

“Constitutional Provisions For The Abortion Law: Is There An Urgent Need For Upgradation ?”

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ABSTRACT

The Abortion Laws in India allow abortion only in very few circumstances which ultimately leaves women with no choice other than to perform the task themselves at home. Sexual crimes, the lack of decision making powers in women in India, multiple pregnancies, social taboos, social dynamics of our society as well as the crippling shortage of trained midwives and medical practitioners have all resulted in the creation of a complicated situation where a large number of abortions occur under the radar either by quacks or themselves. The result of unwanted pregnancies can be grave and adversely effects the lives of women and their families. The Abortion law in India is 38 years old and has become obsolete and needs urgent

upgradation. A women's reproductive and sexual health, mental health, marital status, family dynamics, financial stability, personal needs, shape her reproductive choices. Reproductive rights are globally recognized as critical both to advancing women's human rights as well as in promoting development. The woman who is carrying the foetus has absolutely no agency over her body under the Indian abortion law. It is high time that we understand the needs of women with respect to the abortion laws and make amends accordingly.

INTRODUCTION

“Abortion has been legal in India since 1971, when the Medical Termination of Pregnancy Act was passed. The law is quite liberal, as it aims to reduce illegal abortion and maternal mortality. An abortion can be performed in India until the 20th week of pregnancy. The opinion of a second doctor is required if the pregnancy is past its 12th week. The Medical Termination of Pregnancy Act was amended in 2002 and 2003 to allow doctors to provide mifepristone and misoprostol (also known as the “morning-after pill”) on prescription up until the seventh week of pregnancy.”¹

“Every year 6.7 million abortions take place in India but the sad part is that 5.7 million are illegal. The place and technique used in most of the illegal cases are unsafe and unhygienic, "The result is obvious - India has a steep maternal mortality rate of 498 per 100,000 women, which is very high as compared to other countries, we

are following 38-year-old law of abortion which prohibits abortion after 20 weeks, unless under exceptional circumstances such as a threat to the mother's life. Importantly, pregnancy that results from rape or failure of a contraceptive device between married couples is viewed as causing grave injury to the mental health of the woman. Many countries like Canada, Korea, China, Germany, France and several other European countries have comparatively liberal laws on abortion. Canada goes to the extent of not interfering with the issue at all and leaves it entirely to the woman and her physician. The woman is perceived as having complete liberty upon her person and the fetus is seen as a part of her body, acquiring the status of a person only after birth. Korea permits abortions till twenty-eight weeks but spousal consent is mandatory for married women. In India, legal abortion beyond 20 weeks can only be done in certain circumstances. If complications arise either in the mother or the child or some rare disease that the child suffers from, then the legal period needs to be increased to 24 weeks or above.”²

“When is termination of pregnancy allowed by a medical practitioner?³

- (i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or
- (ii) There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
- (iii) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of

the pregnant woman's actual or reasonable foreseeable environment.

PERMISSION

No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian. (b) Save as otherwise provided in C1. (a), no pregnancy shall be terminated except with the consent of the pregnant woman.”

ABORTION AS A HUMAN RIGHT

“Throughout history, induced abortions have been a source of considerable debate and controversy.⁴ An individual's personal stance on the complex ethical, moral, and legal issues has a strong relationship with the given individual's value system. A person's position on abortion may be described as a combination of their personal beliefs on the morality of induced abortion and the ethical limit of the government's legitimate authority.

It is a woman's individual rights, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. A woman's reproductive and sexual health shape her reproductive choices. Reproductive rights are internationally recognized as critical both to advancing women's human rights and to promoting development. In recent years, governments from all over the world have acknowledged and pledged to advance reproductive rights to an unprecedented degree. Formal laws and policies are crucial indicators of government commitment to promoting reproductive rights. Each and every woman has an absolute right to have control over her body, most often known as



bodily rights. A woman's right in this respect is doubtful because her right is dependent on certain conditions: proof of risk to her life or grave injury to her physical or mental health, substantial risk of physical or mental abnormalities to the child if born and a situation where abortion could only save her life, all to be arrived at by the medical practitioners. Can a woman request a medical practitioner to perform an abortion on the ground that she does not want a child at that time? Where the liberty of the woman is fully dependent on certain other factors, such as quest cannot be said to be just and reasonable. The M.T.P. Act also does not classify the pregnancy period so that the woman's interests and the state's interests could be given predominance in one's own spheres.

