



DOES THE ‘PULSE’ OF AN UNBORN CREATE NINE MONTHS OF SLAVERY? A LEGAL PERSPECTIVE IN THE LIGHT OF THE TEXAS HEARTBEAT ACT

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INTRODUCTION

The advances in fetal physiology have revealed the fact that the fetus is an entity possessed with different types of sensory perceptions. In addition to this, fetus is considered having potential to respond to the stimuli such as pain and as British Medical Association (‘BMA’) specified, the fetus feels pain subsequent to twenty four weeks of gestation. Fetal behavioural studies are continued with the advancements of the medical technologies namely the medical imaging & electrical / optical fetal monitoring. Twenty first century marked a significant rise in the development of fetal rights. *Texas Heartbeat Act 2021* (‘The Act’) in USA signified the recognition of fetal rights while imposing hindrances to the existing freedoms on termination of pregnancy. The Act is basically aimed at the prohibition of abortions after a time specified, subsequent to the detection of the fetal heartbeat. The research predominantly aims at analysing the provisions of the Texas Heartbeat Act, the recognition of fetal heartbeat as a legal aspect and studying the legal dimensions of the aspects of reproductive autonomy.

METHODOLOGY

Methodology of this study is normative in nature and the doctrinal methodology is prioritized. The doctrinal methodology is signified throughout the research due to the fact that it involves with the analysis of the Texas Heartbeat Act and International legal instruments. Data for the research have been collected from primary and secondary sources of law. Primary sources of law predominantly include the international & foreign domestic legal instruments, case law jurisprudence while secondary sources of law include academic publications, texts relating to law.

RESULTS AND DISCUSSION

The Texas Heartbeat Act in its objective specifies that, the legislation predominantly concerns on the termination of pregnancies subsequent to the detection of the fetal heartbeat. Section 171.204 of the Sub Chapter of the Act stipulates that, “**It is prohibited to perform abortion or induce abortion of an unborn child with a detected heartbeat**”. The liability is extended to the physician in an instance where he failed to perform a Test to detect the fetal heartbeat. The physician is exempted from the liability if he/she has taken sufficient steps to perform a test to detect the fetal heartbeat in terms of Section 171.203. Under the category of legislative findings of the Act, Section 171.202 identifies that, “fetal heartbeat has become a key predictor that an unborn child will reach live birth”. Further, the Act specifies that, “cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac”.

*Roe v. Wade*¹ declared that, the unduly restrictive abortion legislation is unconstitutional. Justice Blackmun while delivering the majority opinion of the decision expounded that, the abortion restrictions in Texas operate in contravention of the right to privacy of women. Right to privacy was considered a constitutional right. In addition to the view on right to privacy, the Court’s attempt was to strike a balance between the recognition of women’s rights and the potential life of the fetuses. Thus, the Court basically focused on the viability of the fetus. A viable fetus has the capability of a meaningful life outside the womb of the mother². The viability is achieved by a

¹ *Roe v. Wade*, 410 U.S. 113 (1973)

² British medical association-bma views. (2020). The law and ethics of abortion. (September 2020 – post-ARM update ed.). <https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf>



fetus after twenty four weeks of pregnancy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*³ the court's view was that, it is unconstitutional to impose restrictions on the termination of pregnancy before the fetus is viable.

The two decisions signified that, undue abortion restrictions contravene the constitutional rights entitled to by the women. *Texas Heartbeat Act* marks a step forward from the point of fetal viability to the fetal heartbeat. The ban of termination of pregnancy once the fetal heartbeat is detected amounts to a controversy. Proponents to the reproductive health rights emphasize the fact that, six weeks of time does not support a developed heart of a fetus. The fetus is considered a group of cells. Thus, the proponents emphatically argue that, the fetal heartbeat is a misleading concept for a fetus in the six weeks of gestation. The completion of nine weeks of gestation converts the fetus into an entity with the functioning of heart. Completion of the second trimester (sixteen to eighteen weeks of gestation) marks the properly developed fetal heart. The medical views on the development of the heart and the section 107.204 of the sub- chapter of the Act are in contradiction. As Wyatt (2001) states, proponents to the fetal heartbeat basically argue on the medical duty of care to the fetus. Granting of patienthood to the fetus elevates it to a unique position. The fetus is considered as dependent on the body of the mother and no treatment can be administered without sacrificing the bodily integrity of the mother. This phenomenon signifies the beginning of the maternal – fetal conflict.

