

ARE WOMEN BEING DEPRIVED OF THEIR HUMAN RIGHTS? AN INTERSECTION OF PRO-CHOICE AND PRO-LIFE NOTION

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ABSTRACT

International human rights standards have matured notably to recognize that the deprivation of abortion care in various circumstances contravenes women's basic human rights. The plan of action which was taken on at the ICPD associating over 180 countries has an exclusive chapter discussing about the women's empowerment entitled "reproductive rights and reproductive health" expressing the principle of autonomy. The question of whether women are being deprived of their human rights when access to abortion is confined is at the heart of this paper. This study looks at how bodily autonomy has influenced the acceptance of abortion as a fundamental human right claiming that the foundation of both gender equality and personal liberty is the ability to construct reproductive decisions. The pith of this paper is to emphasize that the right to abortion cannot be construed as a mere legal right but as a basic human right per se. This study aims to answer various questions on pro-choice and pro-life ideas and thereby leveraging the pro-women notion.

Key words: Abortion, human rights, pro-choice and pro-life, bodily autonomy.

"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. ... Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world." – Eleanor Roosevelt

I. Introduction:

The courts have long served as a battlefield for the most highly charged and contentious issue of all the time, Abortion. It is commonly defined as the intentional termination of pregnancy with reasonable knowledge that such termination will cause the expulsion of the embryo or fetus. From the biological perspective, abortion cannot be a human right because a human

embryo is considered an early form of human life and there can never be a right to terminate a human life. Contrastingly, according to the American legal philosopher, Ronald Dworkin¹¹⁴⁹ a fetus has no interest before the third trimester. He also says that "not everything that can be destroyed has an interest in not being destroyed". Thus whether abortion is against the interest of a fetus must depend on, if the fetus by itself has interests, but not on whether interests will develop if no abortion takes place. Respect for human life finds an ultimate expression in the bond of love a mother has for her child....whether to have an abortion requires a difficult and a painful moral decision. Chosen motherhood is the real liberation. The choice to

¹¹⁴⁹ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford Univ. Press 1999).

have a child makes the whole experience of motherhood different. Such a decision of the mother to terminate her pregnancy cannot be trespassed and intruded by any other external forces, which violates her Right to privacy, bodily autonomy and even her right to life. Anti-abortionists first decide that abortion is wrong and then look at the issue with their minds already made up. On the other hand, pro-choice activists decide first that every woman has a right to an abortion and then sort through the arguments. In this paper, we bring out well-grounded and valid arguments to support why the Right to Abortion is an inherent part of Human Rights.

II. Abortion As A Human Right:

Each year, nearly 70 million women have unwanted pregnancies¹¹⁵⁰. The impact of these pregnancies will vary immensely depending on such factors as a woman's health, family relationships, economic resources, and the availability of medical care. These and other factors will influence her decision to either carry a pregnancy to term or seek an abortion. Given the complexity of this decision, the only person equipped to make it is the pregnant woman herself.

The UN human rights treaty bodies brought out the relevant standards on human rights issues in respect to abortion:

- The Committee on Economic, Social and Cultural Rights ('CESCR'),
- The Committee on the Rights of Persons with Disabilities ('CRPD Committee'),
- The Committee on the Elimination of Discrimination against Women ('CEDAW Committee') and
- The Human Rights Committee ('CCPR').

While the initial point of their evaluation and analysis were different, they all urge that this is an issue of women's human rights to life and to bodily integrity, women's freedom from torture

and ill treatment, and women's rights to autonomy and self-determination, privacy, health, equality before the law and equal protection of the law, and non-discrimination.

A. Right To Gender Equality:

The Right to Gender Equality is a fundamental principle of human rights law. The restrictive abortion laws, though not directly place men in a superior position, straightaway affect the fundamental rights of women, thereby positioning them in a more disadvantaged and inferior status. Freedom from discrimination in the enjoyment of secured human rights is made certain in every major Human Rights Instrument. Article 2 of UDHR, Article 2.1 of civil and political rights covenant, Article 2.2 of Economic, social, and cultural rights covenant, Article 1 and 3 of CEDAW ensures the right to be free from gender discrimination.

