

COMMENT

Abortion rights judgment: a ray of hope!

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Abstract

While granting a prisoner the right to abort her foetus, a recent Bombay High Court judgment recognised a woman's absolute right to abortion. This article discusses the judgment in detail and the bioethical debates over abortion rights. It deals with the restrictions imposed by the law not only on when the foetus can be aborted, but also who can get the abortion done and in what circumstances.

On September 19, 2016, the division bench of the Bombay High Court passed a landmark judgment (1) recognising the absolute right of women to abortion. The judgment is a ray of hope in a democratic country in which retrogressive measures restricting rights and imposing bans, such as those on food, liquor, surrogacy and bar dancing, are taking precedence over the rights and liberties of the people. The judgment speaks of real empowerment, which comes not from restricting rights or banning some activities and forcing people to act or take decisions against their wishes, but from respecting rights, providing complete and honest information, and putting in place systems that will facilitate and be conducive to responsible decision-making, based on informed choices. Abortion has been an area that has been brought under the purview of the law, with certain restrictions being placed on the reproductive choices of women. The judgment of the High Court, subtly but surely, demolishes the interpretative restrictions or liberalities on abortion imposed by the Medical Termination of Pregnancy Act, 1971 (MTP Act) (2), by respecting the rights of women and understanding the situations in which women find themselves, thus helping them to take responsible decisions on their reproductive choices, whether it is a matter of abortion, contraception or pregnancy.

The case

The Bombay High Court, on its own motion, took up the case of a pregnant prisoner seeking permission to terminate her pregnancy. In her requisition, the prisoner had written that she already had a five-month-old baby who was suffering from convulsions/epilepsy, diarrhoea and fever, and she herself was

ailing. She stated that she was unable to even look after her five-month-old child and herself, and wanted to terminate her pregnancy. The medical officer of the jail was in favour of the termination of the pregnancy. According to the procedure for prisoners, they must refer the matter to a committee. Though the letter was sent to the committee, the abortion did not take place for almost a month. Since it was getting delayed, the Sessions court judge referred the matter to the High Court for urgent orders. The Chief Justice approved of the directions to refer the prisoner to JJ Hospital for termination of the pregnancy, and the same was carried out. The matter was taken up as *suo motu* public interest litigation. Thereafter, the court took up another case of an undertrial pregnant prisoner and gave directions for the termination of her pregnancy, in accordance with her wish.

The court held that a pregnant woman prisoner should not be treated any differently from any other pregnant woman. It allowed a pregnant prisoner to make a choice about her pregnancy, just as any other woman would or ought to. The court found that there were no specific provisions in the prison manual for pregnant women prisoners who want to terminate their pregnancy, and so laid down a detailed procedure to be followed by the prison authorities in such cases. It stated that the medical officer attached to the prison should inform the pregnant prisoner that she can terminate her pregnancy, provided it falls within the time period laid down under the Act. The onus is placed on the medical officer. If a woman prisoner wants to terminate her pregnancy, she should be sent to the civil hospital on a priority basis so that the necessary steps can be taken.

Development of the law relating to abortion

While analysing the American case of *Roe v Wade* (3), which concerns abortion rights, Hull and Hoffer traced the history of who decides to abort from the 19th century onwards (4). They stated that, prior to the 19th century, abortions were exclusively the domain of women and did not fall within the radar of the law. Midwives would manage not only pregnancies, but abortions as well, on the basis of the woman's wish (4). However, the 19th century saw the rise of research in medicine, as also that of the influence of the medical profession, which took charge of a number of aspects of the health of women (4). Ensuring safety in abortions became a pivotal concern and gradually, it came to be believed that abortions were safe only in a medical set-up (which is true to a large extent). However, with the rise of the medical profession,

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came the desire to control abortions within the medical set-up and soon, laws placed several restrictions on abortion (4).

In India, abortions took place clandestinely and were never given societal approval. During the British regime, the Indian Penal Code of 1870 criminalised abortion, to the extent that even a woman who caused herself to miscarry or induced abortion was liable to be punished (5). The medical profession was exempted from prosecution for acts done in good faith and was later given immunity under the MTP Act of 1971.