The 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. The rights provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the mother that protects the unborn.”

“The prohibition or severe restriction of abortion has not hindered its practice but instead it has forced high risk abortions that hit poor women harder. Large part of the legislations in Latin America have tried to solve the problem of abortion through prohibition, meaning grave economic, social, health and social justice consequences for the women living in these countries while there is no fall in the high abortion rate that exists in the region. Because of this, it is essential to review the laws that regulate induced abortion.”⁵

PREVIOUS CASES

“This is not the first time that the Supreme Court has permitted a woman to abort a foetus older than 20 weeks. In 2015, the apex court overturned a decision by the Gujarat high court in a similar case. The Gujarat high court had denied permission to a 14-year-old rape survivor to abort her 25-week old foetus. Interestingly, while delivering its verdict, the high court acknowledged the adverse physical, emotional and psychological implications of the decision on the petitioner's life, but ultimately chose to subscribe to the law. The girl then approached the Supreme Court, which recommended that a

medical panel examine the girl and decide whether the termination of pregnancy was in her best interests; if the panel was in favour of the abortion, then the girl could go ahead with the termination.⁶

In 2008, the Bombay high court denied a woman, whose foetus had been diagnosed with a congenital heart defect, permission to abort her 26-week foetus. The petitioners argued against the constitutionality of section 5 of the MTP Act – which permits abortion beyond 20 weeks only if it is necessary to save the life of the pregnant woman. The petitioners argued that since the 20-week law includes a provision to terminate a pregnancy if a foetus has severe abnormalities, the same provision should apply if the foetus is over 20-weeks old. However, the high court rejected this argument and held that it was not empowered to read down section 5 as it would virtually amount to usurping the power of the legislature.

Therefore, on a plain and strict reading of the MTP Act, the court held that abortion on the ground of severe abnormalities of the foetus was only permissible within 20 weeks. As there was no risk to the life of the pregnant woman, the court denied the petitioners the right to abort the foetus.

Similarly, in 2015, the Punjab and Haryana high court denied a 13-year-old rape survivor permission to terminate her 25-26-week-old foetus. More recently in *R v Haryana*, the Punjab and Haryana high court did not grant the petitioner, also a rape survivor, permission to terminate her pregnancy as the commissioned medical report did not agree to an abortion. However, by way of abundant caution, the court requested doctors from AIIMS, the premier medical institution in the country, to reassess the

possibility of terminating the pregnancy. The doctors were instructed to take the decision in good faith and in the best interest of the petitioner. However, the petitioner delivered a healthy baby over the course of these lengthy proceedings. Interestingly, the court also directed the Centre to make necessary amendments to the MTP Act – to clearly stipulate that doctors will not be unnecessarily prosecuted if they act in good faith to save a rape survivor's life or to prevent grave injury to the women's physical and mental health.”

“The Supreme Court's order passed in the case of “*Ms X*” v Union of India is a cop-out on an important issue — the constitutional right of a woman to have autonomy over her own body in the context of a pregnancy.⁷

While it has allowed the petitioner to terminate her pregnancy on the basis of medical advice that pointed out that her life would be in danger if the pregnancy was continued, the Court refused to engage with the larger questions that the petition raised – that the provisions of the Medical Termination of Pregnancy Act, 1971 (MTP Act).