Article 1 of the CEDAW is as follows: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Article clearly states that any restriction made on the basis of sex that has the effect or purpose of nullifying the recognition of women shall constitute a discrimination against women. The term "discrimination against women" covers laws that have either the "effect" or the "purpose" of halting the women from exercising any of her human rights or fundamental freedoms in view of equality with men. Laws that restrict abortion have both the "effect" and "purpose" of preventing them. On this regard, the restrictive abortion laws do impair the fundamental freedom and human rights of women to decide on their bodily autonomy and their right to prioritise their own self. Laws that disagree with the access to

¹¹⁵⁰Global Health Council, *Promises to Keep: The Toll of Unwanted Pregnancies on Women's Lives in the Developing World 3* (2002).

abortion, regardless of what their stated objectives are, have the discriminatory purpose of both denigrating and undermining women's capacity to make amenable decisions about their bodies and their lives.

B. Right To Life, Liberty And Bodily Autonomy:

Article 3 of the UDHR and Articles 6.1 and 9.1 of ICCPR guarantees every human being the inherent right to life, liberty and bodily autonomy. In 1971, philosopher Judith Thompson published a bold strategy referred to as the violinist argument. She asks the readers to consider this hypothetical scenario,

"Imagine that you wake up the in morning and find yourself in the hospital bed with tubes surgically implanted into your back connecting you to some man you have never seen before. This man, it turns out, is the famous violinist who suffers from some rare and fatal kidney disease. For some reason, the only effective treatment is for him to be hooked up to a live human being. You protest to the doctor who apologized for the inconvenience, but now that you are attached, you can't be disconnected from the violinist because he would immediately die."

Now, some people will latch on to the idea to stay hooked up to the violinist and others might even deny the same. One cannot be called callous and selfish to unplug themselves from the violinist for the reason that he will die. But certainly, it is their right to unplug themselves and it would be wrong for anyone to prevent them from doing so.

Thomson's argument hinges on the idea that the right to life does not include the right to use another person's body to sustain one's own life. The decision of the pregnant woman to terminate her pregnancy is not with the intention to kill or destroy the fetus but only to relieve herself by denying the fetus from using her body. But she can't rightfully strangle a baby after she has given birth to it, be it for any reasons and grounds.

The Human Rights Committee has confirmed that "although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant"¹⁵¹. The Committee on the Elimination of Discrimination Against Women observed that, "Criminal regulation of abortion serves no known deterrent value. When faced with restricted access women often engage in clandestine abortions including self-administering abortifacients, at risk to their life and health"¹⁵².

The UN Human Rights Committee, in its General Comment 36 (Right to Life) did not preclude the possibility of adoption of regulations on voluntary terminations of pregnancies, but noted that restrictions in access to abortion "must not, inter alia, jeopardise their [women or girls] lives, subject them to physical or mental pain or suffering which violates Article 7, discriminate against them or arbitrarily interfere with their privacy"¹⁵³.

Article 5 of the UDHR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Ouiam* is from a rural family living in poverty. She was into her marriage life by the age of 16 after which she had a child. Shortly after, her husband died as a result of a car accident. Twice, she entered into relationships with other men, for "self-protection" and "protection for her child". Consequently, she became pregnant from each of them. Both times she sought and was unable to obtain an abortion. In Morocco abortion is criminalised in almost all circumstances and clandestine abortions are unaffordable for women living in poverty. Unfortunately, Ouiam's last attempt to have an

¹⁵¹ Human Rights Comm., *General Comment No. 36, Article 6: Right to Life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

¹⁵² Comm. on the Elimination of Discrimination Against Women, *Communication No. 8/2005*, ¶¶ 42, 59, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018).

¹⁵³ Human Rights Comm., *General Comment No. 36, Article 6: Right to Life*, ¶¶ 8, 49, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) (addressing the right to abortion within the scope of the right to life).

abortion failed, after which she filed a complaint that the biological father refused to acknowledge paternity. After this, it was Ouiam, who was sentenced to imprisonment, as a consequence of which she was unable to even get back to her children and spend the remaining 10 years in the prison.

This case study serves the best illustration to the inhumane, torturous scenarios that still prevail in the globe, even in this 21st century; the entire callous actions can be brought to an end by bringing the right set of laws and regulations throughout.

C. Right To Privacy:

“This right to privacy.... founded in the fourteenth amendment’s concept of personal liberty... is broad enough to encompass a women’s decision whether or not to terminate her pregnancy.”¹¹⁵⁴ (ROE VS. WADE, 1973)

Article 17.1 of the ICCPR states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

The decision regarding the woman’s reproductive health and capacity lies within her personal and private arena as eventually, it is only in her body, the fetus gets implanted, and where the physical, psychological, mental and other aftermaths ought to be borne and endured by her.

