International Journal of Law, Policy and Social Review
www.lawjournals.net
Online ISSN: 2664-6838; Print ISSN: 2664-682X; Impact Factor: RJIF 5.42
Received: 28-01-2021; Accepted: 19-02-2021; Published: 16-03-2021
Volume 3; Issue 1; 2021; Page No. 45-49

A jurisprudential analysis on abortions: A perspective from natural law and sociological school of law

KP Mathotaarachchi[1], KAAN Thilakarathna[2]
[1] Senior Lecturer, Department of Institute of Human Resource Advancement, University of Colombo, Sri Lanka
[2] Lecturer, Department of Institute of Human Resource Advancement, University of Colombo, Sri Lanka

Abstract
Abortion is a controversial subject because people can argue both for and against legalizing it and the arguments could be made in in equally convincing manner. It concerns not only the rights of a mother but of an unborn child as well. Many countries have introduced different grounds on which a legal abortion may be allowed. Therefore, it becomes important to explore from some jurisprudential perspectives whether legalizing abortions are permitted or not. This article focuses on two such theories, natural law and the sociological school of law. Both natural law and sociological school of law offer very much a contrasting viewpoints regarding the legalization of abortions. Natural law, focusing more on the moral aspects of law vehemently refuses the idea of allowing for abortions and it can be seen somewhat extreme. In contrast, sociological school of law takes a more pragmatic view and focusing on social engineering tries to bring about the best the law can be. However, even the sociological school of law finds it difficult to give an exact answer to the question, hence it becomes a case of circumstances, where abortions are permitted on a limited number of grounds and deciding on those grounds then becomes the duty of the law and policy makers of the country who have the balance out the competing interest of the relevant stakeholders.

Keywords: abortion, convincing manner, jurisprudential perspectives

Introduction

Abortion is arguably the most controversial and divisive moral issue of modem times. For the past three decades, arguments both for and against abortion have been mounted by groups of all kinds, from religious fundamentalists to radical feminists and every shade of opinion in between [1]. In contemporary jurisprudence, abortion has taken a central interest as a topic. As a concept it has been there from the beginning of the human kind not as a debated concept but as a practice. Schur [2] observes that 'since the very beginnings of civilization women have used abortion-the destruction or expulsion from the womb of the unborn child, the fetus, before it attains viability to free themselves from unwanted childbearing' [3]. When we argue about abortion, what should we argue about? 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 [4]. Therefore, the question about abortion is not whether it should be allowed or not, instead it has been about when to allow, and on what basis to allow.

In a study done from a medical-legal perspective in 1951, Fisher [5] observes that, 'abortion is legally defined as the expulsion of the fetus from the uterus (womb) at any time before its term of gestation is complete'. Fisher categorizes abortion in to three parts as spontaneous, therapeutic and criminal. Spontaneous abortions are due to abnormal development or death of the ovum or its membranes; while the remainder are caused by maternal disease, either systemic or involving the womb or its accessories. A therapeutic abortion is an interruption of pregnancy performed to safeguard the health or save the life of the mother. Criminal abortions are unlawful abortions; i.e., the interruption of pregnancy by the mother herself or another person [6].

The controversy remains with regard to the third category. As there are only a handful of grounds available with regard to conducting a legal abortion, women have chosen illegal means in getting rid of their pregnancies in the form of illegal abortions and this has led many to believe that any legalization or liberalization of laws relating to abortions would escalate the number of abortions that are being performed. Some countries only allow an abortion to be carried out if it is done to save the life of the mother. For an example, in Sri Lanka the Penal Code Ordinance No 02 of 1883, section 303 stipulates that, abortion is only legal in Sri Lanka when it is performed in good faith and for the sole purpose of saving the life of the mother. The question of legalizing abortion therefore, is not a question about giving a yes or no kind of answer, instead, it is about finding a middle path, where, when and how to allow it.

Dworkin observes that, 'the great, divisive abortion argument is at bottom an argument about a moral and metaphysical issue: whether even a just-fertilized embryo is already a human creature with rights and interests of its own' [7]. He argues that, the debate is in truth only a proxy for the genuine disagreement at the root of abortion conflict, grounded in the sanctity of human life, or, more precisely, differing interpretations of the sanctity of life and what is required to show that value appropriate respect.

