

RIGHT TO ABORTION IN INDIA – A STUDY AS WOMEN’S RIGHT VIS-A-VIS HUMAN RIGHT

- Dr. Caesar Roy*

Abstract

Abortion remains one of the greatest contentious issues because it involves taking a human life. It is up to the mother to determine abortion. Due to an unwanted pregnancy, a woman may be forced to choose an unsafe abortion that could be harmful to her health. In a country like India, abortion right of women is quite silent; this right for every women of India is not properly raised under Article 21 of our constitution. Under the Medical Termination of Pregnancy Act, 1971, only married women in India were granted the right to an abortion, and even then, only under specific circumstances. The purpose of this article is to enlighten relating to the abortion laws and legislative policies in India. The right to an abortion is one of the basic rights that all women in the US are presumed to have. Despite much criticism, the International Organization acknowledged this right as a basic human right. Only married women were allowed to obtain abortions because they were initially legalized in India for the purpose of family planning rather than as a fundamental human right, and even then, only in cases when all other birth control methods had failed to avoid pregnancy. As a result, it is impossible for women to get abortions in India. Feminist movements are urgently required in India for women to be able to claim their right to abortion. In this article, meaning of abortion, laws on abortion in India and their analytical explanation are placed. Besides, the right of abortion as human right as well as women right and the need for right to abortion are discussed in this article. Various cases of other countries including Indian judiciary are discussed here. The article is concluded by providing some fruitful and effective suggestions in this regard.

Keywords: *Abortion, right of women, right to abortion, Reproductive choice, Laws on abortion.*

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1. INTRODUCTION

Many countries still view abortion as a topic of great concern, and it draws significant global concern as both a public health issue and an ethical and religious one. In India, the public debate on abortion has centered on either the spread of clinics in urban areas or the declining sex ratios and sex-selective abortions. Unwanted pregnancies can happen for several unanticipated reasons, and a woman ought to have the option to discontinue the pregnancy. India is one of many countries whose laws on abortion have been expanded to allow for abortions to be performed for a range of medical, humanitarian, and social purposes. The right of a woman to have an abortion is protected by her personal liberties, including her freedom for life, liberty and her quest of pleasure. The legality or illegality of abortion in India is governed by a number of laws. Sections 312 to 316 of the Indian Penal Code, 1860 and the Medical Termination of Pregnancy Act, 1971 both address the provisions of the country's abortion legislation.

Human rights encompass the freedoms that should be guaranteed to all people, free from all forms of bias. The basis of freedom is the acknowledgement of the intrinsic value and the unalienable rights of every member of the human community. The right to life is a person's most valuable right. It is the most important human right, and no exceptions are allowed. It is irrefutable. Article 6(1) of the International Covenant on Civil and Political Rights forbids the wilful taking of life. Yet, this greatest advantage is restricted by several difficult issues. The right to an abortion is one such topic. Every mother is believed to have a fundamental right to an abortion together with other rights. But both the liberties of the mother and the unborn child need to be harmonised.

Alongside to different rights, every mother is believed to have a natural right to an abortion. The right to an abortion was once prohibited and was explicitly discouraged by community. Ending of pregnancy termination was referred as the killing of the foetus. However, because of developments in technology and time, most countries now accept this right as a legal right, due to the well-known *Jane Roe v. Henry Wade*¹ ruling by the US Supreme Court. According to the finding of the court in this case, a mother may choose to terminate her pregnancy for whatever cause if the "point at which the foetus becomes 'viable'". However, yet there are many who disagreeing and who think it ought to be illegal.

¹ 410 US 113 (1973)

2. MEANING AND CONCEPT OF ABORTION

The word “abortion” refers to the “right to choose” of a woman over whether to keep her pregnancy or end it. There is no clear definition of “abortion” anywhere. Due to the divisive nature of abortion, lawmakers have had a difficult time defining it. In the medical field, this ambiguity has raised a few issues. Medical professionals frequently refer to it as “termination of pregnancy” due to the stigma associated with the term.

According to the Black Law Dictionary, abortion is “an artificially induced termination of a pregnancy for the purpose of destroying an embryo or foetus”.² According to Law Lexicon “abortion is the delivery or expulsion of the human foetus prematurely i.e. before it is yet capable of sustaining life.”³ Abortion is also defined in Chambers 21st Century Dictionary, as “the removal of an embryo or foetus from the uterus before it is sufficiently developed to survive independently, deliberately induced by the use of drugs or by surgical procedures”.⁴

Medical terminology for abortion includes miscarriage, the evacuation of the foetus between the fourth and the seventh month of pregnancy, and preterm birth, giving birth to child after the seventh month but prior the entire gestation period. The phrases “miscarriage,” “abortion,” and “premature labour” are now interchangeable on the point of law and refer to any cessation of pregnancy before childbirth.⁵

Based on its nature and the conditions in which it happens, abortion is divided into four kinds. They are – natural, accidental, spontaneous and artificial or induced abortion. The first three types of abortions are not illegal, but induced abortions are prohibited unless specifically waived by the law.⁶ The Medical Termination of Pregnancy (MTP) Act, 1971 which governs abortion in India, fails to define the terms “abortion” or “termination of pregnancy.”

