

AN ANALYSIS OF ABORTION IN INDIA

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ABSTRACT

This study deals with nature of the offence which is caused by the act and it explains the circumstances which constitutes offence under ipc (culpable homicide / murder). It is about abortion in India under certain conditions and circumstances abortion in India that can be enforceable by law only up to 20 weeks of pregnancy , which is defined as the pregnancy or continuance of the pregnancy would amount to death of the women which would cause risk to the life of women or causing grave injury of health or when there is a substantial risk whether the child born could suffer from such physical or mental abnormalities as to be physically challenged, women can be terminate her pregnancy beyond the permissible 20 weeks limit which is prescribed under the medical termination of pregnancy Act, 1971. When the abortion leads to female foeticide or with the intention to cause death then it is murder . When the Act is caused due to the negligence of abortionist then that would amount to culpable homicide. This study provides clear data about abortion in India and international instruments are also mentioned below.

Keywords: abortion, substantial risk, physical or mental abnormalities, murder, culpable homicide.

INTRODUCTION

The law enacted in india and which has been written in accordance with British law, it declared that the induced abortion as unlawful & also Induced abortion is defined which can be said as "causing miscarriage". Punishment for abortion practitioners in India is three years in prison or fine or both and if any woman is availing of abortion then the penalty would be either seven years in prison or a fine or both. The only exception to this is when

the abortion is induced which is to save the life of woman, the existence of unlawful abortions are all combined with the idea that the abortion could also be a mode to control population, which causes the government to rethink about the law. In the year of 1964, Central Family Planning Board of the Government met and also formed a committee in order to examine about the subject of abortion from the terms of medical, legal, social, and moral also standpoints. The Abortion Committee, which is headed by Shantilal Shah has submitted his report in the year December 1966. The report is also suggested that penal law was too restrictive & recommended the exemptions where abortion was permissible increased & liberalised. Most of the report's and the suggestions were also included in Medical Termination of Pregnancy Act. abortion laws fall under Medical Termination of Pregnancy Act, which is enacted by Parliament in year of 1971 with intention of minimising the cause of unlawful abortion and also consequent maternal mortality. MTP Act has come into an effect from the year 1 April 1972 & which was also amended in years of 1975 & 2002. Pregnancies which are not exceeding twelve weeks can be terminated which is based completely on one opinion that is formed in good faith. If in case pregnancy exceeds twelve weeks but which is not less than twenty week the termination requires the opinion of 2 doctors. Medical Termination of Pregnancy Act of India clearly provides the condition which is pregnancy can end or be aborted, then those people who are all qualified in conducting abortion and also place of execution..

Aim of the study:

1. To analyse whether abortion is culpable homicide or murder
2. To know the circumstances for abortion in India with case laws

Research methodology

1. This study is a non doctrinal research
2. Secondary data are used

Source of study

List of journals, articles, books are used for reference purpose in this study .

ABORTION IS A CULPABLE HOMICIDE OR MURDER

ABORTION IN INDIA

Murder

When an act of murder is done with intention to cause death of any person and which falls under offence of murder and the essential criteria is mens rea should be present in murder which should be very high. Mens rea has to be in the order that should result in death

of a person that should not only cause bodily harm or grievous injury without any intention to cause death and there are also few circumstances that abortion can also be considered as an offence of murder and basic right of human is right to life which is applicable for the child which is not born. Infringing such basic right with intention to cause death is considered to be murder . (Eg:sex selection abortion)¹

Culpable homicide

Culpable homicide consists of two types that are voluntary culpable homicide & the second one is involuntary culpable homicide and where voluntary culpable homicide is something where there is intention for murder which is clearly present but the circumstances of the act makes the crime as culpable homicide. Incase of involuntary homicide the intention for murder is not present but independent intention for Act is present and these happenings make it to be culpable homicide and It may also be a legal act or illegal act which will depend wholly upon the facts and circumstances of the case . abortion can also be considered culpable homicide where the intention is absent . In these cases the liability will completely fall on the abortionist and not the women.

