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ABORTION LAW IN INDIA

**AUTHORED BY –
SEJAL ANIL JETHVA**

INTRODUCTION

“There is no freedom, no equality, no full human dignity, and personhood possible for women until they assert and demand control over their bodies and reproductive process...The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned.”¹

Induced abortions have generated a lot of discussion and controversy throughout history. A person's value system is closely related to their personal position on the difficult ethical, moral, and legal issues. The morality of induced abortion and the ethical bounds of the executive branch of government can both be considered when describing a person's attitude on abortion.

The right of a woman to have an abortion is protected by her individual rights, including her right to life, liberty, and the pursuit of happiness. The sexual and reproductive health of a woman influences her reproductive decisions. Internationally, it is acknowledged that improving women's human rights and fostering development are mutually exclusive goals.

ABORTION AND THE CONSTITUTION OF INDIA

While establishing the democratic setup, our Constitution framers were vigilant and inculcated the spirit that people must be protected against misuse of power by the government and its officials. They, therefore, provided for the fundamental rights in part-III of the Constitution. The article 21 of Indian constitution provide right to life which includes within its ambit the right to privacy. Right to life and personal liberty is the most sacrosanct, precious, inalienable and fundamental of all the fundamental rights of citizens. This guarantee imposes a restraint on the government and it is part of the cultural and social consciousness of the community in India. In this context, every woman owe an individual right, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. The women have reproductive features and have right to decide about her sexual health and shape her reproductive choices. To ensure availability of human rights to women and to advance the development, the international community acknowledged reproductive rights of the woman. In order to follow the international mandate, governments from all over the world have recognized and accredited reproductive rights to women to an unprecedented heights. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus it can be reiterated that all over the World each and every woman has an unconditional right to have control over her own body.²

¹ BettyFriedan, Abortion: A Woman's Civil Right, 39 (reprinted in Linda Greenhouse and Reva B. Siegel, 1st edn 1999).

² <https://www.legalserviceindia.com/article/I384-Legalize-Abortion-In-India.html>

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

After the Roe v. Wade³ case, European and American countries started to legalise abortion. During the last thirty years, since 1970s many countries have liberalized their abortion laws. Roe case has been subsequently modified by the US Supreme Court in Planned Parenthood v. Case⁴ where the legality of the abortion law is now linked to the viability of the foetus rather than the rigid third trimester test laid down in Roe case.

In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The recommendation was adopted in the later half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee – called Shantilal Shah Committee. After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.⁵ On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and liberalised abortion laws in India.

The committee acknowledged that there did not exist and would not exist in the predictable future either the doctors or the medical facilities to support an extensive abortion programme. It also specifically denied that its intention was to force down for the legislation of abortion only for the population control in India. The committee further pointed out:⁶

It is felt, that legalising abortions with a view of obtaining demographic results is unpractical and may even defeat the constructive and positive practice of family planning through contraception. It is noteworthy that the MTP Act was implemented in the month of April, 1972 and again revised in the year of 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. This Act was amended in the year 2002 and again in 2005. The Preamble of the Act states, “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto”.⁷

The Act, consisting of just 8 sections, deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. It legalizes abortion in case where there is a failure of contraceptives or where the pregnancy will adversely affect the physical or mental termination of pregnancy, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian’s consent is required.⁸

The Act permits abortion only in certain circumstances. It Act allows medical termination of pregnancy up to Twenty weeks’ gestation. Though the Act talks about the written consent of the pregnant mother before the technique is administered to her, the law fails to recognise the social reality that a woman cannot make a free choice. Thus, it is evident that the Act fails to achieve a equilibrium between the right of the unborn to be born and the right of the woman, who bears, gives birth and rears the child, to decide whether she wants the child or wants to abort the foetus.

In Nikhil D. Dattar v. Union of India,⁹ section 3 and 5 of MTP Act was challenged on the

³ 410 U.S. 113 (1973).

⁴ 505 U.S. 833 (1992).

⁵ Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966)

⁶ Ibid.

⁷ Medical Termination of Pregnancy Act, 1972 (Act of 1971), Preamble.