3. ABORTION AS A WOMEN’S RIGHT VIS-A-VIS HUMAN RIGHT

² B. A. Garner, *Black’s Law Dictionary*. 6 (West (Thomson Reuters), 11th edn., 2008)

³ Aiyar, *Law Lexicon*, 2nd edition, 1977, p. 10

⁴ Allied Chambers (India) Limited, New Delhi, p. 4

⁵ K. Mathiharan and Amrit K. Patnaik (eds.), *Modi’s Medical Jurisprudence & Toxicology* 1013 (Lexis Nexis Butterworth, New Delhi, 2006)

⁶ K.D. Gaur, *Criminal Law & Criminology* 209 (Deep & Deep Publication, New Delhi, 2002)

Human rights are basic safeguards against the state or other public authorities that each and every member of the human family is entitled to, regardless of other factors.⁷ No one may be denied these rights without committing an enormous injustice. There are some things that should never be done, some liberties that should never be violated, and some things that are sacrosanct.⁸

The Protection of Human Rights Act of 1993 contains a very detailed definition of human rights. According to this Act human rights mean “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India”.⁹

Human rights are those rights that every person has by virtue of being a human being and that are acknowledged and upheld in a civilised society. Humans have certain fundamental, unalienable rights known as human rights that they have by virtue of being human. These rights are in effect from the time an individual is born because they are a natural consequence of their existence. All people have innate human rights, which include birth rights, regardless of their caste, religion, sex, or nationality. Because they protect each person’s freedom and dignity and advance their physical, moral, social, and spiritual well-being, these rights are essential for all. Human rights are therefore those that are part of whom we are and without which we cannot function as beings. The word “human right” is broad and includes civil rights, civil liberties, as well as social, economic, and cultural rights. Human rights are universal safeguards provided by law for people and organizations from acts and omissions that violate basic liberties, rights, and human dignity.

In the Tehran UN Conference on Human Rights, reproductive health care got accepted as an unalienable human right.¹⁰ The Plan of Action from the Bucharest Conference on World Population in 1974 reiterated the fundamental human right of spouses to choose their own proportion of family members.¹¹ Due to the 1994 International Conference on Population and Development (ICPD), held in Cairo, and the 1995 Fourth World UN Conference on Women,

⁷ D.D. Basu, *Human Rights and Constitutional Law* 5 (Prentice Hall, New Delhi, 1994)

⁸ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 at 619

⁹ Human Rights Act, 1993 (Act 10 of 1993), s. 2(1)(d).

¹⁰ United Nations, *Final Act of the International Conference on Human Rights, Tehran*, U.N. Doc. A/CONF. 32/41 (May 13, 1968)

¹¹ United Nations, *Report of the United Nations World Population Conference, 1974* (Bucharest, 19-30 Aug. 1974) 3-26, U.N. Doc. E/CONF.60/19 (1975)

held in Beijing, the advancement of reproductive rights for women is currently growing pace.¹² Women's right to abortion was mentioned in the overall conclusions that were produced at these conferences, which lends more evidence that these rights are in fact human rights. Like to the UN system, regional human rights accords including the African Commission on Human and Peoples' Rights, Inter-American Commission, and European Convention on the Protection of Human Rights and Fundamental Freedoms concentrated on the right to abortion. While international and regional human rights treaties and treaty-monitoring organs have not yet specifically addressed the problem of abortion on demand, the aforementioned rights have strong written and interpretive backing that has been applied by national legislatures and courts all over the world to protect a woman's right to abortion and that advocates can use to advance women's right to abortion on demand.¹³

The right to life is reaffirmed and upheld by the International Covenant on Civil and Political Rights (ICCPR). The Covenant proclaims, "Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life."¹⁴ Notably, the covenant declares that every person is subject to the right. "Human being" is a scientific phrase for a living human entity, in contrast to the word "person," which, through judicial interpretation in the United States (US), has put the unborn outside of a sphere of protection. A possible justification is that the fundamental human rights documents forbid abortion and do not establish a legal right to it.¹⁵

Another explanation can be derived from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that "States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."¹⁶

There should never be a requirement to become a mother. Women should have the freedom to manage their bodies and, as a result, the choice to have or not have children, without being

¹² Cook, Dickens and Fathalla, *Reproductive, Health and Human Rights: Integrating Medicine, Ethics and Law* 148 (Oxford University Press, New York, 2003)

¹³ Jaime M. Gher and Christine Zampas, "Abortion as a Human Right – International and Regional Standards" 8(2) *HRLR* 249-294 (2008)

¹⁴ International Covenant on Civil and Political Rights, art. 6

¹⁵ *Ibid.*

¹⁶ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, art. 12

compelled to become mothers under any circumstances. In a majority decision declaring Canada's draconian criminal abortion statute unconstitutional and ineffective, the Chief Justice of Canada made the following observation -

"Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person".¹⁷

The *Roe v. Wade*¹⁸ decision by the U.S. Supreme Court in 1973, which acknowledged a woman's restricted right to end a pregnancy, set off a wave of awareness for this right. It was proclaimed a "fundamental right" that was "broad enough" to include a woman's choice to have an abortion or not, and it was only subject to government regulation in the face of some "compelling" interest of the state (both the mother's life and the "potential life" of the foetus were acknowledged as "legitimate" interests). According to the US Supreme Court, a pregnant woman has an unrestricted right to privacy regarding her body during the first twelve weeks of pregnancy. The state must not intrude in her decision to carry the pregnancy to term or end it at this point because the foetus is still an integral part of her body.¹⁹

4. PRESENT LEGAL FRAMEWORK ON ABORTION IN INDIA AND ITS SIGNIFICANCE

Abortion restrictions differ depending on the country's laws. Laws in several countries forbid abortion in any situation, even when the woman's life or health is in danger. Nicaragua, for instance, fits within this category. Laws in certain countries, including Brazil, permit abortions when a woman's life is in danger. As many as 56 countries have legislation that permits abortion for health-related or medical reasons. Argentina is an example. In addition to a woman's health, certain countries frequently take into account her social or economic situation to make abortion permissible in a variety of situations. India, Japan, and the United Kingdom are a few of the countries that are in the group.

