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Abortion Laws: Exploring the evolution of abortion laws in various societies

Abstract:

This paper explores the evolution of abortion laws across the various societies. It examines the changes from ancient civilizations to modern times. It analyzes various historical practices and perspectives on abortion and how the cultural, religious, and legal attitudes have changed. It also examines the provisions in IPC regarding abortion, the MTP Act, the Abortion Act, and the evolution of abortion rights in India, the US, and the UK while also examining the recent judgment of Dobbs v. Jackson and how it can affect the future of abortion rights in other nations. The paper ultimately focuses on women's right to abortion and societal control over it.

Introduction:

Birth and death are the two truths of life. Life begins with one's birth and ends with one's death. We people have always tried to influence these in one way or another and have also tried to regulate it as well. One thing that has always been questioned is Abortion.

Abortion is the termination of a pregnancy through a surgical or pharmacological procedure[1].

Be it religion, customs, or the society itself, all have tried to control the practice of abortion. With time these views have changed and evolved and thus in the modern world we finally have abortion laws. To further understand these laws we need to look into the past, so as to find out why and how they were developed and where we stand with our current laws.

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[1] Oxford Bibliographies, https://www.oxfordbibliographies.com/display/document/obo-9780199756797/obo-9780199756797-0090.xml?rskey=tygpVh&result=1 (Last visited on 6 March 2024)

The ancient abortion practices:

Abortion as a concept can be said to be as old as humans themselves. While we did not have modern medicine or good surgical methods to perform abortion, we have found quite a lot of evidence in the form of text and material that depict the practice of abortion in the pre-modern era.

The first abortion which we have found records of dates back to 1550 BCE. It was mentioned in Ebers Papyrus an ancient Egyptian medical text[2]. Various other cultures also showed that abortion occurred but not extensively and was majorly a discouraged practice. An 8th-century Sanskrit text instructs women wishing to conduct an abortion to sit over a pot of steam or stewed onions[3]. The technique of massage abortion which involves the application of pressure to the pregnant abdomen has been practiced in Southeast Asia for centuries. One decoration at the temple of Angkor Wat in Cambodia which dates c. 1150, shows a demon performing such kind of abortion on a woman who has been sent to the underworld[4].

Japanese documents have been found that show that abortion became prevalent in the Edo period, especially among the peasant class due to the various famines and the high taxes which made life extremely difficult for families with a large number of children.

The native Māori people of New Zealand have shown records of terminated pregnancies through the use of drugs, ceremonial methods, and even the use of girding of the abdomen with a belt. However, other sources claim that the Māori people did not practice abortion due to the fear of Makutu (witchcraft).

Though it can be seen that abortion was indeed practiced, what matters more is to understand how society and the people viewed it, as a practice's acceptance by society is entirely different from it being practiced and tolerated.

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[2] Katie Hunt, *Abortion is ancient history: Long before Roe, women terminated pregnancies,* CNN Health (Last visited on 6th March 2024), https://edition.cnn.com/2023/06/23/health/abortion-is-ancient-history-and-that-matters-today-scn/index.html

[3] *Id*

[4] Geroge Devereux, A study of abortion in primitive societies, (New York:International Universities Press 1976)

The ancient abortion views:

Our current understanding of Greek and Roman practice and method of abortion comes from the early classical texts. Abortion although it happened in the ancient Greek civilization, was not particularly considered a crime nor was it punished, at least not legally. Plato mentions a midwife's ability to induce abortion in the early stages of the pregnancy in Theaetetus[5].

The Stoic school of thought was of the belief that the fetus possessed a plantlike nature and only attained the status of an animal upon birth when it first drew breath. Due to this reasoning, they found the act of abortion to be morally acceptable.

Aristotle's argument about abortion was rather subtle with the only difference between lawful and unlawful abortion being the ability to sense and live in an organism. Before this point, Aristotle did not consider abortion as a termination of life. He said that a male child acquired a human soul at 40 days, while females did so at 90 days before which point it had vegetative attributes and after it had animal attributes.

The swearing of the Hippocratic Oath by the doctor known as Hippocrates banned pessaries from inducing abortions. Some explanations have gone beyond pessaries because of their alleged side effects while others claim that it just discouraged doctors from using dangerous methods to carry out abortions.

Scribonius Largus, a Roman medical writer understood the prohibition more widely as including all drugs that terminated pregnancies. However, there are other opinions suggesting that Hippocrates intended to stop doctors from performing risky abortion techniques.