The MTP Act (2), while legalising abortion, placed certain restrictions (under section 3) in terms of when pregnancies may be terminated by a registered medical practitioner. The stipulated time is less than 12 weeks on the opinion of one medical practitioner, and 12–20 weeks on the opinion of two medical practitioners. When section 3 is not applicable, section 5 of the Act permits abortion in case a medical practitioner is of the opinion that the termination of a pregnancy is immediately necessary to save the life of the pregnant woman. Though the MTP Act makes provisions related to the physical and mental health of the pregnant woman, it inadvertently makes the practice of abortion doctor-centric rather than giving the woman the right to decide on whether or not she wants to continue with her pregnancy. In more ways than one, the Bombay High Court judgment has interpreted the MTP Act in such a way that the right to abortion is granted to the woman, and the medical officer is to merely ensure that the procedure is followed within the conditions laid down under the MTP Act.

The judgment states: “[The] MTP Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother, so also it is the right of a woman not to be a mother and her wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and is protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Woman owns her body and has a right over it. Abortion is always a difficult and careful decision and woman alone should be the choice-maker. ... unborn foetus cannot be put on a higher pedestal than the right of a living woman.”

The judgment of the Bombay High Court thus supersedes the debates among religious groups, philosophers, politicians, and the medical and legal community on pro-life versus pro-choice. Supporters of any side of the abortion debate have all along justified their position by referring to fundamental rights. Representatives of the pro-life movement argue that the right to life (right of the foetus) must be respected and protected after conception, whereas pro-choice groups believe that the right to abortion flows from the woman's right to her physical integrity and her right to make free choices relating to her body. Some groups have even argued that the restrictions on abortion constitute discrimination against women.

The court categorically stated that according to human rights law, a person is vested with human rights only at birth;

an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of the woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The woman alone should have the right to control her own body, fertility and motherhood choices.

International covenants on rights of the woman

In 1948, Article 1 of the Universal Declaration of Human Rights (6) stated: “All human beings are born free and equal in dignity and rights.” The word “born” necessarily excludes the foetus and rights are conferred only on birth. The International Covenant on Civil and Political Rights (ICCPR), 1966, and the United Nations Child Rights Convention, 1990, make reference to the rights of children born. There is no reference to the rights of a foetus.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 (ratified by India in 1993) (7), refers to women's reproductive rights. It states that women have the right to take free and responsible decisions on the number and spacing of their children, and to have access to information, education and the means to enable them to exercise this right.

In 1994, the International Conference on Population and Development (8) acknowledged the importance of advancing gender equality, eliminating violence against women and ensuring that women are able to control their own fertility. The conference proposed development policies to make abortion less frequent and offer safe procedures for women. It emphasised that unsafe abortions should be addressed as a public health concern. The conference urged governments to give adequate information to men and women, and to educate them on how to choose safe, effective, affordable and acceptable methods of family planning, and other methods of regulating their fertility.

In 2000, the Human Rights Committee, which monitors compliance with the ICCPR, highlighted the fact that prohibitions on abortion create a threat to women's lives. General Comment No. 28 (2000), on equality of rights between men and women, requested the State parties to give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions (9).

Unwanted pregnancies

In India, 9%–20% of maternal deaths are on account of unsafe abortions (10). Many women undergo unsafe abortions outside the hospital set-up due to high costs, the lack of medical competency in rural areas, absence of knowledge of legal abortion, reluctance to approach services in the neighbourhood, lack of confidentiality, etc. (10). The percentage of unwanted and untimed pregnancies in India in 2005–2006 was about 24.3% (10).

The judgment dealt at length with the impact of unwanted pregnancy on the pregnant woman's mental well-being, categorically stating that the woman's mental health can deteriorate if it is a forced or unwanted pregnancy.

The court analysed explanations 1 and 2 in the MTP Act that presume grave injury in respect of mental health (i) if a woman is pregnant due to rape; and (ii) if the pregnancy is accidental, having occurred because of the failure of the device or method used by a married woman or her husband to limit the number of children. According to the Act, the pregnancy is then unwanted and maybe presumed to constitute grave injury to the pregnant woman's mental health (2).

The court expanded the restrictive interpretation of the explanations in the law, by (i) stating that the two explanations in the law do not restrict the scope of various other circumstances that cause grave injury to the mental health of women; and (ii) including women who are in other circumstances and situations and get pregnant. The latter expands the interpretation of unwanted pregnancy from that only within marriage to that in live-in relationships or any couple living together like a married couple. In fact, the court explained that a woman can be pregnant, irrespective of her marital status, either because she has chosen to or because it is an unwanted pregnancy.

Responsibility

The interpretation of the MTP Act all these years reflected the law's failure to treat pregnant women as persons capable of taking responsible decisions concerning their fertility and whether to undergo an abortion or not.