Induced abortion is illegal under Sections 312 to 316 of the Indian Penal Code (IPC), 1860. The unlawful termination of pregnancy is covered by Section 312. It states that "whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for

¹⁷ *R. v Morgentaler v. The Queen* 44 D.L.R. (4th) 385 at 402 (1998)

¹⁸ *Supra*, note 1.

¹⁹ *Ibid.*

the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.” It also covers women who intentionally miscarry. The sole exception allowed was a miscarriage that was intentionally brought on to save the woman’s life. Despite the fact that Sections 312 and 316 allowed penalties for miscarriage in certain situations, the good faith provision rendered miscarriage a legal act. When India passed the Medical Termination of Pregnancy Act in 1971, its abortion regulations began to become more transparent. It was intended to relax the IPC’s current strict regulations.

On August 25, 1964, the Central Family Planning Board of India suggested that the Ministry of Health form a committee to investigate the necessity for abortion-related laws. The suggestion was implemented in the latter half of 1964, creating a committee made up of representatives from various Indian public and commercial organisations. The name of that committee was Shantilal Shah Committee. This committee’s report was published on December 30, 1966, following a review of an extensive variety of statistical data that were accessible at the time.²⁰ This report led to the government passing the Medical Termination of Pregnancy Act of 1971 (MTP Act of 1971), which relaxed India’s abortion laws and regulations.

It is important that the MTP Act was adopted in April of 1972 and again modified in 1975 to remove cumbersome processes for the approval of a place and to increase the accessibility of services. Two amendments to this Act were made in 2002 and 2005, respectively. Preamble of the Act embodies “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.”²¹ The Act, which only has 8 sections addresses a number of issues, including the time, place, and conditions under which a registered medical practitioner can end a pregnancy.

If a pregnancy is terminated by a registered medical practitioner in compliance with the MTP Act’s norms, he is not liable for any offence under the Indian Penal Code or any other currently in existence laws.²²

²⁰ Government of India, “Report of the Committee to Study the Question of Legalisation of Abortion” 36 (Ministry of Health and Family, 1966)

²¹ Medical Termination of Pregnancy Act, 1972 (Act of 1971), Preamble

²² *Ibid.*, sec. 3(1)

When a pregnancy lasts no more than twelve weeks, the Act permits a registered medical practitioner to end the woman's pregnancy on the specified grounds.²³ However, in cases when pregnancies last longer than 12 weeks but less than 20 weeks, the concordant advice of at least two registered medical practitioners who are of the view evolved in good faith that²⁴ –

- (i) The continuation of the pregnancy would involve a risk to the life of the pregnant women, or
- (ii) A danger to her physical or mental health that could be fatal; or
- (iii) If rape resulted in the pregnancy; or
- (iv) There is a substantial possibility that the child will be significantly handicapped by certain physical or mental abnormalities if it is born; or
- (v) The failure of any device or plan employed by the married couple to reduce the number of children; or
- (vi) The pregnant woman's health is at risk due to her surroundings, whether it be present now or in the near future.

Explanation I to Section 3 states that “where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.” Additionally, Section 4 specifies where a pregnancy may be aborted. The most significant provision is the carving out of an exception to Section 3(2) in Section 5(1), which states that “the provisions of Section 4, and so much of the provisions of sub-section (2) of Section 3 as related to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.”

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in 1994 to stop the illicit use of technology to commit female foeticide in the whole country. The Act forbade determining the gender of the foetus and specified penalties for violations. The Pre-

²³ *Ibid.*, sec. 3(2)(a)

²⁴ *Ibid.*, sec. 3(2)(b)

conception and Pre-natal Diagnostic Techniques (Prohibitions of Sex Selection) Act, 1994, was updated in 2003 to enhance the monitoring of technology capable of selecting gender and to stop the deterioration in the child sex ratio. Both of the aforementioned laws were designed to safeguard the capacity of women to have children and to provide legal justification for both prenatal testing and abortion procedures.

Since its implementation, the MTP Act has attracted attention. It has recently come under controversy because of the outdated norms that now interfere with daily life for individuals. The government has attempted to fill in the gaps in the act using a variety of amendments, but the latest ones have not been successful in making it from bills to acts. The Act was first modified in 2002, when the law was decentralised²⁵ and the MTP Rules, 2003, which strengthened penalties for unauthorised abortions, expanded access to abortion.²⁶ On the advice of the National Commission for Women, the Union Ministry of Health and Family Welfare then put out a bill²⁷ in 2014; however, the bill was never introduced in the Parliament. The gestational limit was increased to 24 weeks, registered health professionals were permitted to perform abortions, the requirements for obtaining medical professionals' opinions were relaxed a bit, and most importantly, the term "married women" was replaced with "all women" in the contraceptive failure clause.²⁸