Soranus, a famous ancient Greek physician, admitted that in the medical field, there were two thoughts on abortion. On one hand were those who adhered to the Hippocratic Oath and abstained from performing abortions and on the other was Soranus's position of using abortion as a tool for

[5] Plato, Theaetetus, (EbooksLib 2015)

solving medical problems or dealing with emotional instability which he explained in his book "Gynecology"[6].

The punishment of abortion in the Roman Republic primarily resulted from infringement on paternal rights and not regarding the fetus as a legal person. Fetus did not have personhood under Stoic influence hence rationalizing leniency towards abortionist punishment. However, two emperors Septimius Severus and Caracalla banned abortions temporarily in 211 AD on account of this being against parental rights with temporary exile as a penalty.

Legal collections from the third century such as Pauline Sentences attributed to Julius Paulus were concerned about penalties for giving abortifacients. Nonetheless, there were penalties imposed but these differed depending on the social status of the individuals involved. Despite legal control, however, limited social stigma was attached to performing an abortion.

According to the Roman jurist Ulpian an unborn child is treated as if already born when it comes to matters of inheritance. However, despite this legal recognition, abortion persisted in Roman society without significant social stigma.

Though the ancient Greeks might not have criminalized abortion, they relied upon the herb silphium as an abortifacient and contraceptive. The plant was the chief export of Cyrene and was driven to extinction because of it. Silphium was so central to the Cyrenian economy that most of its coins were embossed with an image of the plant. This shows just how prevalent and accepted the practice of abortion was at that time.

Both abortion and infanticide were considered murder in early Christian writings such as the Didache[7], which existed before 100 AD. A theologian of the 2nd and 3rd century Tertullian, allowed for a certain situation where abortion might be accepted if the woman could die due to an abnormal position of the fetus. Abortion of a formed fetus was equated with murder by St Augustine in his Enchiridion, but his views on earlier-stage abortions were similar to Aristotle's

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[6] Soranus and Owsei Temkin, Soranus' gynecology, (Johns Hopkins University Press, Baltimore, 1991)
[7] George Cantrell Alen, The Didache : or, The Teaching of the Twelve Apostles, (Astolat Press, London, 1903)

and he agreed that it was impossible to say what would happen to undeveloped fetuses at resurrection during the second coming.

The Leges Henrici Primi in approximately 1115 BCE prescribed compensation for causing a miscarriage and inflicted penance on women who had aborted their pregnancies, with the gravity of the offense depending on the time of pregnancy and the motive for terminating it. Midwives accused of carrying out abortions were charged with witchcraft, as illustrated by Malleus Maleficarum in 1487.

In 1591, Pope Gregory XIV published regulations in the apostolic constitution Sedes Apostolica limiting the punishment for abortion to cases involving a "formed" fetus. He differentiated between abortion of an "inanimate" (soulless) fetus and homicide, opting for less severe penalties for early abortions. These regulations remained in effect for nearly three centuries until revised by Pius IX in 1869.

On the other hand, the Vedic and smrti laws of ancient India supported the preservation of caste for the three upper castes and imposed severe punishment for inducing abortion. Abortion is referred to as "Garbhahatya" (pregnancy destruction) and "Bhurnahatya" (fetus murder) in ancient Hindu texts. The voluntary act of killing is being indicated by the term ‘Hatya’ found in both words which means murder. Another Sanskrit word for abortion is “bhrunahan” meaning ‘Killer of an Embryo’ or ‘Killer of a learned Brahmin’ thus showing the severity of the act as Brahmins are considered to be the highest of the castes and killing one is considered to be one of the most terrible sins that any person can commit. Ancient Hindu texts consider it one of the worst sins, unlike involuntary miscarriage which was seen as morally neutral as one did not commit it voluntarily and thus was a part of nature or was considered to be God’s will. The Puranas describe the karma law, the law of action and reaction which states that good deeds beget good and bad deeds beget bad, which further states that abortion stands in contradiction to the progression and cycle of a soul. In Hinduism, abortion equates to killing a human since an embryo or foetus is considered a live person at conception. Women who induced abortion had to face the harshest punishments

including loss of caste whereby they could no longer access resources, their position in society would be lost and even this affected them after death.[8]

The legal view of India with reference to the USA and the UK:

In India, the first law to actively control and prohibit abortion was the Indian Penal Code (IPC)[9]. Sections 312 to 316 of the IPC address laws related to abortion and miscarriage.