Abortion cannot be taken as culpable homicide otherwise as murder when it is done under the given circumstances which is prescribed under the Act .²

Circumstances for abortion:

The Indian abortion law will fall under the Medical Termination of Pregnancy Act, which was enacted by Parliament of India in the year 1971 with the whole intention of decreasing the incidence of unlawful abortion & also consequent maternal mortality . The Act has come into effect from 1 April 1972 and was also amended in the following years that is 1975 and 2002.³Pregnancies which are not exceeding 12 weeks will not terminate that is based on a single opinion which is formed in good faith. In case of pregnancies which exceeds upto 12 weeks but which is not less than twenty weeks, opinion of two doctors is required for termination.⁴ The Medical Termination of Pregnancy Act of India which clearly stated few conditions where pregnancy can also be ended or aborted, the person who are qualified to do abortion and place of abortion . Some of the followings are as follows:

¹ http://www.legalserviceindia.com/articles/adp_tion.htm

² <http://indianexpress.com/article/gender/whats-wrong-with-indias-abortion-laws/>

³ <http://www.creaworld.org/abortthestigma/6-things-you-need-know-about-mtp-act>

⁴ <https://blog.ipleaders.in/abortion-law-policy-legal-framework-india/amp/>

- I. Women whose physical or mental health were in danger because of the pregnancy
- II. Women facing the birth which would be potentially handicapped or otherwise malformed children
- III. Rape
- IV. Pregnancy in girls who are unmarried under age of 18 with the consent of the guardian
- V. Pregnancy in lunatics with the acceptance of a guardian
- VI. Pregnancy in result of failure in sterilisation⁵

Laws governing the Right to Abortion in India, woman's right to terminate pregnancy and rights of the unborn:

Human Rights are the right, which are available to every human without any partiality of any kind. Recognition of the dignity which is inherent and which is of equal & also rights are inalienable of all the members of family which is the foundation of freedom in family. The important right of Human is right to life under article 21. It is the superior right from which no derogation is allowed and is inalienable. ⁶Article 6(1) of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of the life. there are some other controversial issues that are related to this supreme inherent right. One of such issue is question of Right to abort. Among some other rights of the women, all mothers has a right to abortion, which is universal right. But all the rights of mother are balanced with rights of unborn child. Previous right to abort was not allowed and it was opposed by society. ⁷The termination of pregnancy is termed as a murder of the foetus. But because of change in time & the technology, in the present time this right is legally approved by most of the nations after the decision in the case of Roe Vs Wade by the Supreme Court of US. But contradictions are present & people believe that it has to be abolished. ⁸

International Instruments Relating Right To Abortion:

Art 1 of American Declaration of Human rights and American Commission of Human Rights says that the abortion has been legalised until the end of First trimester that is Right to

⁵ https://www.huffingtonpost.in/2017/08/04/why-is-india-s-abortion-law-failing-its-women-on-so-many-fronts_a_23063014/

⁶ <https://thewire.in/gender/abortion-pregnancy-law-india>

⁷ <https://www.theatlantic.com/past/docs/issues/97may/abortex.htm>

⁸ <https://edition.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html>

life is been protected from moment of the conception by the Article 6(1) of ICCPR and Art 2 of the European Convention of Human Rights & Art 4 of African Charter of Human rights and also the right of the people. But are silent on issue that when will life begin . But also the interpretation forced to believe the child is not protected from time of inception. right to life of the foetus has balanced with rights of mother and International courts and also the tribunals did not address the difficult philosophical issues of when the life would begin , but it is focused on the meaning of a language which is used in relevant treaty .. They in general held that the reference made to every human being or all the are not included as an unborn foetus.right of woman to her life been the basis on which number of the international bodies upheld right of woman to abort the child .⁹right to the freedom of expression & also to access to information that is been used to argue for right of the women to receive all the information which is about abortion options. right to abort may is also based on right of the woman which is to decide freely and also responsibly on number and also spacing of her own children.In the month of January 2006 CBS which is a News poll in United States ,which asked about people's personal feeling about abortion, 27% of the people said that the abortion has to be "permitted in all the cases," 15% of the people states that it has to be "permitted, but which is subject to the greater restrictions which is now," 33% of the population said which has to be "permitted only in the cases like rape and incest or is to save the life of the women ," 17% of the population said it should be permitted to save the life," 5% of people said it should not be permitted. In the month of April 2006 poll on the case Roe v Wade which made abortion up to 3 month of legal pregnancy ", in this almost 49% of the respondents indicated in favor.¹⁰