The upper house of the Parliament received another bill in 2017 that sought to extend the gestational period to 24 weeks.²⁹ In an effort to increase the gestational limit to 24 weeks, a new measure was submitted to the upper house of the Parliament in 2017.³⁰ A member of the Parliament introduced the Women's Sexual, Reproductive, and Menstrual Rights Bill in 2018, which sought to do away with the requirement of a doctor's opinion for abortions up to 12 weeks.³¹ The Amendment Bill, 2020 aims to raise the maximum gestational period to 24 weeks, reduce the number of registered medical practitioners required to one up to 20 weeks and two up to 20 to 24 weeks, and establish stipulations for unmarried women and their partners in the event that contraceptives fail.³²

²⁵ The Medical Termination of Pregnancy (Amendment) Act, 2002

²⁶ The Medical Termination of Pregnancy Rules, 2003

²⁷ The Medical Termination of Pregnancy (Amendment) Bill, Ministry of Health and Family Welfare (2014)

²⁸ *Ibid.*

²⁹ The Medical Termination of Pregnancy (Amendment) Bill (2017)

³⁰ The Medical Termination of Pregnancy (Amendment) Bill (2018)

³¹ The Women's Sexual, Reproductive and Menstrual Rights Bill, Dr. Shashi Tharoor, M.P. (2018)

³² The Medical Termination of Pregnancy (Amendment) Bill, (2020)

Except in cases when it is necessary to preserve the woman's life, abortion is illegal in India under the Indian Penal Code.³³ The MTP Act, 1971 was enacted in order to liberalise the law to safeguard women's lives from illicit abortions because India's abortion laws were quite harsh. However, this law was created as a family planning strategy to manage the population, as every person may infer from the text of Section 3 of the Act, not as a right to be granted to women. The circumstances under which doctors may perform abortions are described in Section 3 of the MTP Act. According to the section, a doctor's approval is required before performing an abortion on a woman. Under the MTP Act, women's desire for abortion is not accorded any sort of consideration. Additionally, Explanation 2 of this provision states that only married women were permitted to have abortions and that too even only under certain circumstances, such as when the woman could demonstrate that the failure of any kind of contraception caused the pregnancy, which could be regarded as denying the right to an unmarried woman.³⁴ The question that now arises is why, in the 21st century, women still have to provide evidence that their pregnancy was brought on by the failure of any form of contraception. The fact that a woman wants an abortion indicates that the pregnancy is not wanted, which is why she must respond to the doctor's questions about why the pregnancy is unwanted. This law was put into place to safeguard the lives of mothers. However, while the law only applies to married women, rape victims, and minors, there is only one alternative left for the other woman who wants an abortion, i.e. illegal abortion.

5. ABORTION AND JUDICIAL OBSERVATIONS

Many anti-abortion laws were considered unlawful after the famous *Roe v. Wade* decision by the US Supreme Court on the grounds that they infringed upon a constitutional right to privacy. The Court in this case observed that "the state cannot restrict a woman's right to an abortion during the first trimester. However, the state can regulate the abortion procedure during the second trimester 'in ways that are reasonably related to maternal health,' and in the third trimester, demarcating the viability of the foetus, a state can choose to restrict or even to proscribe abortion as it sees fit".

Following the *Roe v. Wade* decision, abortion became legal in some European and American nations. Since nearly 1970, several countries have relaxed their laws on abortion throughout the

³³ Siddhivinayak S. Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 Reproductive Health Matters 24, 114-124 (2004)

³⁴ *Ibid.*

past thirty years. The US Supreme Court later changed *Roe case* in *Planned Parenthood v. Casey*³⁵, where the viability of the foetus is now related to the constitutionality of the abortion law rather than the strict third trimester standard established in *Roe case*.

The first case regarding the constitutionality of the District of Columbia Law, which granted the right to abortion only in order to safeguard the mother's life and her mental health, was *United States v. Vuitch*.³⁶ The court in this instance, which was presided over by a doctor, found that the statute was ambiguous because it defined "health" to include both bodily and psychological well-being. The Court also made sure that the prosecution would have the burden of proving rather than the petitioner.

Doe v. Bolton,³⁷ a case that arose out of the *Roe v. Wade*³⁸ decision, provided women's rights to life and health a new dimension as the scope of abortion was broadened to include more factors. Georgia's abortion legislation was overturned in this particular case by the Supreme Court because it only permitted abortions when a pregnancy was brought on by rape, incest, or some serious health issue. The law's excessively convoluted procedures made it challenging for women to obtain their rights. In light of this, the U.S. Supreme Court declared the Georgia laws unconstitutional because they infringed on the right of the woman to determine whether or not to end her pregnancy.

Recently, *Roe v. Wade* was overturned by the US Supreme Court in *Dobbs v. Jackson Women's Health Organisation*,³⁹ ending the constitutional right to abortion after almost 50 years. The court found in majority that abortion is not a constitutional right since it is not mentioned in the Constitution and because its legal status is not "deeply rooted" in the history of the nation.

With the aid of several decisions where the court broadened the scope of the right to life and personal liberty provided by Article 21 of the Indian Constitution, the role of the Indian judiciary in enforcing reproductive justice may be pointed out. The judiciary has often taken action to stop the infringement of reproductive rights. The Supreme Court made a significant step forward in 2009 when it recognized a woman's right to choose whether or not to have children as a

³⁵ 505 U.S. 833 (1992)

³⁶ 402 U.S. 62 (1971)

³⁷ 410 U.S. 179 (1973)

³⁸ 410 U.S. 113 (1973)

³⁹ 597 U.S. ____ (2022) (No. 19-1392)

component of her personal freedom under Article 21.⁴⁰ It was held that “there is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected.”

