

Right to Abortion

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Abstract

Abortion or termination of pregnancy is a spontaneous or induced termination of pregnancy by removing or expelling embryos or fetuses from the uterus before the ability of the fruit of the uterus for life. It is caused by the death of a fetus or resulting in his death. Abortion can occur spontaneously, because of complications during pregnancy or abortion can cause it. To meet the definition of abortion, it must occur before the 28th week of pregnancy, provided that the length of the fruit of the uterus is less than 35 centimeters and the weight is less than 1000 grams. The set conditions are not absolute, as in many cases, the fruit of the uterus is less than 35 cm and lighter than 1000 g capable of life.

Key Words: Abortion; Law; Right; Responsibility

Introduction

Discussions on abortion law often begin by defining the circumstances in which pregnant people should be able to access abortion (the 'grounds' for access) [1]. However, we want to suggest that our first concern should be with ensuring that any new abortion legislation actually meets the needs and fulfils the rights of pregnant people, while allowing space for best medical practice and clinical judgment. Liberal abortion law on paper does not always translate into effective abortion access in practice, and human rights bodies are clear that once abortion is legalised it must be accessible without discrimination.

The termination of a pregnancy is potentially one of the most difficult and harrowing decisions a woman can make [2]. This process of decision-making has a profound impact on the practice of medicine. Doctors have to be aware of their legal and ethical duties to the patient, even though these may be at odds with their own personal morals or beliefs, and without unnecessarily intruding on the privacy of the patient concerning their decision. In particular the doctor should pay consideration to the fact that it is the patient (and their family) who have to deal with the emotional and personal consequences of their decision.

The field of abortion law has survived several revolutions [3]. Perhaps the greatest is the shift in focus to human rights. Although today it is exceedingly difficult to encounter any legal treatment

of abortion without some comment on the rights involved, this was not always the case. Abortion law evolved "from placement within criminal or penal codes, to placement within health or public health legislation, and eventually to submergence within laws serving goals of human rights."

The collection builds on significant transnational legal developments in abortion law. Innovation in case strategies and an abundance of decisions from constitutional and human rights courts have produced a rich jurisprudence, which remains largely unexamined and undertheorized by legal scholars. Technological change, such as new medical methods of early abortion, has given rise to new legal controversies and rendered former legal frameworks outdated. While the United States and Western Europe may have been the vanguard in abortion law reform in the latter half of the twentieth century, Central and South America are proving the laboratories of thought and innovation in the twenty-first century, as are particular countries in Africa and Asia. Too often though, barriers of language and legal form impede the transnational flow of these developments and the thinking behind them.

Abortion has always been a debated topic within society and at the heart of the debate lies the issues of competing rights, those of the pregnant woman and those of the unborn child [4]. Some members of society believe that abortion amounts to the murder of the unborn child whilst others consider that abortion is the right of women and it is her alone who should make the decision regarding her pregnancy. Abortion is the termination of a pregnancy which may have been unplanned resulting from contraception failure or as the result of unprotected sexual intercourse. Occasionally, abortion is requested after a planned pregnancy but where the circumstances have changed dramatically for the woman, making the continuation of the pregnancy very difficult for her and her existing family.

Abortion is also available to women who discover that their unborn child is suffering from severe abnormalities. In such cases, the pregnancy may be beyond 24 weeks and this can be

very distressing for all concerned. Such cases are generally cared for within the midwifery services and will not be addressed here. Women with a wanted and planned pregnancy who are having their pregnancy terminated because of foetal abnormality should not be cared for with women who are seeking an abortion because of an unintended/unplanned pregnancy.

Some people consider that abortion is wrong in any circumstance because it fails to recognise the rights of the fetus or because it challenges the notion of the sanctity of all human life [5]. They argue that permitting abortion diminishes the respect society feels for other vulnerable humans, possibly leading to their involuntary euthanasia. Those who consider that an embryo is a human being with full moral status from the moment of conception see abortion as intentional killing in the same sense as the murder of any other person. Those who take this view cannot accept that women should be allowed to obtain abortions, however difficult the lives of those women or their existing families are made as a result. Such views may be based on religious or moral convictions that each human life has unassailable intrinsic value, which is not diminished by any impairment or suffering that may be involved for the individual living that life. Many worry that the availability of abortion on grounds of fetal abnormality encourages prejudice towards any person with a handicap and insidiously creates the impression that the only valuable people are those who conform to some ill-defined stereotype of 'normality'.