It leaves us therefore in a situation where the question of whether an abortion is to be undertaken or not is left purely in the hands of a medical practitioner, with no say for the woman who is actually pregnant. The woman who is actually carrying the foetus has no agency over her body under Indian law. It is this problematic approach of the law in India that should have been examined by the Supreme Court, to see if this is not contrary to the constitutional right to life and liberty, not to mention the right to privacy of a woman.”

NEED FOR ABORTION

“Women's needs and aspirations are at cross purposes with the MTP Act in many ways. The Act is far from accommodating women's abortion needs; rather, women have to disguise their needs to fit within the conditions of the Act. Hence, many of their abortions are rendered technically illegal. For example, if a woman says she needs an abortion because of failure of contraception, she can hardly resist if a doctor insists that she must now use a so-called foolproof contraceptive method. Nor can she argue that she is capable of handling her contraceptive needs effectively. Hence, she is more vulnerable to the already existing pressures to use a permanent or long-acting method. In the Indian context, where women have limited access to good quality primary health and reproductive health care and where the state has a strong bias in favour of population control, their bargaining power while accessing abortion-services is significantly lowered, in spite of their own need for abortion and safe contraceptives. There is also very little space for a woman to acknowledge her sexuality overtly when she needs an abortion, especially if she is single.

Either she has to say that pregnancy is a 'husband's' or that the pregnancy resulted from coercion or rape. Being forced to tell lies-in addition to being seen as 'immoral' and 'heart-less' -makes women feel even worse than they already do about having an unwanted pregnancy. All this turmoil occurs at a time when a woman needs care, support and reassurance. Instead, the law, the biases of health professionals as well as socio-cultural norms act against her.⁸

In addition, a woman is distinctly disadvantaged when a doctor insists upon the husband's signature at the time of abortion. Husbands are sometimes away or absent for long periods of time. Requiring a husband's signature may

ensure legal immunity for doctors, but it also reflects the patriarchal values of Indian society. Children belong to the husband; hence, a woman must get his permission to abort a pregnancy. The rights of the father overrule the rights of the woman to regulate her fertility. On the other hand, if a man denies paternity, neither a single or even a married woman can get an abortion unconditionally. Some of the women in our study said their husbands would not practice contraception themselves, nor allow their wives to do so. The women undergo repeated abortions as a consequence, while the husbands say the pregnancies must be illegitimate.

These problems point to important ethical considerations related to the decision to have an abortion, which are rarely taken into account, eg. that sex should be safe and non-coercive, that men should take responsibility if they contribute to starting a pregnancy, and that women and their offspring should have recognized legal rights.”

“In a significant decision, the Punjab and Haryana High Court ruled that the right to abort a pregnancy in a marriage rests with the wife and not husband.⁹

A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant woman...” said the court.

Stressing that marital intimacy between a couple does not automatically translate to the woman's consent to child bearing, Justice Jitendra Chauhan said, “Mere consent to conjugal rights does not

mean consent to give birth to a child for her husband.” Welcoming the judgement, Jagmati Sanwan, All India Democratic Women's Association national vice-president said, “If the family conditions are unsuitable, no woman would like to give birth to a child because after all, she is the one who takes care of the children for all practical purposes. We see around us that fathers often desert their families after a couple of deliveries. But children become a part and parcel of the mother's physical and emotional world. She invests much into their wellbeing and she alone suffers. Hence, the rights of whether to give birth or not, should be with her.”

CONSEQUENCES OF UNWANTED PREGNANCY

“The denial of legal abortion services may have serious consequences for women's health and wellbeing. Additional evidence on the risk factors for presenting later in pregnancy, predictors of seeking unsafe illegal abortion, and the health consequences of illegal abortion and childbirth after an unwanted pregnancy is needed. Such data would assist the development of programmes and policies aimed at increasing access to and utilization of safe abortion services where abortion is legal, and harm reduction models for women who are unable to access legal abortion services.”¹⁰