In *D. Rajeshwari v. State of Tamil Nadu*,⁴¹ where the court authorised the termination of the pregnancy of an unmarried 18-year-old woman who prayed for permission, claiming that carrying the unwanted child for three months had rendered her mentally ill and that continuing the pregnancy had caused her great mental anguish, which would have seriously harmed her mental health because the pregnancy had been brought on by rape.

In the case of *Satya v. Siri Ram*⁴², the Punjab and Haryana High Court held that it is cruel to terminate a pregnancy when the husband has a “legitimate craving to have a child”. In *Suman Kapur v. Sudhir Kapur*,⁴³ the Supreme Court observed that a woman who has an abortion without her husband’s knowledge or consent has committed mental cruelty, which is a ground for divorce.

In a significant joint decision issued in 2011, the Delhi High Court defined the right to procreation as an “inalienable survival right” and brought it under the purview of the right to health, which is a component of the right to life under Article 21.⁴⁴ It also made it mandatory for all women to have access to and receive the minimal standard of care in public health facilities in an effort to end discrimination against women on the basis of social and economic status.

The Supreme Court of India has ruled that serious foetal abnormalities, even if the foetus is more than twenty weeks old, might be an adequate reason for medical termination of pregnancy. In *Ms. X v. Union of India*⁴⁵, the Supreme Court let a rape survivor who was twenty-four weeks pregnant to have an abortion. In *Tapasya Umesh Pisal v. Union of India*⁴⁶, when the girl was in the

⁴⁰ *Suchita Srivastava & Anr. v. Chandigarh Administration*, (2009) 11 SCC 409

⁴¹ 1996 Cri.L.J 3795

⁴² AIR 1983 P&H 252

⁴³ AIR 2009 SC 589; (2009) 1 SCC 422

⁴⁴ *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, (W.P. (C) No. 8853/2008) and *Jaitun v. Maternity Home, MCD, Jangpura & Others*, (W.P. No. (C) 8853/2008 & 10700/2009)

⁴⁵ (2016) 14 SCC 382

⁴⁶ (2018) 12 SCC 57

24th week of pregnancy, the Supreme Court had approved abortion. The Court held that “it is difficult for us to refuse the permission to the petitioner to undergo medical termination of pregnancy. It is certain that the foetus, if allowed to born, would have a limited life span with serious handicaps which cannot be avoided. It appears that the baby will certainly not grow into an adult.” The Supreme Court approved the termination of pregnancy in the 25th week of the pregnancy in the case of *Mamta Verma v. Union of India and Others*⁴⁷.

In the case of *Devika Bismas v. Union of India*,⁴⁸ the Supreme Court held that “a woman’s reproductive autonomy to be her fundamental right to privacy, and has said that the decision to have or not have a child should be hers alone, devoid of any state intervention”.

In *Murugan Nayakkar v. Union of India & Ors.*,⁴⁹ The Supreme Court approved the abortion of a 13-year-old rape victim’s 32-week pregnancy by observing, “Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed.”

However, the court refused to allow the termination of a 27-week pregnancy in *Savita Sachin Patil v. Union of India*.⁵⁰ The Medical Board determined that although the mother posed no health risk, the foetus had serious physical defects. Based on the Medical Board Report, the Court subsequently refused to allow termination.

The Supreme Court of India’s nine-judge bench in *K.S. Puttaswamy v. Union of India*⁵¹ unequivocally determined that the right to life and personal liberty guaranteed by Article 21 of the Constitution underlies the right to enjoy reproductive freedom.

The court refused to permit abortion in *Alakh Alok Srivastava v. Union of India*,⁵² where the petitioner was a 10-year-old pregnant rape victim who was also 32 weeks along in her pregnancy. The Medical Board concluded that the petitioner would be less at risk from continuing the pregnancy than from having it terminated at that point.

⁴⁷ (2018) 14 SCC 289

⁴⁸ (2016) 10 SCC 726

⁴⁹ 2017 SCC OnLine SC 1092

⁵⁰ (2017) 13 SCC 436

⁵¹ (2017) 10 SCC 1

⁵² (2018) 17 SCC 291

Both Sections 3 and Section 5 of the Act were subject to challenge in the case of *Nikhil Datar v. Union of India*.⁵³ When the foetus in this case was truly identified with a heart blockage during the 26th week of pregnancy, the petitioner requested the termination of the pregnancy. The court decided that it cannot exercise its right under Section 3 of the MTP act because the 26th week has gone and it is therefore unable to give any orders. The type of psychological and physical trauma that the ladies experience was also thoroughly covered in the case. Additionally, a number of ethical dilemmas that doctors would encounter in situations similar to this one are covered in detail in the case.

In *R. and Anr. v. State of Haryana*,⁵⁴ it was held by the Punjab and Haryana High Court that “No doubt, the protection of right of unborn child is an obligation cast upon the State under the Constitutional provisions, yet in view of the unambiguous language of Section 5 of the Medical Termination of Pregnancy Act, 1971, the conflict between the right to life of the mother and the right to life of the unborn child would yield in favour of the right to life of the mother. To force a woman to continue with the pregnancy which she does not want to continue is an infringement of right to privacy and dignity of the woman as well as an infringement of the right to a healthy and dignified life of the nascent life in her womb.”