⁸ Medical Termination of Pregnancy Act, 1972 (Act of 1971), s. 3.

⁹ S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India), available at: <http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf>

ground of non-inclusion of eventualities vires of the Act. In this case the foetus was diagnosed for complete heart block thus the Petitioner, in her twenty sixth week of pregnancy, had sought termination of pregnancy. The petitioner contended that section 5(1) of the MTP Act should be read down to include the eventualities in section 3 and consequently, a direction should be issued to the respondents to allow the petitioner to terminate the pregnancy. The court held that the courts are not empowered to legislate upon a statute. Sections 3 and 5 provide for right to terminate pregnancy only under the specified circumstances. And the remedy under section 5 can only be available when the non-termination of pregnancy would be dangerous to the life of pregnant woman. While dismissing the petition the court further held that since twenty six weeks of pregnancy has already passed the court could not pass any direction for exercise of right under section 3. This case further reiterated that the physical and mental trauma which may be experienced by women in such circumstances. It also highlighted the ethical issue faced by the doctors in similar situations.¹⁰

Section 3 of the said Act, says that pregnancy can be terminated:

- (1) As a health measure when there is danger to the life or risk to physical or mental health of the women
- (2) On humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.
- (3) Eugenic grounds - where there is a substantial risk that the child, if born, would suffer from deformities and diseases.

It is submitted that a decision as to abortion may be entirely left with woman provided she is sane and attained majority. Only in cases where an abortion may affect her life, her freedom may be curtailed. All other restrictions on the right to abortion are unwelcome. True, a woman's decision as to abortion may depend upon her physical and mental health or the potential threat to the health of the child. Apart from these reasons, there are also various important factors. She or the family may not be financially sound to welcome an addition. It may be a time when she wants to change her profession, which requires free time and hard work. Her relationship with the husband may virtually be on the verge of collapse and she may prefer not to have a child from him, for it may possibly affect a future marriage. All these factors are quite relevant and the Indian statute on abortion does not pay any respect to them. The law thus is unreasonable and could well be found to be violative of the principles of equality provided under Article 14 of the Constitution. Is it desirable to pay compensation to woman for all her physical and mental inconveniences and liabilities, which arises in that context? Finally, it may be noted that the M.T.P. Act does not protect the unborn child. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman.¹¹

Under Section 4 of the Act detailed description of the place of termination of the pregnancy is stated like a hospital. It should be hygienic place to perform abortion, where an operation table is provided with proper instruments needed to perform it and drugs and other necessary items for it in the place to be kept. A woman has complete right over her body and she has the right to abortion too and can decide not to do it. Most of the countries where abortion is legalised death rate of women is below 1 for 100,000 procedures. Abortion is quite a safe method if it is done by skilled doctor and who has proper facility.¹²

¹⁰ https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf

¹¹ https://www.legalserviceindia.com/articles/adp_tion.htm

¹² <https://lawyerslaw.org/tutorials/an-overview-of-medical-termination-of-pregnancy-act1971/>

CASE LAWS

D. Rajeswari vs State of Tamil Nadu And Others¹³

The case, is of an unmarried girl of 18 years who is praying for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of pregnancy has caused great anguish in her mind, which would result in a grave injury to her mental health, since the pregnancy was caused by rape. The Court granted the permission to terminate the pregnancy.

Dr. Nisha Malviya and Anr. Vs. State of M.P¹⁴

The accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that two other co-accused took this girl, and they terminated her pregnancy. So, the charge on them is firstly causing miscarriage without consent of girl. The Court held all the three accused guilty of termination of pregnancy which was not consented by the mother or the girl.

Murari Mohan Koley vs The State 2003¹⁵

In this case, a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner for an abortion. And the petitioner agreed to it for a consideration. But somehow the condition of the woman worsened in the hospital and she was shifted to another hospital. But it resulted in her death. The abortion was not done.