The pregnancy does not merely bear the facet of a biological function. Childbearing is a process which is surrounded by the socially constructed values and obligations. A woman is predominantly socially constructed and particularly her social roles and activities are determined by the social construction⁴. Rights of include the right to equality, right to dignity, physical integrity, autonomy and right to information. In addition to this, the right to private life includes the enjoyment of highest attainable standard of health which signifies the reproductive health. The woman is entrusted with the power of making autonomous decisions in the matters related to physical and psychological integrity. Such a right is included within the purview of right to privacy. The *Act* constitutes a restrictive legislation which imposes taboos on the termination of pregnancy at the very early stages of gestation upon the detection of fetal heartbeat. If in the eyes of fetal medicine, the development of the fetal heart takes place in the sixteen to eighteen weeks of gestation. Section 107.202 specifies that, fetal heartbeat is an indicator of the fact that, the unborn child reaches the point of live birth. The section impliedly contravenes the principles developed in the case of *Roe v. Wade*. The case identified the concept of viability subsequent to which the fetus becomes capable of *ex utero* existence after twenty four weeks of pregnancy. It has been emphasized that, regulation of medical procedures for the termination of pregnancy subsequent to the first trimester balances between the human rights of the pregnant woman and the interest of the society in discouraging the termination of pregnancy in an advanced pregnancy with a developed fetus. *Whole Woman's Health v. Jackson*⁵ was a case instituted by the abortion providers questioning the constitutionality of the Act and the civil enforcement mechanism. The same argument has been directed by the case *United States v. Texas*, in which the delegation of enforcement of the Act to private individuals was disputed.

³ Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833

⁴ Kapoor. A. (2015) Rethinking Motherhood: A Feminist Exploration of Social Construction of Motherhood in India. International Journal of Policy Sciences and Law (IJPSL) Volume 1, Issue 4, 2583. https://ijpsl.in/wp-content/uploads/2021/07/Rethinking-Motherhood-A-Feminist-Exploration-of-Social-Construction-of-Motherhood-in-India_Tanvi-Kapoor.pdf

⁵ Whole Woman's Health v. Jackson 595 U.S



The global evidence clearly shows that, majority of pregnancies in the world end with abortions⁶. Over time, the laws on abortion become rigid which illegalized the termination of pregnancies. Such restrictions on abortions lead to the unsafe practices. As discussed in *Roe v. Wade*, the right entitled to by a woman to decide whether to have a child or not is predominantly legal in nature. Such a right is protected under the right to privacy. It amounts to a derivative right under the due process clause specified by the fourteenth amendment to the Constitution of the USA. The concept ‘Involuntary Servitude’ is defined by law as an instance where the ‘control by which the personal service of a man is disposed of or coerced for the benefit of another’⁷. The glorification of the fetus by attributing life does simultaneously cause in involuntary servitude. That stands to an instance where the mother is in service to the fetus. If the pregnancy is wanted, such a service is considered voluntary and rewarding. However, in the instances where the pregnant woman is not in a position or unwilling to perform the specific service, that is the involuntary servitude and forced to continue pregnancy. The 13 Amendment to the Constitution of USA specifies the end of slavery and servitude. Further, it is internationally emphasized by the Article 8 of the International Covenant on Civil & Political Rights (‘ICCPR’). The Act in the imposition of restrictions on abortion in the early stage of gestation amounts to the forced procreation & involuntary servitude.

CONCLUSION

The Texas Hearbeat Act 2021 legally impedes the termination of pregnancies after the detection of fetal heartbeat. It has been accepted that the restrictions on termination of pregnancies amount to the violation of reproductive rights of women. The Texas Hearbeat Act is a controversial legislation on medical and legal grounds. Further, prioritizing the interests of the fetus over the maternal wellbeing is considered as a violation of the freedoms of the pregnant women causing involuntary servitude.

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⁶ Allotey-reidpath et al.. (2018). Nine months a slave: when pregnancy is involuntary servitude to a foetus. *Reproductive Health Matters*, 26(52), 57-61. <https://www.jstor.org/stable/26605067>

⁷ Allotey-reidpath et al.. (2018). Nine months a slave: when pregnancy is involuntary servitude to a foetus. *Reproductive Health Matters*, 26(52), 57-61. <https://www.jstor.org/stable/26605067>