The American case of *Roe v. Wade* [1973] 410 US 113 gave a woman protected rights under the constitution to decide for herself whether or not to proceed with a pregnancy [6]. In Northern Ireland, the law consists of the Offences Against the Person Act 1861, the Infant Life (Preservation) Act 1929 and the common law principle of necessity established in *R v Bourne* [1939] 1 KB 687. In the Republic of Ireland, a strictly Catholic country, abortion is now permitted in limited circumstances. By virtue of The Protection of Life During Pregnancy Act 2013, effective from January 2014, terminations of pregnancy are permitted in limited circumstances. Abortions will be permitted where there is a real and substantial risk to the woman's life from a physical illness, which can only be prevented by the termination of pregnancy whether immediate or not and where there is a real and substantial risk of the woman's suicide. Due to the restrictive nature of the law in both Northern Ireland and the Republic of Ireland, many women travel to England and Wales to terminate their pregnancy.

Abortion rights arguments also stress that a woman's right to manage her own body, including her fertility, is crucial to her status as a full citizen [7]. Historically, they argue, when the government has taken the right to force women to stay pregnant, it has also taken the right to deny women contraception, to force some women to get sterilized, and to support treating the

reproductive capacity of different groups of women differently, depending on their race and class. All of these practices have degraded women in the past, compromising their ability to live dignified and autonomous lives.

Rights advocates argue that *Roe v. Wade* legalized abortion, so abortion is a woman's right, and that women are capable of making their own decisions about exercising their rights without state-mandated education requirements or other constraints designed to discourage abortion. While *Roe v. Wade* does not address sex equality, a number of feminist scholars and others have argued that the abortion right is best conceptualized in a sex equality framework.

Abortion can be performed as early as pregnancy is detected, although some clinicians prefer to wait until a gestational sac can be visualized by ultrasound or directly as part of routine tissue examination immediately following completion of the procedure, which is usually by 4 to 6 weeks' gestation [8]. Aspiration abortion prior to 6 weeks' gestation has been shown to be safe and effective, particularly if protocols that guard against missed ectopic or continuing pregnancies are followed. Upper limits beyond which therapeutic abortion may be performed are based on legal (rather than medical) restrictions, and vary from state to state.

Constitutional Abortion

Constitutional abortion judgments are often characterized by two primary traits [9]. Courts tend to be categorical in their approach, grounding decisions in abstract moral and legal principles that are difficult to relate to women's experiences. Courts are also prone to rely on rarely justified intuitive premises, especially the assumed effectiveness of criminalization in protecting unborn life and gender stereotypes that minimize the perceived effects of criminalization on women's lives. Courts are increasingly becoming more sensitive, however, to the need for a less categorical approach, one that recognizes competing interests, and seeks to resolve constitutional conflicts through a reasoned balance. As the shape of constitutional abortion judgments shift, courts are searching for and experimenting with different frameworks through which to articulate their reasoning.

Proportionality as a methodology requires judges to order the questions they must address in consecutive stages and encourages them to reflect on certain substantive issues too often neglected in abortion adjudication. Judges are required, for example, not merely to assert the protection of unborn life as a constitutional duty or a constitutional legitimate interest, but to assess the effectiveness of law in this protection. With assessment of effectiveness, empirical data on the causes of abortion, best practices to lower abortion rates, and the effect of criminalization on the lives of women become relevant considerations.

Assessments of effectiveness, in other words, require judges to account for the harms of criminalization against its alleged benefits, and to thus consider alternative measures of protection that are equally effective, but less infringing on competing interests. Proportionality explicitly asks about the gains and costs of protecting unborn life, and about the allocations of those costs, which up to the present have been disproportionately borne by women, thus limiting their constitutional rights. Once these considerations are incorporated into judicial analysis and given due consideration, the usual result is support for approaches to abortion regulation other than through criminal law.