Shri Bhagwan Katariya And Others vs State of M.P¹⁶

Abortion without mother's consent 2000. The woman was married to Navneet. Applicants are younger brothers of said Navneet while Bhagwan Katariya was the father of said Navneet. After the complainant conceived pregnancy, the husband and the other family members took an exception to it, took her for abortion and without her consent got the abortion done. The Court opined that if we refer Section 3 of the Medical Termination of Pregnancy Act, 1971, a doctor is entitled to terminate the pregnancy under particular circumstances and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that without the consent of the woman it could not be done. Present is a case where a permanent scar has been carved on the heart and soul of the woman by depriving her of her child. And the Doctor will be liable.

SINGLE, UNMARRIED WOMEN HAVE THE RIGHT TO SAFE AND LEGAL ABORTION

In a significant ruling on reproductive rights, the Supreme Court on 29th September 2022 extended the right to safe and legal abortion up to 24 weeks of pregnancy to unmarried and single women, saying it is the "right of every woman to make reproductive choices without undue interference from the State". Now, all women in the country, regardless of marital status, can undergo an abortion up to 24 weeks into pregnancy.

The bench of Justices D Y Chandrachud, A S Bopanna and J B Pardiwala, ruling on a plea by an unmarried pregnant woman who had been in a consensual relationship but was denied the right to abortion because she was past the 20-week limit, made it clear that provisions of the

¹³ 1996 CriLJ 3795

¹⁴ 2000 CriLJ 671

¹⁵ (2004) 3 CALLT 609 HC

¹⁶ 2001 (4) MPHT 20 CG

Medical Termination of Pregnancy Act cannot be interpreted to deny that right to single women beyond 20 weeks of pregnancy.

If the Act and Rules, the bench said, were “to be interpreted such that its benefits extended only to married women, it would perpetuate the stereotype and socially held notion that only married women indulge in sexual intercourse, and that consequently, the benefits in law ought to extend only to them”.

“This artificial distinction between married and single women is not constitutionally sustainable. The benefits in law extend equally to both single and married women,” it said.

Article 21 of the Constitution “recognises and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decision-maker on the question of whether she wants to undergo an abortion... Depriving women of autonomy not only over their bodies but also over their lives would be an affront to their dignity,” it said.¹⁷

SOCIO- ETHICAL ISSUES

Abortion touches social, religious, economic and political aspects. Its impact on the society seen can be looked at both in a positive and a negative manner. In the earlier years of forming abortion policy, the Western civilisations disapproved the practice. By the nineteenth century many nations passed laws banning abortion. It wasn't until late in the twentieth century when the women rights were given importance and after many awareness movements that some nations, including the US, began to legalise abortion.

In India, which is a country with immense social baggage supplemented by societal evils such as illiteracy and poverty, the impact of the MTP Act should be judged in the context of changing social circumstances, values and attitudes. The social implications of MTP Act, in its very raw form can be segregated into abortion in unmarried girls versus abortion in married woman. These two have completely different connotations. In MTP Act married woman is not considered as a social stigma, whereas unmarried girls are not easily accepted. The fact that it is unaccepted creates hindrances in safe abortions, sometimes defeating the very purpose of abortion *i.e.*, health of the woman undergoing abortion. In villages where there is in access to medical facilities, girls are taken to other distant places for MTP Act in the name of preserving the girl's future and keeping image in the society intact. The legalising of MTP Act has obviously had a positive stimulus upon the omen in need of MTP and has shown reduced incidence of suicide and betterment of health and safety. The acceptance of the family planning methods has also witnessed wider acceptance.¹⁸

The real problem lies in the implementation of the laws and existing framework. It is the responsibility of the government to ensure that MTP Act is done by qualified surgeons in registered clinics or hospitals. The concerned authorities need to deal with another major challenge and that is of the genuineness of reasons behind requesting termination of pregnancy.

¹⁷ <https://indianexpress.com/article/india/all-women-entitled-to-safe-and-legal-abortion-supreme-court-8179879/>

¹⁸ Government of India, Report of Ministry of Health and Family Welfare on Rural Health Care System in India (MHFW, 2005).