Section 312[10] outlines penalties for causing a miscarriage, with imprisonment up to three years and a fine, further increasing to seven years if the woman is quick with the child which means that if the child has started showing movement inside the womb then it is considered to be a more heinous crime as it shows that the child is no more vegetative. Even a woman who causes a miscarriage or consents to one can face punishment according to this law, except in cases where the act is performed in good faith to save the woman's life. Section 313[11] provides penalties for causing a miscarriage without the woman's consent, that is causing the termination of pregnancy without the woman’s consent by any means. Section 314[12] addresses intentions to cause miscarriage, both carrying significant prison terms.

Sections 315[13] and 316[14] deal with acts akin to miscarriage but involve the death of a born or unborn child at the time of birth. Section 315 penalizes acts aimed at preventing the child from being born alive or causing its death after birth, except when done in good faith to save the mother's life. It is very important to distinguish between foeticide: killing a fully developed fetus before birth, and infanticide: killing immediately after birth. These offenses are considered cognizable, non-bailable, and non-compoundable.

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[8] Bhujel, Pallav, RIGHT TO ABORTION UNDER ANCIENT INDIAN JURISPRUDENCE AND CONTEMPORARY LEGAL SYSTEM: A COMPARATIVE STUDY, Education and Society (2022)
[9] Indian Penal Code
[10] Indian Penal Code, s. 312
[11] Indian Penal Code, s. 313
[12] Indian Penal Code, s. 314
[13] Indian Penal Code, s. 315
[14] Indian Penal Code, s. 316

For more than 100 years there were no other laws to deal with abortion in India thus leading to a lot of issues and complications. The few exceptions offered in the IPC were not enough to cover various other grounds that might lead to unexpected pregnancies which the mother was forced to bear. This can be considered to be actively against the rights of the woman to her own body. Another aspect of this can be attributed to the medical field itself. A great majority of the doctors were male and thus were rather unaware or ignorant of the women's condition and denied abortion to those women who were severely in need.

However, as discussed before just because a practice is not socially accepted or is illegal, does not mean that people will not practice them. The population engaged in unsafe and illegal abortion. This practice led to a great number of deaths caused due to unsafe methods and ill-trained personnel.

During this time, this was not just an issue in India but also in the USA. The formation of the American Medical Association (AMA), a male-dominated association with an opposing view to abortion. They launched a campaign to criminalize the practice of abortion and by 1910 abortion was practically illegal at every stage of the pregnancy. The only exception to such was when the patient's life was in danger.

Similarly in the UK abortion was banned except in cases where it was crucial to the survival or health (physical or mental) of the patient. To deal with the rising numbers of maternal deaths due to unsafe abortion, the UK decided to form the Abortion Law Reform Association (ALRA). Recommendations to the government were made by the Birkett Committee, however, World War II interrupted the process. However, finally, in the year 1967, The Abortion Act became law which legalized abortion under certain conditions[15]. It came into effect on 27 April 1968.

Inspired by the UK's Abortion Act of 1967, the Indian parliament passed the Medical Termination of Pregnancy Act, 1971[16]. The act used the UK's Abortion Act as a foundation and tweaked it. The Act allows for the termination of pregnancy by registered medical practitioners under specific

[15] Abortionrights.org, https://abortionrights.org.uk/history-of-abortion-law-in-the-uk/ (Last visited 6 March 2024)
[16] Medical Termination of Pregnancy Act, 1971

circumstances, such as when pregnancy poses a risk to the woman's life or health, or when there's a substantial risk of physical or mental abnormalities in the child. This law aimed to create exceptions to the strict provisions of the IPC, which criminalized abortions except when necessary to save the woman's life. It also aimed to provide safe options for abortion and prevent maternal deaths due to illegal and unsafe abortion practices. The Act is considered one of the most liberal of its kind, as it recognizes the failure of contraceptive devices as valid grounds for abortion.

The most popular case on abortion rights is the case Roe v. Wade[17] which was fought in the United States Supreme Court. In a landmark decision delivered on January 22, 1973, the Supreme Court ruled in favor of Roe stating that the right to privacy under the Due Process Clause of the Fourteenth Amendment included a woman's right to choose to have an abortion. The Court's decision divided pregnancy into three trimesters each with different implications for state regulation. During the first trimester, the Court held that states could not impose significant restrictions on a woman's right to abortion. During the first trimester, states could not impose significant barriers to a woman’s access to abortion. Within such second trimester, abortion remained constitutionally protected but states could regulate it for reasons related to maternal health. In the third trimester laws can still be passed banning or regulating abortions except when there is a need to protect the mother’s life or her general well-being.