Human rights treaty bodies have found that denying or restricting access to abortion undermines the reproductive autonomy of a woman, and it violates her rights to privacy and equality. The HRC has emphasized that a woman’s decision to go for a voluntary termination of pregnancy falls within the ambit of the right to privacy¹¹⁵⁵. UN experts have also noted that denying abortion not only contravene human rights law but also “negate

a woman’s autonomy in decision-making about her own body”¹¹⁵⁶. Moreover, the HRC has found that failure to act in conformity with a woman’s decision to undergo a lawful abortion is a violation of the right to privacy. Regardless of a woman’s reasons for seeking an abortion, her right to abort a fetus is based on her primary right of privacy¹¹⁵⁷, to be free from intrusions of her body and liberty by other parties.

In *Roe v. Wade*, the Apex court applied the core fundamental and constitutional principle of privacy and liberty on abortion and held that the right to privacy encompasses the right to abortion. Justice Alito in *Dobbs* case reasoned the decision by stating that “The right to abortion does not arise from the constitution because it is not deeply rooted in the nation’s history” Judges that are more conservative restricts the right to privacy more strongly. According to them, the right to privacy as a fundamental right should be understood as a “natural right” and therefore must be interlinked in the tradition and history of the U.S. Unfortunately, this decision is a step backward in the abortion jurisprudence. Firstly, because the court employed a backward-looking interpretation on the right to privacy. Secondly, the Supreme court had been moving forward from the conservative interpretation of right to privacy since *Lawrence vs. Texas*, 2003. But, the decision in *Dobbs* down-turned and marked it as the darkest days in the American jurisprudence. A clearer and more refined definition on the right to privacy in this case would have prevented a departure from the track of the jurisprudence that was built for over 50 years. This *Dobbs*’ decision is a clear-cut legal regression which is already posing immense consequences.

¹¹⁵⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹⁵⁵ Human Rights Comm., *Mellet v. Ireland*, Comm’n No. 2324/2013, ¶¶ ___, U.N. Doc. CCPR/C/116/D/2324/2013 (2016). See also Human Rights Comm., *L.M.R. v. Argentina*, Comm’n No. 1608/2007, ¶¶ ___, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

¹¹⁵⁶ Office of the High Comm’r for Human Rights, “*Unsafe Abortion Is Still Killing Tens of Thousands of Women Around the World’ – UN Rights Experts Warn*” (Sept. 27, 2016), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E>

¹¹⁵⁷ Human Rights Comm., *K.L. v. Peru*, Comm’n No. 1153/2003, ¶¶ ___, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

We are told [by the Court] that privacy encompasses only those "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'" that it insulates decisions "important" to a person's destiny, and that it applies to "matters... fundamentally affecting a person." Perhaps the best interpretation of these formulations is that privacy is like obscenity: The justices might not be able to say what privacy is, but they know it when they see it.

D. The Right To Health, Reproductive Health, And Family Planning:

The article 12.1 of the ICESCR recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health and articles 12.1 and 14.2(b) of the women's convention provides that access to adequate health care facilities including the right to avail such healthcare services should be ensured by the state.

Furthermore, Article 16.1(e) of the CEDAW, states as follows: "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights"

The WHO defines "health" as "a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity." When a pregnancy is undesired, its continuation can take a heavy toll on a woman's physical and emotional well-being. The CEDAW Committee's General Recommendation 35 on gender-based violence against women acknowledged that criminalization, denial or delay of safe abortion and post-abortion care, as not only a violation of women's sexual and reproductive health rights, but also a "forms of gender-based violence that ... may amount to torture or cruel, inhuman or degrading treatment."¹¹⁵⁸

E. Case Study:

Manuela Vs El Salvador (2021)¹¹⁵⁹: In this landmark ruling, the Inter American Court of Human Rights, for the first time, established standards throughout the region (includes the 35 countries which were OAS State members) concerning the rights on abortion. The Court deemed El Salvador responsible for the death of a Salvadoran woman, Manuela, who in 2008 was prejudicially sentenced to 30 years of imprisonment for aggravated homicide after suffering an 'obstetric emergency' that resulted in her pregnancy loss. Manuela died imprisoned two years after, from cancer, after receiving inadequate and poor medical diagnosis and treatment. The State was found to have violated Manuela's rights to life, health, judicial protections and guarantees, freedom from discrimination and gender violence, and other rights.

"This is the reality that we have lived, and I am not alone" said Teodora del Carmen Vasquez, who ended up serving more than 10 years, accused of killing her baby, for what she actually claims it a stillbirth. She adds on that "from the moment we get pregnant, we become incubators" which is an intensely striking sentence, defining their agony and helplessness.