In many jurisdictions, abortion has been, or continues to be, prohibited unless legal exceptions apply [10]. A notable exception to this approach can be found in the United States, where women have a constitutional right to privacy that encompasses the right to terminate a pregnancy (at least until viability, when the state's interest becomes compelling). However, in many jurisdictions where no such right is recognized, lawful abortion has historically been tethered to assessments of the danger posed by the pregnancy to the life or health of the woman. Although this "maternal health" exception has been interpreted as broad enough to encompass abortion for serious fetal abnormalities, some jurisdictions have created a distinct exception to permit abortion to avoid the risk of "serious handicap." The impetus for such an exception has resulted from the tremendous recent advances in prenatal diagnosis. Although such advances have enabled these abortions to take place earlier in pregnancy, they have also enabled doctors to detect serious conditions only diagnosable later in pregnancy. Because these abortions sometimes occur after viability, arguments about "serious handicap" as a regulatory concept tend to converge upon arguments about the status of the fetus as birth approaches.

Abortion Advocacy

A change can be seen in the international world of abortion advocacy, a movement from the reform of laws to their implementation, from legal rights to legal services [11]. This is perhaps a consequence of success, an unmistakable global trend toward decriminalization. More likely, it is a consequence of that success being widely undermined, of abortion services allowed by law but too often denied in practice. Abortion rights advocates have encountered what reform movements have long known: the extraordinary discretion that characterizes criminal justice. Abortion laws themselves do not determine what is or is not allowed. More often the law empowers others— doctors and public prosecutors— to make this determination.

In much of the world, abortion is partially decriminalized, that is, it is regulated by criminal law, but not strictly prohibited. Abortion is allowed in certain prescribed circumstances,

commonly where pregnancy endangers a woman's life or health, or results from a criminal act, and where the fetus suffers serious impairment. These circumstances are referred to as the legal grounds for abortion. Common too is third- party authorization, a requirement that doctors or a public prosecutor certify that a legal ground is met in an individual case. In authorization, the problem of discretion arises.

Discretion sometimes manifests in disagreement. Where legal grounds are written in vague terms, interpretive conflicts may arise between doctors and women, or among doctors themselves, on whether a ground is met in the circumstances of an individual case. Doctors may also deny authorization because of their own legitimate fears in the face of an uncertain law. In both cases, the source of the problem ultimately resides in the law. The legal position of a woman cannot be known with any confidence, and rare are the opportunities for review or appeal. This breeds not merely inconsistent but arbitrary practice. Authorizations denied in bad faith, for improper purpose, or in light of irrelevant considerations. In fact the problem of discretion may eventually manifest in arbitrariness writ large. The criminalization of abortion affords doctors coverage to impose their views on women, to deliberately obstruct women's exercise of their legal rights, and to thereby frustrate the intentions of the law.

Conscience

While opponents of induced abortion are properly entitled to invoke conscientious objections to participation, others are equally entitled conscientiously to participate in such lawful procedures, to advise patients about the option, and to refer patients to where appropriate services are available [12]. This includes taking such actions in institutions that, for religious or other reasons, oppose such procedures on principle. The human right to act lawfully according to one's individual conscience is not a monopoly of abortion opponents. As a legally protected human right, however, the right to conscience may be considered an entitlement primarily of human individuals, and available to corporate or other institutions on only a limited basis. Individuals may accordingly invoke conscientious reasons to participate, or not to participate, in abortion procedures, and to offer advice and referral without suffering sanctions or discrimination on grounds of their religious or philosophical convictions.