“Bonding and love between parent and child is a crucial foundation for family integrity and wholesome child development. It is sometimes said that parenthood, particularly motherhood, is a 'natural' condition in which 'there is always room for one more.' But can all parents learn to love a child who was unwanted during pregnancy? Further, even if a woman does love

a child born after an unwanted pregnancy, is love ever enough to ensure wholesome child development? Although it is true that unwanted pregnancy does not always translate into unwanted births, research on the development of children who were unwanted during pregnancy suggests that when women say they cannot adequately care for a child, it is important to listen to them. Both unintended and unwanted childbearing can have negative health, social, and psychological consequences. Health problems include greater chances for illness and death for both mother and child. In addition, such childbearing has been linked with a variety of social problems, including divorce, poverty, child abuse, and juvenile delinquency. ¹¹

In one study, unwanted children were found less likely to have had a secure family life. As adults, they were more likely to engage in criminal behavior, be on welfare, and receive psychiatric services. Another found that children who were unintended by their mothers had lower self-esteem than their intended peers 23 years later. The adverse health consequences of teenagers' inability to control their childbearing can be particularly severe. Teenage mothers are more likely to suffer toxemia, anemia, birth complications, and death. Babies of teenage mothers are more likely to have low birth weight and suffer birth injury and neurological defects. Such babies are twice as likely to die in the first year of life as babies born to mothers who delay childbearing until after age 20.”

“Does it matter whether a pregnancy is unintended at the time of conception—mistimed or unwanted altogether?¹² There is a presumption that it does—that unintended pregnancy has a major impact on numerous social, economic, and cultural aspects of modern life. But it is important to define what these

consequences might be. Therefore, in assessing the consequences of unintended pregnancy, it is useful to review the available data on the extent to which these demographic attributes themselves carry increased risks for children and their parents. Information on both socioeconomic and medical risks are reviewed below; because poverty is intertwined with the issues of both age and marital status, as subsequent text reveals, it is not discussed as a separate issue it is important to note the strong association of teenage childbearing with various problems. The link to diminished socioeconomic well-being, for example, for both children and their mothers has been recognized for several decades (Bacon, 1974). Adolescents who have children are substantially less likely to complete high school than those who delay childbearing. In recent years, the proportion of teenage mothers with high school degrees has increased, in large part because many are able to complete requirements for the general equivalency diploma. However, few teenage mothers attend college, and less than 1 percent have been found to complete college by age 2. Moreover, teenage mothers are more likely to be single parents or, if they are married, to experience marital dissolution (Hayes, 1987). Indeed, the proportion of teenagers who are single parents has increased substantially over the years. Births resulting from unintended pregnancies are often conceived out of wedlock and the infants are born to unmarried women. More than 40 percent of infants born after unintended conception begin life with unmarried parents.

Births to unmarried parents are twice as likely to be unintended as births to married parents (70.4 compared with 33.9 percent) (Kost et al., 1994). Moreover, couples who marry after conception—usually unintended—are more

likely to divorce than couples who marry before conception (Bumpass and Sweet, 1989). Finally, unintended pregnancies within marriage are associated with a greater risk of divorce after the child's birth. For all these reasons, children born after unintended conceptions are very likely to live apart from one or both of their parents, usually their father, sometime during childhood.”

13“The social stigma associated with being an unwed parent is so much that it may lead some women to attempt or commit suicide. In our social setup, pregnancy outside marriage is considered a humiliation that will affect not only the mother but also her family. Such a woman is ostracized in most of our Indian Societies. The immediate family and extended family, which should provide social protection to mothers to be, leave them alone considering their social and financial burden. According to a research conducted by a Colombo-based lawyer, “The single women both at home and at the work place have to face many physical advances from men young and old, married and unmarried. In our interviews these women found it difficult to discuss these sexual advances.” To be single and specially an unwed mother is taken as that you are available or easy to gain access to. Furthermore, what is more critical is that the responsibility of a child born outside marriage rests solely on the mother. The lack of support from family, relatives, society, etc. makes her living quite hard and sometimes unbearable.”¹³

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