The recognition of Abortion rights is well grounded in the established principles of the Indian Constitution and International Human Rights Law. The right to life extends beyond mere animal existence. It incorporates the right to live with dignity, personal liberty and bodily autonomy. The right to privacy protects decisional autonomy and ensures the choices relating to pregnancy remain within the realm of personal liberty. The right to health requires the state to provide safe and accessible abortion. Finally, gender equality cannot be realized if individuals are deprived of the reproductive choices, all these being a human right, certainly abortion is also a human right which should not be denied to women.

¹¹⁵⁸ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (2017).

¹¹⁵⁹ Case of *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441 (Nov. 2, 2021).

III. Pro Life vs Pro Choice:

Francis J. Beckwith, an American philosopher in his book “defending life”¹¹⁶⁰ maintains a pro-life position by arguing that:

1. The unborn entity, from the moment of conception, is full-fledged member of human community.
2. It is prima facie morally wrong to kill any member of that community.

The first argument by Beckwith becomes completely unsatisfactory as, in the first hand, the unborn entity neither has the status of personhood nor becomes a part of the human community. The right to life being a human right cannot be vested upon a foetus as it is an unborn entity. This argument is well supported by Article 1 of the UDHR which states that “All human beings are born free and equal in dignity and rights” This essentially means that Human rights including the right to life is a born right. The fetus being an unborn person, is not certainly supported by the very first Article of the Universal Declaration of Human Rights, which owns the word ‘born free’ implying that the human rights, including the right to life, begin at birth.

Advancing to the second argument of Beckwith which talks about the ‘morally wrong’ notion, it is primarily put forward that, morality, in general is a subjective topic and is deeply influenced by ones own values, ideologies, their adjoining environment and other external factors. With that being said, the line of reasoning discussing on morality, cannot stand firm. Moreover, it is right to say that a phenomenon can be “morally problematic yet morally permissible” provided it causes harm to no human being and causes no interference and disruption to the society. The legal sphere revolves around a person’s individual liberty while morality is concerned with the collective conceptions of what is good and evil. The influential legal theorist of the 20th century, H.L.A.Hart, argued a clear separation between law and morality, supported by John

Rawls, Susan Wolf and many others, whose separation theory was also approached by various sociological jurists of the 19th century including Kelson, Roscoe Pound, etc.

The association of sex with pregnancy is virtually a cultural icon. Pregnancy is what happens to a woman when she has intercourse with a man and his sperm fertilizes her egg. Accordingly, a key criterion in determining a woman’s right to terminate her pregnancy is whether she consented to the sexual intercourse assumed to have caused it. If she did not consent to sexual intercourse, as in rape or incest, then in the eyes of the law she is given greater latitude for an abortion (be it the case of rape or incest, in accordance with the pro-life notion of the anti abortionists, they do not look into the fact that the foetal termination process advanced in those circumstances too, is the halting of the innocent and pure lives) but if she did consent to sexual intercourse, she is given no other choice, than to bear the foetus, in case of fertilisation. But it is imperative here that consent to sexual intercourse does not per se mean that pregnancy is consented. The use of contraceptives during a sexual intercourse by its very nature indicates that there is no consent to pregnancy. This reasoning is braced by the argument of Thomson who makes a distinction between consent to sex and consent to pregnancy by referring to a scenario where, one opens a window of their home to enjoy chill breeze but does not expect a burglar to rob their home through the window. Even if the burglar robs the house, the interest of the one, who had no knowledge of such act, is strived to be protected. The same goes for the pregnant woman and where the development of the foetus was an unforeseen incident. Medically, a normal pregnancy is an extraordinary condition, but the legal significance of the extraordinary way in which a fetus transforms a woman’s body in even a normal pregnancy is that it is an extraordinary injury if a woman does not consent to pregnancy.

¹¹⁶⁰ Francis J. Beckwith, *Defending Life: A Moral and Legal Case Against Abortion Choice* (Cambridge Univ. Press 2007).

IV. Conclusion:

The purpose of this final chapter is to offer an insight on the conclusion of the arguments in the paper. It is concluded that

1. Denial of abortion rights is a violation of human rights.
2. The rights of the women has an upper hand than the rights of the foetus as rights cannot be vested upon an unborn entity.

It is high time that the world moves towards consent regime from choice regime. The principle that using another person's body to preserve, protect, and defend one's own requires the consent of that person is the basic precept of this paper. Reframing women's reproductive rights on the basis of their consent to pregnancy, rather than merely their right to choose an abortion is the heart of this paper. It is the move from choice to consent that gets us "from here to there" securing for all women the right to an abortion.

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