Almost all of the academic discussion about conscience protections in abortion law concerns the right to conscientiously refuse participation in abortion treatment [13]. But could abortion provision not also be regarded as a matter of conscience? In recent years, some scholars have argued that it ought to be. Such scholars have suggested that the respect for moral integrity which justifies exemptions for conscientious 'refusers' of abortion treatment should equally extend to those medical

professionals who feel motivated by conscience to provide abortion care, and who feel that the refusal to provide treatment to patients requesting terminations would entail a breach of their conscience. In the years before abortion was broadly legalized in the United States and Britain, many of the physicians who took personal risks to deliver illegal abortion care to desperate women might well be described as acting out of 'conscience'. Developing this line of thought, some academics have argued that we ought to acknowledge the symmetry of conscientious refusal to provide abortion treatment and conscientious commitment to providing that treatment.

The appeal of conscience is allowed legal act of disobedience which justifies the conflict between certain parts of law enforcement and deep religious, moral, philosophical or political beliefs of the person that work should be done [13]. The essential premise of human rights is that the articulation of their rights does not infringe or deny the rights of others. Or that too much freedom for some does not result in less freedom for others. This is where it is contained all the complexity and sensitivity of the manifestations form of freedom of conscience, including the definition of the position and status of the institution of conscientious objection. In practice arise numerous and not at all naive problems, and the most numerous complaints derived from religious beliefs, for example, those employed in public health institutions by refusing to perform an abortion or euthanasia, if legally permitted, or in individuals as a private person, rejection of mandatory insurance. The country is, however, authorized to impose laws regardless of religious, ideological, political, philosophical and other beliefs of its citizens. In most of the laws in the world is not specially treated, nor in the Constitution and laws incorporated institute of conscience, rather it is associated with the chapters on freedom of thought, conscience, religion, belief, etc.

If doctor appealing on conscience for any reason, same doctor of its decision of appealing of conscience must on time inform the patient and refer him to another doctor in the same field.

Responsibility for Abortion

When we argue about abortion, what should we argue about [14]? When a topic is so mired in moral complexity, it can be difficult to gain clarity on just where one's starting point ought to be. Nevertheless, precisely where the locus of debate should reside is not just an interesting question in its own right, but an essential first piece of the puzzle when it comes to thinking through the rights and wrongs of abortion. For many discussants, the argumentative priority of establishing what we are dealing with ontologically or morally in a human fetus— that is to say, whether a fetus is what we understand to be a 'person' or not— is self-evident. Conversely, some serious and influential

contributions to the abortion debate have sought to establish that the moral status of the fetus is not decisive either for the morality or legality of abortion, or is even rendered redundant by other philosophical considerations.

Speaking plainly, there is more than one way of telling someone that she is asking the wrong question about a contentious subject matter. On the one hand, one could say that her question misfires because the answer to that question will not, in the end, determine anything critical in the discussion, and then go on to illustrate why this is so. Alternatively, one might claim that there is something inherently defective about the question itself— that it asks something that cannot be answered; that it is irrational or unintelligible; that it is not pertinent to the topic under consideration, or that it is not what disputants are truly arguing about. Challenges of both kinds are captured by certain arguments in academic discussion about abortion. Such arguments seek, in one way or another, to bypass the 'personhood' question in moral and legal reasoning about abortion.

Until recently, abortion was one of the most widely proscribed practices in Western culture [15]. The Hippocratic oath specifically prohibited it, and this injunction was supported by Judeo-Christian reverence for life. With the legalization of abortion in many parts of the world during the twentieth century, this barrier has given way to such an extent that the physician's responsibility for deciding whether to perform the procedure is now seen to be of less consequence for its availability than the outcome of political struggles that may have little to do with medicine.

Birth control, as it was called by such leaders of contemporary Western sexual enlightenment as Margaret Sanger (American birth control activist), offered a new sovereignty over unborn life, first to women and then to the medical profession and the state. For half a century the birth control movement publicly maintained the moral distinction between contraception and abortion, extolling the former while condemning the latter as barbaric and unnecessary. The rhetoric called for a pedagogy that would instruct patients (that is, women) and doctors in the responsible control of conception. Until the early 1970s, the rubric family planning concealed a change in attitudes that had taken place among supporters of birth control who also endorsed a less inhibited sexuality. With the rise of the contemporary women's movement, the right to obtain an abortion became a prerequisite to the liberation of women. The assertion that control over one's body must include the right to choose abortion was quickly countered by the assertion that the taking of life is never permissible.