The importance of the judgment lies in the fact that the judges laid great emphasis on "responsibility", stating that women are responsible and capable of taking decisions on their own pregnancies, and those decisions should be respected. The court stated: "To be pregnant is a natural phenomenon for which woman and man are both responsible. Wanted pregnancies are shared equally. However, when it is an accident or unwanted, then the man may not be there to share the burden, and the burden may fall only on the woman. Under such circumstances, why should only the woman suffer, as there are social and financial issues immediately attached to pregnancy, and if the pregnancy is unwanted it can have immediate repercussions. It undoubtedly affects her mental health."

The court upheld women's right to abortion. It stated that the decision to abort is not a frivolous one and recognised that more often than not, it arises from very difficult situations. The court opined that women take carefully considered decisions, as they are anxious about the welfare of their children and other members of the household, who need to be cared for with limited financial and other resources. "These decisions are taken by responsible women who have few other options. If a woman does not want to continue her pregnancy, then forcing her to do so represents a violation of the woman's bodily

integrity and aggravates her mental trauma, which would be deleterious to her mental health."

The judgment lauds the lawmakers for having considered the plight of helpless women by adding the words "mental health" when speaking of pregnant women who may opt for abortion. The court thus reiterated that while forming an opinion on the necessity for the termination of pregnancy, it is the mandatory duty of the medical officer to take into account injury to the pregnant woman's physical and mental health. In doing so, the medical officer should also consider the woman's actual or reasonable foreseeable environment.

Unfortunately, in practice, the legal provisions allowing abortion are often not implemented even if women meet the criteria imposed by the law for abortion. Many doctors employed in public healthcare systems refuse to conduct abortions. The healthcare providers use the MTP Act and Rules to refuse abortions to women who are pregnant out of wedlock, or as a result of an extramarital affair. Their reason for refusal, apart from the legal requirement, is a procedural requirement that some near relative should be present when the abortion is conducted. Many times, the woman does not want any close relative or friend to know about the pregnancy. The procedural requirement not only leads to refusals, but also results in a delay that pushes the time limit and the abortion is consequently not performed, causing much mental stress to the woman. Women who are refused by such healthcare providers are not informed of other options. Thus, they either end up in places where abortions are not conducted safely, or continue with an unwanted pregnancy. In a few cases, they approach the courts for redressal. The court emphasised the need for urgent intervention when a pregnant woman decides to abort, as time is of the essence, and did away with the restriction placed by the law on abortions for unmarried women.

In June 2016, the Supreme Court of the USA passed a landmark judgment (11) on access to abortion facilities and stated that the law should not impose burdens on, or substantial obstacles in the path of, women seeking abortion. The Bombay High Court judgment gave importance to timely access of women prisoners to abortion facilities and laid down that they should be taken to government abortion facilities in time for the necessary tests to be carried out, such that there is no delay in conducting the abortion.

Recently, in *Ms. X v. Union of India* (12), the Supreme Court of India intervened in a case of termination of pregnancy beyond the stipulated 20 weeks of pregnancy. The woman was about 23–24 weeks pregnant and the continuation of the pregnancy would be dangerous to her life. The Court set up a panel of doctors to decide if the pregnancy could be terminated or not, and going by the panel's opinion, directed that the pregnancy be terminated. The judgment of the Supreme Court and other similar judgments of the high courts that allow abortion beyond the statutory 20 weeks speak of the changing perspective on abortion. They underline the need to rethink the necessity of such a statutory restriction. The apex court

relied on a panel of doctors to take the decision, rather than adhering to section 5 of the MTP Act, which allows a medical practitioner to terminate a pregnancy beyond 20 weeks if s/he thinks in good faith that the immediate termination of the pregnancy is required to save the life of the woman. Unfortunately, the apex court gave the discretionary power to abort to the medical community, rather than to the woman, who felt endangered in continuing with her pregnancy, apart from the medical problems she was facing. Unfortunately, pregnant women are treated differently from other adult patients in terms of decision-making, as can be seen in the MTP Act, which overrides their autonomy as adult persons, and gives medical professionals a good deal of discretion.