A jurisprudential analysis on the issue of abortion from a natural law and a sociological legal theory of law in explaining, whether abortions should be allowed for, and under what circumstances, is going to be a crucial focal point in any discussion pertaining to the subject. In the analysis itself, it is imperative to understand, the rights and interests which are at stake. On one hand arguments on abortions involves the rights and interests of the person who

is carrying a child, and on the other, the rights and interests of the unborn, who is incapable of making a decision either on or of its own.

The argument on abortion has concerned, primarily on the constitutional, political, and moral grounds of abortion rights and the proper role of each branch of government in contributing to the formulation of abortion law. A jurisprudential analysis should, therefore, focus on the different dilemmas faced by all the stakeholders who are tasked with finding a rational basis for advancing and defending a particular view-point that they hold regarding the topic of abortion. In particular, when one is trying to broaden the scope of legally allowed grounds for abortions, or when one is considering about legalizing abortion, it is not only the prospective mother and the child which should be of concern, instead the whole dynamics and the implications upon the whole society should be taken up in considering the changes that are going to be made in changing the society by the enforcement of laws.

Natural Law Argument on Abortion

Natural law is based on the premise that, a particular law is and should be capable of being evaluated and judge from a moral lens. It has been observed that, 'the idea of a higher moral law that positive human law must not violate has a long and continuous history in both Western and Eastern thinking' [8]. The natural law proponents are of the view that, there is a necessary connection between the law and morality. For the, law is evaluated through morality and not the *vice versa*. Abortion is centered more towards morality than the law. However, a moral discussion is not a possibility in the modern word. It is observed that, 'there is no longer a sense that core values should shape our lives. Nor is it accepted that, because an issue rests on moral premises, it should be left to individuals to decide privately, according to their own judgment, how they should respond' [9].

The general argument posed by the natural law school regarding the idea of abortions is that, from a moral point of view abortion is something inherently immoral. It rejects the argument that, a fetus is not a natural being. If a fetus has the moral status of a person, surely it would follow that there should be no greater scope for personal choice in "feticide" than there is scope for personal choice in "parent-cide." [10] In 1984, Alan Zaitchik defended the use of viability [of a fetus], arguing that "it is natural to view [a viable fetus] as a person" because we can "easily *imagine* it already outside its mother's body doing well in an artificial incubator." [11] With regard to this general line of argumentation, abortion would not be or cannot be allowed any legalization.

John Finnis [12] a contemporary legal scholar, who belongs to the natural law theory, postulates his vision of law through the concept of natural rights. He bases his ideology of law by the introduction of values. According to him, there are seven basic values consisting of, life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion. He insist that, these values are exhaustive and that, there is no hierarchy among them so that, there can be no arbitrary preference among them [13]. Since both life and religion are considered as basic values, they stand against any legalization or liberalization of laws pertaining to abortions. If one is to respect life, it should be given both to the mother and the fetus. Finnis is highly opposite to the idea of abortion. He states that, 'If the unborn are human persons, the principles of justice and non-maleficence (rightly understood) prohibit every abortion; that is, every procedure or technical process carried out with the intention of killing an unborn child or terminating its development' [14]. Further, no religion allows for an abortion, not even when it is done to save the life of the mother.

When one confronts the arguments put forward by Finnis, there could be no opportunity of legalizing abortions. As his theory values life, a life of a fetus would, according to his theory, be afforded with all the rights and privileges, which any other human being is entitled to enjoy. According to him, a fetus could not be treated in a discriminatory manner, just because it is living inside the womb of his/her mother. Therefore, if one is to follow in the footsteps of Finnis, it is evident that, it would not be possible for anyone to use his theory to justify the legalization of abortions.

On the other hand, Ronald Dworkin a scholar falling within the natural law school, which is in itself a controversial claim forms a different kind of argument based on his thesis of rights [15]. According to Dworkin, it has to be taken as a matter of principle [16]. Dworkin points out that, where there is a particular statute which allows for abortions to be carried out in certain situations, it would be a matter of interpretation and that, without deciding for themselves laws prohibiting abortion invade fundamental moral or political rights, judges are required to make a decision based on principles, as to whether, in the particular circumstance which the matter is posed from them, is it possible for allowing for an abortion.