When interpreting Section 5 of the MTP Act in the case of *Ashaben v. State of Gujarat*,⁵⁵ where the victim experienced imprisonment before she could request termination, the Gujarat High Court adopted a restrictive stance. When a 24-week pregnancy was brought before the High Court, the Court pointed out that “undoubtedly, Section 5 of the Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground of having conceived on account of rape. It strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression ‘good faith’ discloses that the opinion has to be based on the necessary examination required to form such an opinion.”

⁵³ SLP (C) 5334 of 2009

⁵⁴ CWP-6733/2016, decided on 30th May, 2016

⁵⁵ 2015 (4) Crimes1 (Guj.)

In *Minor R Through Mother H v. State of NCT of Delhi & Anr*,⁵⁶ the Delhi High Court provided guidelines that investigating personnel must abide by when a sexual assault victim is more than 24 weeks pregnant. The court held that “denying a woman the right to medical termination of pregnancy in sexual assault cases and imposing the responsibility of motherhood on her, would amount to denying her the human right to live with dignity as she has a right in relation to her body including the right to say yes or no to being a mother.” In situations where pregnancy lasted longer than 24 weeks, the Court issued the following directives that the IO was required to abide by –

- (i) It would be required to perform a urine pregnancy test when a sexual assault victim underwent a physical exam, as this Court had seen that such a test was frequently neglected.
- (ii) When a victim of sexual assault is discovered to be pregnant, the investigating officer in charge of the case must make sure that the victim appears before the Medical Board specified in Section 3 of the MTP Act on the same day, especially if the victim is a major and gives her consent and expresses a desire to have the pregnancy medically terminated.
- (iii) With the consent of her legal guardian, a minor sexual assault victim who was pregnant would be brought before the Board with a view of having the pregnancy aborted.
- (iv) A suitable report would be provided to the appropriate authorities following the examination of a minor victim by such a Board so that, in the event that a court order for the termination of a pregnancy was requested, the court in question wasted no more time and could swiftly issue the requested order.
- (v) The State Government or the Union Territory was required to see to it that the Medical Boards were established in the hospitals in accordance with Sections 3(2C) and 3(2D) of the MTP Act. The Court was informed that these boards weren't available in hospitals in every district, which occasionally inconvenienced both the victim and the IO because they had to be taken for MTP and other testing. As a result, the State Government/Union Territory should make sure that the requirements of Sections 3(2C) and 3(2D) of the MTP Act are followed and that such Boards be established in all

⁵⁶ 2023 SCC OnLine Del 383

Government Hospitals that have legitimate MTP Centres. It should also be necessary that such Boards be established in advance.

In *Centre for Enquiry into health & Allied Themes (CEHAT) v. Union of India*,⁵⁷ the Supreme Court of India ordered the Central Government to educate the public about female foeticide and sex detection and to vigorously enforce the terms and rules of the PNDT Act, 1994. Additionally, the court mandated that the Central Supervisory Board (CSB) meet once every six months. The Central Supervisory Board must order States and Union Territories on how to submit quarterly returns and must also study, monitor, and assess how the law is being put into practice. In *Chetna, Legal Advisory WCD Society v. Union of India*⁵⁸ the court held that if necessary, it is also possible to contact the National Human Rights Commission to ask for their help in ensuring that the National Programme for the Eradication of Female Foeticide and Infanticide is implemented correctly and improved as needed. In another case, *Centre for Enquiry into Health & Allied Themes (CEHAT) v. Union of India*,⁵⁹ the Supreme Court of India once more ordered State Governments to conduct additional research so that unlicensed clinics cannot function in any area of the nation.

6. NEED FOR RIGHT TO ABORTION

According to Article 21 of the Constitution, refusing medical attention is a breach of the fundamental right to life and freedom. The Supreme Court of India has ruled that having access to emergency medical care is a fundamental right,⁶⁰ and that the primary responsibility of the medical profession is a duty of care. Since they lack the financial means, political strength, and influence over the judiciary, the poor are unable to routinely go to court.⁶¹ Therefore, for those who are disadvantaged, access to timely and cheap abortion treatments is crucial. When illegal abortion services are the only choice, the risk of significant complications or even death is increased for women and girls who depend on the public healthcare system and have limited access to post-abortion treatment.⁶² The fundamental principles of human rights do not warrant

⁵⁷ (2001) 5 SCC 577

⁵⁸ (1998) 2 SCC 158

⁵⁹ AIR 2002 SC 3689

⁶⁰ *Parmanand Katara v. Union of India*, (1989) 4 SCC 286

⁶¹ Edward P. Pinto, "The jurisprudence of emergency medical care in India: an ethics perspective" 2 *Indian Journal of Medical Ethics* 4 (2017)

⁶² Jocelyn E. Getgen, "Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban" 41 *Cornell International Law Journal* 1143-175 (2008)

criminalising abortions, and this has been acknowledged on a national and worldwide level.⁶³ According to a number of decisions given by Indian courts, a woman's right to an abortion comprises the rights to equality, non-discrimination, bodily autonomy, health, dignity, and choice, all of which are covered in the following section.