The Court rejected the argument that Constitutional protections begin at conception citing that the Constitution does not define when personhood begins and that the unborn have never been legally recognized as persons in the full sense. While the court acknowledged that views differed on when life begins, it held that it is not the role of states to impose one theory of life over the rights of pregnant women.

This ruling struck down many state laws across the country that restricted access to abortion which led to significant changes in abortion policies nationwide.

Due to these changes there emerged a battle between two groups, the pro-life and the pro-choice. As can be seen, these groups were divided on their views of abortion rights. The pro-choice faction

[17] Roe v. Wade, 410 U.S. 113 (1973)

believes that abortion is a fundamental right or a personal right and shall not be subjected to state law as such would be encroaching upon their freedom and rights. On the other hand, the pro-life faction is of the opposing view. It does not consider an embryo as an inanimate object but believes it to be a person or at least have life and thus shall be protected by law. It believes in the theory that life begins at conception.

This war between these two factions has been the loudest in the USA where the religious groups have combined with the pro-life. This is visible on the social media landscape with each faction criticizing the other, resulting in a social media war campaign.

Dobbs v. Jackson, the overruling of Roe v. Wade:

In the recent case of Dobbs v. Jackson[18], the Supreme Court of the USA overturned the landmark judgment of both Roe v. Wade and Planned Parenthood v. Casey. In its judgment, it upheld the validity of Mississippi's prohibition of pre-viability abortion. Justice Samuel A. Alito, Jr. authored the majority opinion, agreeing with Mississippi that both Roe and Casey were fundamentally flawed.

The reasoning behind and historical analysis of Roe was condemned by Alito who claimed that the constitution does not have any deeply rooted right to abortion in a nation's history so far as making all abortions legal regardless of viability is concerned. He observed that until recently, most states banned abortion and it was prosecuted under the common law. Also, Alito dissented from the Court's understanding of privacy rights as extending beyond preventing government restrictions on personal relationships into include decisions on terminating pregnancy.

According to him, laws limiting abortion only have to be reasonably related to a legitimate government interest rather than satisfy a compelling state interest because it is not a fundamental constitutional right under constitutional law jurisprudence since so many reasons exist why one might want an abortion. Consequently, if Mississippi enacts this kind of legislation after 15 weeks of gestation or the post-viability phase it would be reasonable for protecting prenatal life interests as well as curtailing certain abortion operations.

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[18] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022)

In their dissent, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissenting views were strongly worded, in which they criticized the majority's decision to overrule Roe v. Wade and Planned Parenthood v Casey on the grounds that it had a tremendous effect on women reproductive rights and freedom of individuality. They worried that it may push states to enforce even stricter abortion laws, outlawing them at any pregnancy stage without exceptions. They also disagreed with the rest of the Court that other sex or marriage-related rights were not compromised by this decision. Consequently, they thought this undermined the credibility of the Court and destroyed public faith in the judicial system. Departing from the norm, their dissent concluded with only two words: "We dissent."[19]

Even though this judgment may not directly affect the legal landscape in India, it will surely cause ripple effects in the entirety of the world. This judgment shows us how the rights of a person can be quashed by the state and the court. While foreign judgments do not have any binding power on the Indian courts, they surely possess persuasive value. With the increasing presence of religion and religious pleas, it might not be farfetched to imagine that a similar case might be fought in India which would have devastating results.

Conclusion:

We as a society have evolved greatly compared to the ancient times. We no longer have religion controlling the state nor do we have moral laws. However, even to this day, we face some major issues when it comes to topics like abortion, as they are so deeply affected by religion, culture, morals, and other various aspects of the society that it becomes nearly impossible to deal with them in isolation. While bias is an inherent flaw of human nature, if such affects the judgments of such major cases then it is bound to cause major damage to the present society.

India has seen a major development in the development of rights, especially the rights of women. The ancient society had practically put women in shackles due to their sex alone. Women were basically tortured by the society, and beaten into becoming submissive slaves to it. Only recently have their voices been heard and been granted rights. They are not the privileged sex, rather they

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[19] *Id*

are the ones who have suffered more. The right to abortion is yet one such right that the society fights over to take away from women. Women are not mere objects to be used by the society but rather their own person who should at least be allowed to have certain rights over their bodies.