Nevertheless, the Bombay High Court's judgment has "come off the fence" and advanced the law in this sensitive area, showing the way to how the law can be implemented. The court emphasised the need to show respect and give dignity to a pregnant woman, whether she is a working woman, homemaker, prisoner, etc (would include unmarried, and widowed women or women in a relationship, irrespective of their marital status). All women were placed in a common category –pregnant women who have taken a decision to abort and who have the same rights with respect to the termination of pregnancy. The High Court made a good analysis of what constitutes a threat to the life of a pregnant woman, that is, to her physical and mental integrity. It subtly did away with the discretion of medical professionals. The judges placed the onus on the woman, respected her choice on terminating the pregnancy, and involved the medical personnel only after her decision was taken, to help her terminate the pregnancy lawfully, either under section 3 or 5 of the MTP Act.

The Medical Termination of Pregnancy (Amendment) Bill of 2014 (13) proposes to expand the definition of registered medical practitioner with registered healthcare provider to include practitioners from other streams of medicine, such as ayurveda and homeopathy. Under the Bill, nurses and auxiliary nurse midwives can also perform abortions. The Bill also proposes to extend the length of the period during which abortion may be conducted from 20 weeks to 24 weeks. Significantly, the length of the pregnancy would be of no importance if the foetus has substantial abnormalities and abortion is required. Though the Bill echoes the High Court judgment in parts, a specific provision on women's autonomy and their right to self-determination in the matter of abortion would reduce women's vulnerability in clinical settings.

The court has laid emphasis on women's autonomy and their capability to take informed decisions on matters relating to their bodies, fertility and reproduction. No other doctrine or practice, however exalted or sacred, can be allowed to dictate the law relating to abortion. The bottom line is that for the first time, a court of law has spelt out that women should be trusted to make responsible decisions, and that this should be respected.

Conclusion

Courts have been a vehicle of social change, paving the way for policy change while upholding the rights of individuals. In upholding the reproductive rights of women, the Bombay High Court judgment is, indeed, a courageous judgment. It respects women's basic right to autonomy to decide what to do with their bodies, including whether or not to get pregnant and to stay pregnant.

The court set up a system to help pregnant women prisoners desirous of terminating their pregnancy without having to undergo a harrowing time waiting for the decision to be taken by some other body of persons. It respected the woman's right to privacy and confidentiality, and promoted equality of women and procedural fairness in issues relating to abortion.

This judgment comes as a ray of hope at a point when society has little to offer women by way of social security and when retrogressive views are prevalent. The case discussed here has little to do with a prisoner wanting to access abortion services; it has more to do with making real strides towards equality for women in India.

References

1. *In High Court on its own Motion v. The State of Maharashtra*, Suo Motu Public Interest Litigation No. 1 of 2016; judgment dated 20.9.2016.
2. The Medical Termination of Pregnancy Act, 1971 [cited 2016 Nov 21]. Available from: <http://tcw.nic.in/Acts/MTP-Act-1971.pdf>
3. *Roe v. Wade* 410 U.S. 113 (1973).
4. Hull, NE H and Hoffer, Peter Charles, "*Roe v. Wade: The Abortion Rights Controversies in American History*"; 2nd ed., Lawrence: University Press of Kansas; 2010
5. Section 312 to 316 of the Indian Penal Code: Of the causing of miscarriage, of injuries to unborn children, of exposure of infants and of the concealment of births [cited 2016 Nov 21]. Available from: <http://ncw.nic.in/acts/THEINDIANPENALCODE1860.pdf>
6. Universal Declaration of Human Rights [cited 2016 Nov 21]. Available from: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
7. Convention on the Elimination of all Forms of Discrimination Against Women [cited 2016 Nov 21]. Available from: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>
8. International Conference on Population and Development [cited 2016 Nov 21]. Available from: https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf
9. Article 10 and 11 of General Comment 28, Equality of Rights Between Men and Women [cited 2016 Nov 21]. Available from: <http://hrlibrary.umn.edu/gencomm/hrcom28.htm>
10. Sebastian MP, Khan ME, Sebastian D. "Unintended Pregnancy and Abortion in India Country Profile Report with Focus on Bihar, Madhya Pradesh and Odisha." New Delhi, India: Population Council; 2014.
11. *Whole Woman's Health, et al v. John Hellerstedt, Commissioner of Texas Department of Health et al*, SC of US No. 15-274, judgment dated June 27, 2016
12. *Ms. X v. Union of India*, In the Supreme Court of India, Writ Petition (C) No. 593 of 2016, vide order dated 25.7.2016
13. Draft Medical Termination of Pregnancy (Amendment) Bill 2014. Ministry of Health and Family Welfare, Maternal Health Division, Government of India, Notification No. 12015/49/2008 – MCH, dated October 29, 2014.