According to Dworkin, when judges are faced with *hard cases*, they have a duty of making the law best it can be. A case invoking the legality of an abortion would fall within the definition of a hard case. As a judge is required to make a decision based on principles, there could be a dilemma where there are two opposing principles which could be equally applied to a situation, which could bring about two totally different outcomes. In such a kind of a situation, a judge is required to make a compromise between a "fit" answer and a "moral" answer. However, Dworkin does not suggest that, with regard to an issue concerned with an abortion, a moral answer would be better than a fit answer.

If one considers the decision of *Roe v. Wade* [17] in which the Supreme Court of the United States of America recognized the right to an abortion of a women under the fourteenth amendment of the constitution. The fourteenth amendment to the constitution recognized the, citizenship rights and equal protection of the laws. In the above case, the Court, relying on the due process clause, held that, according to the substantive due process recognized in the fourteenth amendment to the Constitution, the right to privacy should entail in its scope, the ability of a women to decide on the termination of her pregnancy. The Court declared that, during the tenure of pregnancy, gradually the right to privacy has to give away to the rights of the State concerning the unborn child. However, the view that, tying state regulation of abortion to the third trimester of pregnancy was overruled in the decision of *Planned Parenthood v. Casey* [18] where the Court decided that, a woman has a right to abortion until fetal viability, which nonetheless upheld the right to abortion under the fourteenth amendment to the Constitution.

It would therefore, be clear that, according to the stance taken by Dworkin, legalizing abortion cannot be taken only from the view point of the one who is seeking entrance to the outside. The compelling rights and interests of the mother, who is carrying the

fetus has to be taken into consideration as well. It is therefore, becomes a battle between pro-life versus pro-choice. In legalizing abortion, Dworkinian view leaves the central question of finding the morality of a law enabling for abortions to be put aside and gives focus on the application of the grounds and circumstances in which abortions could be legitimize on principles if not morals. It is there for clear that, according to the Dworkinian view, an abortion is not an immoral being *per se* and that, it is a matter of principle.

Sociological Jurisprudential Argument on Abortion

No theory has captured the wide imagination of many as with the case of sociological jurisprudence. One of the most celebrated members in this school of thought Roscoe Pound describes 'sociological jurisprudence is in another line of development. It proceeds from historical and philosophical jurisprudence to utilization of the social sciences, and particularly of sociology, toward a broader and more effective science of law [19]. Sociological jurisprudence, with the help of sociology of law, expanded the boundaries of jurisprudence much further – so much so that the field is difficult to demarcate. There are innumerable connections between law and society: every branch of human learning, from physics, chemistry and medicine to philosophy, religion and psychology, produces knowledge about law and society. Sociology borrows from all these fields, and sociological jurisprudence borrows from sociology [20]. Sociology seeks to understand the workings of society in a scientific way. Sociological jurisprudence may be said to be the scientific method of studying the law. The law has to be evaluated from a sociological dimension in order to better understand their respective claims and to find solutions to the existing problems. To attempt to explain the law on a purely logical basis is equivalent to interpreting a graph of the vibrations in a speeding motor-car without taking into account the surface of the road [21]. Emile Durkheim, mostly famous for his fabulous work on Sociology is nonetheless a prominent figure in the discourse of sociology of law as well. Being a French philosopher, he has expressed his own views on abortion in a society full of misfits and misfortunes during the latter part of the industrial revolution. Durkheim saw that new institutions and individual rights could flourish only in a setting in which social bonds and community norms supported the new individual freedom [22]. Durkheim explained the abortion issue beyond individual rights to the social level of analysis considering, for example, the involvement of other persons besides the potential mother and child in the abortion decision, and considering the community's responsibility to provide for its members [23].

Durkheimian theory is therefore, a macro level analysis of the social structure that was prevalent at the time of his study. His theory recognizes the concept of abortion as a prevalent social malpractice. However, as a sociologist he directs his attention to the causes of such malpractice and hence the analysis is based on finding and explain the reasons for this phenomena of abortions that is prevalent in a society. For the question, whether abortion should be legalized or not, Durkheim does not, again as with the others, does not give a direct answer. However, he proposes that, abortion as a social malpractice would require to be regulated in order to stop it being from used to exploit the vulnerable groups. Roscoe Pound, on the other hand could be considered as the father of the modern sociological school on jurisprudence. According to Pound, law is a mechanism of social change. Even though the society is always a step ahead of the law, law should make it an endeavor to close out the gap which exists between the law and the society.

