals, rather than experience-guided choice between legal propositions, that the development of law is determined the breakfast." In Raghubir Singh, the Supreme Court further noted that not

[25] (2017) 2 SCC 629
[26] (2014) 1 SCC 188.

usually, the nature of things has a gravity-heavy inclination to follow the grooves laid down by the preceding law. Yet a sensitive judicial conscience often persuades the mind to search for a different set of more sensitive criteria for a changed social context.

In ***Rex v. Bourne***[27], this famous Case, indicated that an abortion carried out in good faith to preserve the mother's life was lawful. In the leading case of ***Morgentalor Smoling and Scott v. R***[28], the Apex Court considered the physical safety of the pregnant woman. The country's criminal code is required for a pregnant woman who wanted an abortion to apply to a medical committee, which caused delays. The Supreme Court found that the process attacked the guarantee of a person's safety. This subjected the pregnant woman to psychological stress.

In ***Maher v. Roe***[29], the Apex Court held that a state "has the right to determine the price in favor of the birth of a child on abortion and to write that decision by allocation of public funds." Therefore, it may refuse to pay for a nonmedical abortion, even if it funds medical expenses related to conception and delivery under the state's Medicaid program.

In ***Harris v. McRae***[30] the Apex Court upheld the federal "Hyde Amendment", which then halted the lack of funding for only those abortions because the mother's life was in danger, assuming that there is no constitutional right to abortion at public expense for a woman. Since 1994, the Hyde Amendment has allowed funding for abortions where the pregnancy was the result of rape or incest.

In ***Thornburgh v. American College of Obstetricians and Gynecologists***[31], the Apex Court invalidated a Pennsylvania statute that required, inter alia, consenting development, abortion options, and medical risks of abortion, reporting abortions and using a method of abortion by a physician the requirement is most likely. In Rust v. Sullivan56 , The Court upholds federal rules prohibiting family planning clinics that are receiving Title X funding in consultation or refer clients for abortions. In Hill v. Colorado , Colorado law prohibited pavement counseling within 100 feet of a "health care facility", including an abortion clinic, making it illegal for a person to approach within 8 feet, educate, show a sign or Passing a sheet. In a complete

[27] (1939) 1 K.B. 687.
[28] (1988) 1 SCR 30.
[29] (1979) 432 U.S. 464.
[30] (1980) 448 U.S. 297.
[31] (1986) 476 U.S. 747.

reversal of First Amendment case law, the constitutional was found to protect the audience from unsolicited communication, being content neutral and a reasonable restriction on time, place, and manner.

In ***Vijender v. State of Haryana & Others,***[32]the Apex Court stated that "It was, no doubt, not necessary for the petitioner to apply to the Court for permission. All the law requires in a case where a person is a victim of rape is to secure the decision of two doctors committee if the pregnancy is more than 12 weeks." Further, it held that "A rape victim shall not be further traumatized by putting through a needless process of approaching courts for taking permission. The Medical Termination of Pregnancy Act does not contemplate such a procedure at all and the medical personnel before whom the person shows up is bound to respond to an information regarding the complaint of rape...the medical personnel will take the decision regarding the termination and carry out the procedure." In ***Kavita v. State of Haryana & Others***[33], the Court did not allow for the abortion, but did express its great sympathy for the rape survivor. In the light of this forced pregnancy, the Court ordered the hospital to provide her with a private room, free health care, mental health care services, and Rs. 2 lakhs to support her child. In recent judgment ***ABC v. State of Kerala***[34], the High Court of Kerala "allowed for the Medical Termination" of a 23 weeks pregnant "minor rape victim". The Court recorded that continuation of Pregnancy is contrary to the safely and interests of the victim, who is only 15 years old. Justice P.V. Asha held that "as per section 5 of the Medical Termination of Pregnancy Act, 1971 it is allowed to terminate pregnancy beyond the gestation period of 20 weeks". Where it is necessary to save the life of the pregnant woman. In ***Jyoti v. Government of NCT of Delhi***[35], the Delhi High Court recent judgement on Jan 4, 2021 allowed a woman's plea for medical termination of her 25 weeks pregnancy, taking note of a report by AIIMS that survival of the fetus, suffering from serious abnormalities, was unlikely. Justice Navin Chawla said, "I see no reason to deny permission for medical termination of pregnancy. The petition is therefore allowed." Thus, we see that the decisions of the Court depend on the recommendations of the Medical Board. This is the conclusion of the Medical Board on the continuation and termination of pregnancy, which

[32] (2014) W.P. (C) 83
[33] (2015) LP Appeal No.538
[34] (2020) W.P. (C) No.29.
[35] (2020) W.P. (C) No.11248.

becomes the determining factor for the court rather than the reproductive rights of the woman. Therefore, we need to ask the question whether the courts should be completely dependent on MBR? While medical boards can determine a woman's physical health, can it determine a woman's mental health and the conditions she may need to end her pregnancy? Ultimately the right to terminate a pregnancy should not be determined by the woman if her reproductive autonomy is to be protected? In the case of ***Eisenstadt v. Baird***[36], the Apex Court struck down a Massachusetts ban on the sale of contraceptives. Eisenstadt read Griswold to establish a right to contraception, and then ruled that the right must extend to unmarried persons as well. "If the Right to Privacy means anything, the Court wrote, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. But in India the Supreme Court has said that the right to privacy enshrined in Article 21 of the Constitution and the right to abortion can be read from this right. There are various High Court and Supreme Court decisions like Nihal v. Chand Bhagwan Def' or ***Kharak Singh v. State of U.P***[37]and ***Gobind v. State of M.P.*** [38]where the Apex Court showed its awareness of 'individual autonomy' to be of central concern of any system of limited government. The court also held that the 'concept of privacy' must be based on a fundamental right implicit in the concept of liberty. The Supreme Court after referring to the views of American judges on privacy observed that as such our Constitution does not confer any right to privacy but recognized that an unauthorized intrusion into persons home and disturbance caused to him thereby is as it were the violation of Common Law rights of man, an ultimate essential of ordered liberty, if not of the very concept of civilization.' Of course, the right is not absolute, the Court accepts the right to privacy encompassing and protecting the personal intimacies of the family, marriage, motherhood, procreation and childbearing.

[36] (1972) 405 U.S. 438
[37] AIR 1963 SC 1275.
[38] AIR 1975 SC 1378.