People must know that abortion or termination of pregnancy is a serious global health problem [16]. 20 million of abortions

performed are insecure because a large number of women die and a large number of women remain enduring health consequences. In the world exist legislations in which termination of pregnancy is prohibited, but also exist legislations which allows termination of pregnancy without any consequences. In the event of a pregnancy termination, unwanted consequences can happen, and when they can happen, the question of legal responsibility is arises. When viewed all legal and medical facts, the termination of pregnancy can result with the existence of a criminal act.

Conclusion

Abortion or Termination of pregnancy is a medical procedure. Abortion are performed at the request of a pregnant woman. In addition to a request for abortion by a minor who does not reach the age of 16, a parent or caregiver consent is also required. Abortion is an termination of pregnancy whose duration has not been enabled by the fetus for life outside the uterus. If the pregnancy are terminated before the 28th week, either spontaneously or intentionally, it is considered an abortion. If termination of pregnancy occurs after the 28th week, it is considered a birth.

References

1. De Londras F, Enright M. Repealing the 8th - Reforming Irish Abortion Law", Policy Press, Bristol, UK, 2018; pp. 64. – 65.
2. White SM, Baldwin TJ. Legal and Ethical Aspects of Anaesthesia, Critical Care and Perioperative Medicine, Cambridge University Press, Cambridge, UK, 2004; pp. 107.
3. Cook RJ, Erdman JN, Dickens BM. Abortion Law in Transnational Perspective - Cases and Controversies", University of Pennsylvania Press, Philadelphia, USA, 2014; pp. 1.
4. French, K. Abortion in Sexual Health, Blackwell Publishing Ltd, John Wiley & Sons Ltd, Chichester, UK, 2009; pp. 137-138.
5. Brennan S. et al. Medical Ethics Today - The BMA's Handbook of Ethics and Law, Third Edition, BMJ Books, John Wiley & Sons, Ltd, Chichester, UK, 2012; pp. 282.
6. Carr C. Beginning Medical Law", Routledge Taylor & Francis Group, Abingdon, USA, 2015;pp. 118.
7. Solinger R. Reproductive Politics - What Everyone Needs To Know, Oxford University Press, Oxford, UK, 2013;pp. 67. – 68.
8. Simmonds K, Likis FE. Aztlan-James EA, Schuiling KD, Likis FE. Unintended Pregnancy in Women's Gynecologic Health, Third Edition, Jones & Bartlett Learning, Burlington, USA, 2017;pp. 408.
9. Undurraga V, RJ Cook, Erdman JN, Dickens BM. Proportionality in the Constitutional Review of Abortion Law in Abortion Law in Transnational Perspective - Cases and Controversies, University of Pennsylvania Press, Philadelphia, USA, 2014; pp. 77-78.
10. Karpin I, Savell K. Perfecting Pregnancy - Law, Disability, and the Future of Reproduction", Cambridge University Press, Cambridge, UK, pp. 106 – 107; 2012.
11. Erdman JN, Cook RJ, Erdman JN, Dickens BM. The Procedural Turn: Abortion at the European Court of Human Rights in. Abortion Law in Transnational Perspective - Cases and Controversies, University of Pennsylvania Press, Philadelphia, USA, 2014; pp. 121. – 142.
12. Dickens BM, Cook RJ, Erdman JN, Dickens BM. The Right to Conscience in Abortion Law in Transnational Perspective - Cases and Controversies, University of Pennsylvania Press, Philadelphia, USA, 2014;pp. 210-238.
13. Franjić S. European Legal view on Termination of Pregnancy. J Gynecol Res Obstet. 2017;3(3): 051-055.
14. Greasley K. Arguments about Abortion - Personhood, Morality, and Law, Oxford University Press, Oxford, UK, 2017;pp. 257-1.
15. Imber JB. Abortion and the Private Practice of Medicine, Routledge, Taylor & Francis Group, Abingdon, USA, 2017;pp. 1.
16. Franjić S. Could Termination of Pregnancy Become a Criminal Act. M J Gyne. 2017; 2(1): 011.