The question relating to abortion is a contest between two completing rights of the mother and the unborn. In achieving a fair balance between the competing of interest, Pound puts forward a theory called "jural postulate" which means 'the method by which interest may be tested and evaluated so that the conflicts between the various interests may be resolved' [24]. He suggests that the balancing process is a form of social engineering in which the role of the law is to "provide as much as society can". He identified legal and judicial activity as a form of social engineering. Pound did not use the term 'social engineering' in the modern sense of deliberate attempts to restructure society or rearrange social relations. Rather, it was used to compare the legal task to that of a problem-solving design engineer who tries to make the machine run more efficiently and smoothly [25].

In the context of legalizing abortion, it can be argued that, the theory offered by Pound is out of all the other theories discussed in this paper, the most practical one which could be used to implement or to abolish a particular law. Pound's theory is realistic as it looks at the actual practice of the society before suggesting or making reforms to the existing law. When one considers the social data pertaining to abortions, it is very clear that, the problem is with the number of abortions that are being performed. Further, when one considers the grounds in which abortions are allowed vary significantly from country to country. The following table shows the different grounds allowed for by different countries in permitting for a legal abortion.

Table 1

Name of the Country	Grounds on which abortion is permitted: (Yes=Y, No=N) (Data is formulated with the information provided by the UN country profile on abortions) Source: UN Country Profile on Abortion Laws						
	save the life of the Women	preserve physical health	preserve mental health	Rape or incest	Foetal impairment	Economic or social reasons	Available on request
Sri Lanka	Y	N	N	N	N	N	N
India	Y	Y	Y	Y	Y	Y	N
Pakistan	Y	Y	Y	N	N	N	N
South Africa	Y	Y	Y	Y	Y	Y	Y
United Kingdom	Y	Y	Y	N	Y	Y	N
United States	Y	Y	Y	Y	Y	Y	Y
Qatar	Y	Y	Y	N	Y	N	N
Austria	Y	Y	Y	Y	Y	Y	Y

Afghanistan	Y	N	N	N	N	N	N
Bangladesh	Y	N	N	N	N	N	N
Total Y	10	7	7	4	6	5	3

When the legislature enacts a law, according to pound, there are four main things to consider. First all the parties/stakeholders who are going to be affected by the law must be recognized. Then the retrospective and prospective effects of the new law must also be evaluated. After which all the interests or the competing claims that are going to be put forward must be presumed and evaluated and finally the normative standards must be set, meaning there should be ways and means to evaluate the effectiveness of the enacted law. For this necessary institutions and mechanisms must be set forth.

From the above, one has to understand that, law does not operate in a vacuum. Law is not, therefor, an actor in itself but only the instrument of human actors whose interest it represents. Thus the full consideration of the effects of particular laws cannot be separated from an analysis of the forces which shaped those laws [26]. Therefore, if one is proposing to legalize abortion in a particular country, the above four points must be remembered and adhered to. Firstly, there has to be a thorough examination of the interested parties and the respective interests that are going to be affected by legalizing abortions. Then, the possible implications of such legalization of has to be carried out. In this regard, results have shown that, there is no necessary connection between the number of abortions and the legalizing or liberalizing the abortion laws [27]. Afterwards the respective claims which could be brought from religious, cultural, social and economic perspective have to be analyzed. For an example, the issue with Sri Lanka regarding liberalization lies with the religious and cultural issues which has impaired the legislative will in bringing the necessary changes. At the final stage, there have to be institutions with proper resources and authority to monitor the functioning of the practice relating to abortions. It can be argued that, it is from this kind of a mechanism that, if laws relating to abortions are going to be legalized or liberalized, that it could be achieved.

Conclusion

Abortion is and will be an issues which will pose many kinds of dilemmas for both the present and the future generations. It is a dilemma because there are variety of views which advocate both for its implementation and abolition. It is a dilemma because it impacts not only on the mother and the unborn, but the whole society at large. Further, there is no political, sociological, legal or scientific theory or a justification either for its implementation or abolition. The views on abortion are divided not between different disciplines but in the same discipline between different kind of philosophers and scholars.