There have been cases reported where in MTP Act is performed flimsy ground such as examinations, family weddings, tours etc. such abortions are conducted by the medical practitioners for financial gains and go unchecked on most occasions due to fabricated reports. Abortions have both long term and short term consequences. It is also unfortunate that abortion often is used as an alternative to regular methods of family planning.¹⁹ Such issues can only be addressed by government initiatives and awareness programs. It is the social responsibility of doctors to counsel all patients coming for termination of pregnancy about the use of some contraception. It should be emphasised that contraception use is much safer than termination of pregnancy. To mitigate the ill effects on society, the balancing of the negative and positive aspects of this social legislation needs to be taken up.

The ethical debate about the legal stance of prevention of unwanted pregnancies has been continuing for many years throughout the world, and this established the idea of enacting a legislation that would balance the ethical and legal perspective. In India, in spite of legislative and judicial control, ethical controversies surrounding medical termination of pregnancy still continues. Though many people believe that medical termination of pregnancy is immoral but today it is a right that cannot be taken away from the women.

In relation to social stigma a Supreme Court bench comprising Thakker and D.K. Jain JJ held in *Suman Kapur v. Sudhir Kapur*²⁰ that an abortion by a woman without her husband's consent would amount to mental cruelty and a ground for divorce. To quote the bench:²¹ Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse.

In the light of such judgements, it can be said that Constitution does not guarantee right to abortion to the women in India and the MTP Act, 1971 itself limited sphere of this right and provides for the 'termination of pregnancy' in certain cases only.

In a expansion that may have far-reaching consequences, the Supreme Court of India have decided that severe foetal abnormality can be a valid ground for the medical termination of pregnancy, even if the foetus is more than twenty weeks old. The Supreme Court granted a twenty four week pregnant woman and rape survivor the permission to go for an abortion in *Ms.X v. Union of India*.²² Here it is pertinent to specify that the International Federation of Gynecology and Obstetrics (FIGO) recognises an ethical obligation to allow women to terminate a severely malformed fetus.²³ FIGO emphasises that in such cases, "[t]he decision to terminate a pregnancy should rest primarily with the parents."²⁴ It is evident that many countries permit the legal abortion procedure throughout pregnancy in cases of fetal impairment to protect a pregnant woman's health.

¹⁹ Ministry of Statistics and Programme Implementation, NSSO 60th Round, Report No. 507 on Morbidity, Health Care and the Condition of the Aged, (National Sample Survey Organisation, 2004).

²⁰ AIR 2009 SC 589

²¹ Ibid.

²² http://supremecourtindia.nic.in/FileServer/2016-07-25_1469453114.pdf

²³ <http://www.figo.org/docs/Ethics%20Guidelines%20%20English%20version%202006%20-2009.pdf>

²⁴ *Id.* at 75.

PSYCHOSOCIAL ASPECTS

The famous birth control activist Margeret Sanger once said that “No woman can call herself free until she can choose consciously whether she will or will not be a mother”. Women have however now come a long way since those days where in abortion was illegal and medical termination of pregnancy was socially unacceptable. The crucial consequence that followed this attitude towards abortion was the psychological implications upon the pregnant woman and her family. These persons were faced with distress of an uncertain future. In today’s time however, it is legally available in most countries of the world and due to this the physiological trauma and social isolation have reduced. Psychologically it gives them a sense of control upon one’s own future and the power to make choices. However, in the favorable social circumstances following legalised abortion, the patient’s relief of getting rid of the unwanted pregnancy out shadows and feeling of guilt that either used to accompany an illegal and socially unsanctioned procedure. In a minority of patients, one sees psychological disturbances in the form of major psychoses or depression.²⁵

It was not yet recognised as a justification for abortion that the women’s health would be endangered if the pregnancy is carried to the full term. That step has not been taken but perceptibly it constitutes a greater inroad in the sanctity of life of the fetus than a provision intended to guard against danger to the women’s life. But each person has a right to bodily sovereignty and human rights and various international instruments protect such rights. Thus it becomes important to secure the right to abortion to every woman.²⁶

Those who are pro-life are against abortion and believe that since life begins at conception, abortion is parallel to murder as it is the act of taking human life. Abortion is in direct disobedience of the idea of the sanctity of human life and that no civilized society permits any human to harm or take the life of another human. Their answer to an unwanted child is adoption and they believe that with millions of child less parents wanting to adopt a child. In the instance of rape and incest, *etc.*, they believe that abortion punishes the unborn child who committed no crime; instead.