ABORTION AND MURDER

Abortion , murder of adult are same in which both involve the intention of killing of an innocent. But there are some essential differences between abortion and in case of murder. The initial difference has to be with the culpability in terms of the knowledge and also in terms of voluntary act. If a person kills his auto mechanic, is implausible in extreme for that person to try to excuse his act by claiming He did not realize that repairman was innocent human . By contrast and also in many cases of abortion, the woman who is obtaining abortion does not believe her authorization is terminating the life of innocent human . It is that

⁹ <http://thefederalist.com/2017/04/17/shouldnt-punish-mothers-harshly-abortion-even-though-murder/>

¹⁰ <http://www.chicagotribune.com/sns-abortion-timeline-story.html>

ignorance is culpable and that ignorance is inculpable, but still the ignorance of identity of victim is never involved in these typical cases of murder.¹¹

Secondly, the voluntary essentials of the act is mitigated by fear and anxiety on part of the woman, which points the voluntariness of act. When mother kill her newborn, as it happens sometimes, it is not usual for the punishment be mitigated in light of subjective factors, as post-partum depression, which led to killing.¹² By the way of similar reasoning, the mothers who authorise abortion often motivated by fear, which minimises the voluntariness of the act. In cases of abortion, unlike typical cases of murder and duress is been involved in which the father of the child and others, pressures the woman to get an abortion which she would have ever got the news of the pregnancy had been greeted by all with joy.

Third, the victim of abortion is although fundamentally equal and it is not equal in all the respects to the victim in case of typical murder.¹³ In the act of murder, the victim's death creates negative impact among the victim's relatives and friends. The victim can no longer carry out his or her responsibilities at work or at home. The act involved in murder also make other people to fear for their lives. The murder brings loss for all who have contributed to the life of victim including parents, caregivers, and teachers who have helped the victim to gain maturity.

Section 299: Culpable homicide

This deals with culpable homicide. Which means that if any person cause death by doing any act with an intention of causing death or the intention to cause bodily injury as it is likely to cause death and with the knowledge that he is likely to cause death and commits the offence of culpable homicide. These acts comprises use of the poisonous substances, other than conventional weapons of assault.

Section 300: Murder

The murder is dispensed in this section that is analogous to definition of Culpable Homicide under section 299 of IPC and it puts many emphasis on deliberate intention or

¹¹ <https://www.history.com/news/the-criminalization-of-abortion-began-as-a-business-tactic>

¹² <https://www.commonwealmagazine.org/abortion-and-murder-again>

¹³ <http://bigthink.com/articles/re-re-abortion-is-murder>

premeditation. Punishment for culpable homicide be any term of imprisonment to a maximum of life imprisonment , but for murder it can extend to imposition of death penalty, minimum sentence is life imprisonment. The detection of intention in these cases are the most difficult to differentiate and bring justice.

Section 304A: death by negligence

This section deals with the death which is caused by any negligent act and states, Whoever causes death of a person by doing a negligent act which is not amounting to culpable homicide and be punished with imprisonment for 2 years or fine or both and hence the act of negligence is with reference to handling and storage of poisonous substance, other than carelessness in the use of vehicle and machinery. For example, if chemist leaves storeroom which contains toxic drugs not locked and erroneously a child consumes the drugs, out of curiosity, which leads to his death. In these circumstances the chemist is held guilty under the section. Besides Section 304A these cases may attract Section 284 of IPC.

Conclusion

This study concludes that there is no meaning in conferring a right to the mother to destroy the foetus. Her right is limited to have a termination of pregnancy. It is also said that delivering 20 million babies annually would be a greater strain on the nations medical services and economic resources than, say, performing one to five million abortions a year. The law has to take care of the liberty of the mother as well as the unborn. As a hospitable community we should seek ways of providing support for lonely and frightened mothers, and for lonely and abandoned 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. Abolitionists believe that anyone who performs or procures an abortion after abortion is abolished as murder ought to be tried and convicted of murder in a court of law. While such a position is unpopular, it is far more consistent and demonstrably less ageist than the alternative “pro-life” positions on the matter. Yet making such differentiations is consistent with holding that in terms of basic human dignity, the president, the regular citizen, and the human fetus have equal basic rights. So it is not “inconsistent” for a defender of prenatal human beings to embrace lesser penalties for abortion than for murder of post-natal human beings. Abortion can be considered as murder or culpable homicide based on the facts and circumstances of the case and interpretation of

law plays important role in deciding the case . When the abortion is done under the circumstances mentioned then the act(abortion) doesn't constitute an offence .

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