When one considers about the reality of abortions, it is clear that everyone is aware of the issue. What remains problematic is coming to a consensus. The jurisprudential discussion and the analysis above shows that, while there are different views expressed under the natural law where there is opposition and agreement in legalizing abortion, there is no coherence in formulating a practical approach to combat the issue. While Finnis totally opposes the idea of abortions based on his theory of basic values which includes both life and religion, which are totally against the legalizing of abortions, on the other hand Dworkin, once more showing prospects with his theory of principles fails to give a direct or a proper solution to the question of legalizing abortions, by pointing out that, since abortions are falling within the definition of hard cases, it should be a task for the judiciary to make.

The sociological school of jurisprudence on the other hand forms a realistic approach in both understanding and appreciating the social reality of abortion. In particular, Roscoe Pound opines that, society is a mechanism which runs on conflicting interests. The law is require to a bridge the gap which exist between the law and the society. With his ideas on jural postulates what Pound proposes seems to be the most viable out of all the other theories which have been proposed. What Pound offers is a practical mechanism which could be used to resolve social problems that exist in a society through legal means and especially by the change of laws to meet up with a changing society.

Even with all the jurisprudential theories, it can be concluded that, abortion is and will always remain a gray area in the society as the competing of interests between the parties could never be satisfactorily be compromised in order to achieve a consensus on the issue of legalizing abortions.

References

1. Damien Keown. Buddhism and Abortion (1st edn, Palgrave Macmillan, 2014.
2. Edwin M. Schur, 'Abortion and the Social System' Social Problems, 1955, 3.
3. *Ibid*
4. Kate Greasley, *Arguments about Abortion* (1st edn, OUP, 2014, 1.
5. Russell S. Fisher, 'Criminal Abortion' The Journal of Criminal Law, Criminology, and Police Science, 1951, 42.
6. *Ibid*
7. Ronald Dworkin. *Life's Dominion* (1st edn, Harper Collins Publishers, 1995, 30.
8. Suri Ratnapala, *Jurisprudence* (1st edn, CUP).
9. Ann Furedi, *The Moral Case for Abortion* (1st edn, Palgrave Macmillan, 2016.
10. *Ibid*
11. Susan Dwyer and Joel Feinberg, *The Problem of Abortion* (2nd edn, Wadsworth Pub, 1997.
12. John Finnis, *Natural Law* (1st edn, New York University Press, Reference Collection, 1991.
13. Penner JE. *Mccouberey and White's Textbook On Jurisprudence* (5th edn, Oxford University Press, 2012.
14. J Finnis, 'Abortion and Health Care Ethics' (*Belmont.bme.umich.edu*, 2016) <http://belmont.bme.umich.edu/wp-content/uploads/sites/377/2018/02/1-Abortion-and-Health-Care-Ethics.pdf> accessed 1 October 2018.
15. Ronald Dworkin. *Taking Rights Seriously* (1st edn, Bloomsbury Academic, 1977.
16. Ronald Dworkin. *A Matter of Principle* (1st edn, Clarendon, 1996.
17. 410 U.S. 113 (more)93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S.LEXIS 159

18. 505 U.S. 833, 112 S. Ct. 2791; 120 L. Ed. 2d 674; 1992 U.S. LEXIS4751; 60 U.S.L.W. 4795; 92
19. Pound R. 'Sociology of Law and Sociological Jurisprudence' The University of Toronto Law Journal V. 1943; (5)(1):1,2.
20. *Ibid*
21. Paton GW. A Textbook of Jurisprudence (4th, Clarendon press, Oxford, 1972, 31.
22. Sidney Callahan, *Abortion* (1st edn, Springer Verlag 2011).
23. *Ibid*
24. E Nalbandian, 'Sociological Jurisprudence: Roscoe Pound's discussion on legal interests and jural postulates' Mizan L. Rev. 2011; 5:141-145.
25. Ratnapala S. *Jurisprudence* (2nd, Cambridge University Press, Cambridge, 2013, 211.
26. R Cotterrell, The Sociology of Law: An Introduction (1st, Butterworths, London, 1984, 49.
27. Peiro R. 'Does The Liberalization of Abortion Laws Increase The Number Of Abortions?: The Case Study Of Spain' (2001) 11 The European Journal of Public Health.