Due to issues with overpopulation, poverty, women's mortality, sex discrimination, etc., it is thought necessary to implement abortion reforms in developing nations like India. Reforms pertaining to abortion were considered as being focused mainly on the independence of women in developed nations. India's abortion regulations fall under the state's umbrella of welfare laws. Despite having a more general goal of achieving welfare, they are nonetheless restricted to a state's socioeconomic and political objectives.

An abortion might be the only option for rural women in a nation like India where getting contraception is difficult to come by. Criminalizing abortion promotes unauthorized, hidden abortions. Because abortion should be illegal, the fundamental error is the premise that the foetus has a right to life.⁶⁴

The right to an abortion was only made available under the MTP Act at the doctors' discretion. If the expecting mother is successful in convincing him that the requirements for abortion outlined in the statute are met, he will grant permission. A certificate from one licensed gynaecologist or obstetrician is required for terminations within the first 12 weeks of pregnancy. Only if the pregnant woman's life is in danger, if it would substantially harm her bodily or mental health, or if there is a significant chance that the baby will be born with a serious disability, is termination permitted between 12 and 20 weeks. During this time, two licensed obstetricians or gynaecologists were necessary to certify the termination.

It is also important to note that, despite the fact that the Medical Termination of Pregnancy Act of 1971 (MTPA) does not require the husband's approval, Indian courts do not consider a wife's decision to end her pregnancy without his consent favourably. The unborn child is regarded as the husband's property in India. Therefore, whether a woman wants a kid or not, her husband's decision is taken into account, and since every small move a woman makes in her life is

⁶³ Center for Reproductive Rights, *Breaking Ground: Treating Monitoring Bodies on Reproductive Rights*, (2018), available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Breaking-Ground-2018.pdf> (last visited on July 23, 2023)

⁶⁴ Harry C Meserve, "Pro Life, Pro Choice" 22(1) *Journal of Religion & Health* 75-107(1983)

dependent on getting approval from her husband, family, and society, it is very challenging for her to have control over her womb.

Although Indian courts have not explicitly affirmed the right to an abortion, they have impliedly violated women's rights. The Supreme Court of India has ruled against the right to procreate in a number of cases, and the ability to manage one's reproductive system gives rise to a second right, the right to abortion.

To give effect to the various judgements as stated earlier, the MTP Act has not yet undergone any such obvious alteration. Therefore, it is crucial to ensure that every woman in India has access to the right to an abortion. The MTP Act is currently out of date, and as a result, women are required to file legal cases. Due to the Courts' varied views of the law, the judgements are therefore applied quite harshly.

The MTP Act also failed because it frequently considers the situation of minor rape victims whose pregnancies are found too late. Due to the stigma associated with rape and the victims' silence, adolescent pregnancies are sometimes not detected until the kid starts having health problems. By the time they emerge into the light, the infant is frequently either already past the 20-week mark or is very close to it. As a consequence, there are several situations in which young girls and women are asking with the courts to grant them permission to end their unwelcome pregnancies that are more than 20 weeks long.

All of these occurrences make it abundantly clear that, absent the enactment of alternative regulations and laws, no workable solution could be found, and the courts would still be required to consider and provide decisions in each individual case. The current system may serve as a temporary fix, but it cannot be viewed as a workable long-term solution to the issue. Another flaw in this regard is the slow legal system.

7. CONCLUSION AND SUGGESTIONS

A woman has a natural responsibility to provide her children all they might possibly need. However, there may be circumstances where woman engages in actions that are harmful to the foetus. It could be the result of behaviours committed wilfully, carelessly, or ignorantly. It is best to leave the mother's decision regarding abortion to her. However, the unborn should be given the essential protection, taking the viability of a legal norm into consideration. In cases where the government or non-profit organisations are prepared to care for the unborn, it is also

advantageous to the mother. Giving the woman the power to kill the foetus serves no purpose. Her only option is to terminate her pregnancy. Additionally, it is claimed that having 20 million newborns per year would place a bigger burden on the country's healthcare system and financial resources than, say, having one to five million abortions every year.

India's current abortion laws do not consider "choice" in the calculation. The MTP Act does not merely give a woman the option of choosing whether or not to become a mother because abortions are conditional and based on factors such as the mother's physical or mental health, a handicapped or malformed child, underage pregnancies, rape, pregnancies in women who are not of sound mind, and failing to use contraceptives.

Additionally, the constitution gives women full freedom to decide how they want to use their bodies. Nobody has the right to tell her how to behave when it comes to reproductive issues. Therefore, interfering with her reproductive choices is a violation of her personal freedom and privacy. The legislative restrictions have greatly curtailed a woman's ability to enjoy her freedom, particularly when it comes to her right to self-determination, bodily autonomy, and access to abortion. The rights to life and liberty of women have been severely compromised by these regulations. India has some strict laws regarding abortion. Women should have the freedom to govern their bodies, which includes the choice of whether or not to have children. The following suggestions have been put forward in this regard –