Their basic premise is that for women who demand complete control of their body, control should include preventing the risk of unwanted pregnancy through the responsible use of contraception or, if that is not possible, through self-restraint. In short, it can be said that abortion should not be used as another form of contraception.²⁷ On the other hand, those who are prochoice support abortion and believe that since the fetus cannot be regarded as a different entity in the first trimester as a fetus cannot exist independent of the mother. This is so because it is attached to the mother by the placenta and umbilical cord and its health is dependent on her health, and cannot be regarded as a separate entity as it cannot exist outside her womb.²⁸

²⁵ Siddhivinayak Hirve, “Abortion Policy In India: Lacunae and Future Challenge” Abortion Assessment Project 2004, India Centre for Enquiry into Health and Allied Themes, Bombay (2004).

²⁶ Ibid.

²⁷ Abortion Arguments from Pro-Life and Pro-Choice Sides & Main Points of Debate, *available at*: <http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm>

²⁸ Abortion Arguments: 10 Arguments For Abortion, 10 Arguments Against Abortion, *available at*: <http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm>

Another contention that they put forwards is that the concept of human life is totally different from the concept of personhood. At the time of conception human life occurs, but fertilized eggs that used for in vitro fertilisation, in many times, are not implanted and are routinely thrown away and it is not considered as murder, then how would abortion be considered as murder? They also believe that the concept of adoption is not an alternative remedy to abortion. Even in the case of rape or incest, *etc.*, often a woman is unaware that she is pregnant or is too afraid to talk about, thus the contraceptive pills are ineffective in these situations. This group of persons believes that although abortion should not be used as a form of contraception but even with responsible contraceptive use pregnancy can take place.²⁹ Another aspect that they rest their case on is that teenagers who become mothers have harsh prospects for the future such as leaving the school, health issues, inadequate prenatal care combined with social stigma. Thus they believe it to be against the very fundamental concept of civil rights and right to make choices.

CONCLUSION

Before drawing any conclusions, it is important to understand the basic purpose behind abortion law. It can be concluded that the main goal is to provide quality abortion care that meets the needs of all women by improving aspects such as easy access and affordability of safe abortion services. I can do it. This can be done by mobilizing human, financial and material resources to provide care and safety in abortion procedures and by increasing the number of trained people and well-equipped abortion centers. It also integrated abortion services into primary and community health centers, increased investment in public facilities, expanded the abortion provider base by training paramedics in early pregnancy abortion, and combined it with the latest technology. Increase efficiency and reach by simplifying enrollment procedures and policies. In India, the legalization of abortion through her MTP law enacted in 1971 has not yielded the expected results. Despite modest guidelines, the majority of women still rely on unsafe abortions. This contributes significantly to the burden of maternal morbidity and mortality. The MTP Act now clarifies Section 3. In this section, dismissal for rape or contraceptive failure is permitted because the distress they cause constitutes "serious injury to physical or mental health." The MTP method is discouraged because the diagnosis of fetal dysfunction is likely to result in distress that constitutes a serious mental health violation, and because specific fetal abnormalities are not identified within a fixed 20 weeks of gestation. It should be recognized that no exceptions must exist during pregnancy. Pregnancy can be determined. The great Tamil saint Thiruvalluvar said, "To touch children is a bodily pleasure, and the ear's pleasure is to hear their words." It is a mother's duty to give her best to her children. However, they may also engage in activities that harm their unborn child. This may be due to ignorance, negligence, or sometimes willful misconduct. Abortion is associated with various social, ethical and economic issues. From this we can conclude that the mother's right to abortion is limited. Ensuring the mother's independence and liberty and the life of the unborn child rests on the shoulders of Law No. The medical community and society need to offer love and support to women with unplanned pregnancies and help them find compassionate alternatives to abortion.

²⁹ Ibid.