- (i) Many believe that the legal abortion limit for terminating an abortion by 20 weeks ought to be increased by at least four or five weeks. Before the parent can even consider an abortion, a precise diagnosis of the foetal defect is required. But it takes time for these medical tests to be finished, which pinpoint major illnesses in the unborn child. Additionally, in order to obtain a more certain result, some tests start around the 20th week of pregnancy. By that point, parents will discover that they are legally unable to undergo an abortion. While the argument over abortion's legal limit may have just begun in India, it has been going on for some time in the West, particularly in nations with a significant Catholic population. Many nations, including Canada, Korea, China, Germany, France, and a number of other European nations, have comparably lenient abortion legislation. Canada even goes as far as to let the woman and her doctor handle the situation totally on them without intervening in any way. The unborn is seen as an integral component of the woman's body and is only given the status of a person after birth. The woman is thought to have complete

freedom in her person. Abortion is legal in Korea up until twenty-eight weeks, although married women must have their husbands' approval. The Abortion Act of 1967 in the United Kingdom allows abortions up to 24 weeks, however there is no upper limit if the pregnancy threatens the woman's life or if the child is expected to be born severely physically or mentally abnormal. If a child has difficulties, I believe the mother has the right to end the pregnancy. Only under particular conditions is an abortion permitted in India after 20 weeks. In light of the *Nikhil Datar v. Union of India*⁶⁵ popularly known as *Nikita Mehta case*, which was previously highlighted, the MTP act should now be modified. The legal term must be extended to 24 weeks or more if issues develop with the mother, the kid, or a rare condition that the child has. If a disorder is found in the unborn kid, in my opinion, the woman is free to choose whether or not to abort the child.. The situation of *Nikita Mehta* is shocking; many women must have experienced the same issues. The law should be put into effect as soon as feasible by the government. Why should India be an exception when every other nation in the world abides by the 24 week limit on abortion? India is developing in every area, so why not change the law to mandate improved maternal care and facilities? Extending the number of weeks for abortion would be a step in the direction of a robust and advanced civilization.

- (ii) It is necessary to change the MTP Act since it is thought to be a tool for population control rather than enhancing the range of reproductive options. Therefore, it is necessary to change the clauses in order to stop their abuse and to make sure that they increase rather than decrease women's reproductive freedom. Additionally, it is time to stop discriminating against married and single women. All women, whether or not they are married, must be allowed to terminate a pregnancy if their contraception fails.
- (iii) Some sections of the Indian Penal Code need to be amended. For instance, Section 312 of the IPC should be appropriately modified in accordance with the MTP Act of 1971 to cover all the grounds for which a pregnancy can now be ended by a registered medical practitioner. Additionally, Section 375 of the Indian Penal Code, 1860, which permits a husband and wife to engage in sexual activity if the wife is older than 15 years old, needs to be amended. Even though the Criminal Law

⁶⁵ SLP (C) 5334 of 2009

Amendment Act of 2013 altered the IPC, this section has not been changed. Therefore, this IPC clause unintentionally encourages child marriages.

- (iv) The role that contraceptives play in a person's sexual life is essential. The rise of AIDS has also greatly increased the use of contraception. The saying that "prevention is better than cure" is a wise one, thus it makes sense to use contraceptives to prevent abortion. There are many contraceptives available now that can effectively prevent conception, including male and female sterilisation, contraceptives, condoms, cervical caps, IUCDs, and more. However, as most people are unaware of these techniques, it is recommended that the government take a proactive role by making contraceptives easily accessible.
- (v) Professional organisations like the Medical Council of India should establish strong guidelines and rules as well as outline the proper sanctions for "erring" physicians who perform unlawful abortions.
- (vi) Female foeticide can be completely eliminated with the help of the government. The government ought to provide incentives to parents of girls, such as free schooling, additional food assistance, and tax breaks. In contrast to sting operations, this method may be the most effective. Additionally, in nations like India, where both the issue of population growth and female foeticide exist, the greatest answer is for the single girl child to be given her own category, similar to other reservations like those for SCs and STs.
- (vii) All the joys of life fade away for the average individual if they are not in excellent health. Naturally, one should not discuss the wretched life of the person born with major anomalies if this is the position for a normal person. The Supreme Court has interpreted "life" in Article 21 of the Constitution to mean "living with dignity." It is preferable to avoid giving birth to such a helpless child who will have to rely on others for the rest of his or her life if a person cannot live a dignified life and their existence is equal to that of a helpless creature.
- (viii) The negative effects of giving birth to disabled children can be reduced by establishing efficient state structures that provide enough financial and non-financial support to such children and families. Expert committees may be established to review cases that are more advanced than twenty weeks so that only specific

instances receiving an abortion sanction at this time. Additionally, it would be crucial to specify precisely what constitutes a disability severe enough to warrant an abortion after 20 weeks, such as in situations of anencephaly where there is no benefit to continuing the pregnancy.

- (ix) Services for reproductive health can greatly benefit from the involvement of the media. Because they have the power to pressure the government into creating laws that will benefit people. But regrettably, people still avoid talking about the problems with their health. They can draw attention to instances of flagrant disregard for human rights in relation to reproduction, inform those in need of health services about available options, and serve as a liaison between the populace and the government.

To sum up, not much has changed thus far despite the restriction on prenatal diagnostic methods. As a result, it implies that the Act's execution is very subpar and that the law lacks societal acceptance, which is a requirement for any law to be effective. The State should focus on improving the standing of women in society, particularly in rural India, rather than establishing regulations on abortion. To this purpose, specific efforts for women's education are required. Education is essential for empowering women since only empowered women can achieve social equality, which in turn would lessen dowry demands. Women's economic empowerment will also lessen their reliance on their sons to provide for them financially and take care of them as they age. It is important to take both legislative and non-legislative actions to empower women, as this will lower the rate of female foeticide.