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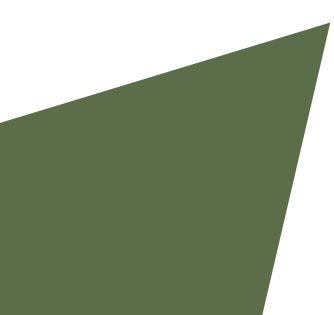
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Abortion: Problems in laws regarding abortion in India

Rachit Bansal

ABORTION: PROBLEMS IN LAWS REGARDING ABORTION IN INDIA

Laws regarding abortion in India are listed in “*The Medical Termination of Pregnancy Act, 1971*”, the act allows abortions till twenty weeks of pregnancy but with a certain set of conditions attached. Before 1971 The Indian Penal code, 1862 and Criminal procedures act, 1898 made abortion illegal and punishable for both the mother and the abortionist. These strict rules lead to steep rise in number of cases where women had taken recourse to unsafe abortions carried out by naive abortionist. They realised that in majority of cases women seeking abortions are married and under socio-cultural pressure and that decriminalising abortion would encourage these women to seek abortion services in legal and safe settings.¹ The liberalisation of abortion laws in India started in 1964. Government of India formed a *Shah Committee* to take care of the issue. In 1966 the Shah Committee came up with a report which suggested to make abortion legal in India to prevent deaths and unsafe abortions. In 1971 finally “*The Medical Termination of Pregnancy Act*” (MTPA) was passed. Abortion even today is considered a murder by many people across the world. This belief lets courts and legal systems of a nation interfere women in their decision about termination of pregnancy or abortion. In India, *The Medical Termination of Pregnancy Act, 1971* does allow abortions under a broad range of circumstances but can be considered a conservative law from a feminist perspective. The Act gives healthcare providers the power rather than women seeking abortion to have the final say on abortion, and creates an environment within which women are made dependent on their healthcare providers.² An abortion is a decision that a female should be allowed without any outside intervention, this is a decision about a woman’s body and her will to continue with her pregnancy or not.

In recent times there has been an ongoing debate on the issue of abortion. The 2 arguments of the debate are-1. Pro-Choice 2. Pro-life. The Pro-choice argument talks about how the women should have the right to make a choice regarding their pregnancy and how a foetus should be considered a part of women’s body and not a separate human being and thus, a women should have all the control over the foetus and her pregnancy. Whereas the pro-life argument talk about how a foetus is a potential life and abortions are equal to killing a human and right to kill a human cannot be given to another human not even the mother. The pro-life people believe that people

¹ Hirve, Siddhivinayak S. “Abortion Law, Policy and Services in India: A Critical Review.” *Taylor & Francis*, [www.tandfonline.com/doi/full/10.1016/S0968-8080\(04\)24017-4](http://www.tandfonline.com/doi/full/10.1016/S0968-8080(04)24017-4).

² SHWETA KRISHNAN, 'MTP Amendment Bill, 2014: Towards Re-Imagining Abortion Care' (*Indiaenvironmentportal.org.in*, 2019) <<http://www.indiaenvironmentportal.org.in/files/file/MTP-Amendment-Bill-unsafe-abortion.pdf>> accessed 1 November 2019.

should not be allowed to use birth control and when a women gets pregnant it marks the starting of a new life and mothers should not be given the authority to end the life of that new human being. The wrong ideology starts when humans endow the female egg and male sperm with an intention of creating a new human. People call the foetus formed after the fusion of egg and sperm a human thus consider the process of abortion a murder. In reality this foetus is just a chemical matter and not a human.³ That thinking is clearly mentioned in the judgement in the case ***Ashaben w/o Dineshbhai Jasubhai Talsaniya (devipujak) VS State of Gujarat***. Quoting a line from the judgement “ *A woman is considered to be with child as soon as she becomes pregnant.*”⁴ This line makes it clear that till date the courts consider an unborn foetus a human, however, this chemical matter becomes a human only after the foetus comes out of woman’s body. Just because the chemical matter one day might become a human we cannot consider it to be an actual human and laws of the state should not apply on this chemical matter. This chemical matter till it is in a woman’s body is just a part of that woman’s body and not a separate entity, thus, a woman should have all the rights to take decisions regarding that chemical matter. If a woman for any reason believes that she does not want the foetus(chemical matter) in her body and does not want to continue with her pregnancy then the state shouldn’t interfere in the decision, but instead try its best to provide best abortion services to that woman and help the woman in any way possible. The whole point of contention of the jurists becomes useless if we stop considering a foetus a human being.

In many cases of abortion pregnancy happens because of pre-marital sex. *The Medical Termination of Pregnancy Act, 1971* requires that before abortion a permission should be taken from a guardian if the girl involved is below 18 years of age and in India pregnancy and sex before marriage is considered a big taboo and thus those girls don’t even dare to reveal their condition to their family members and often resort to other abortion ways which are not legal and are very unsafe for their health and often lead to failed abortion and even death.

Often unconsensual sexual intercourse, rape and lack of use of appropriate measures to prevent pregnancy lead to unwanted pregnancies. Under explanation 1 and 2 under section 3 of *The Medical Termination of Pregnancy Act, 1971*, abortion in such cases is only allowed till 20 weeks of pregnancy. Unwanted pregnancies cause mental trauma to the victim and in such cases irrespective of the time period if the victim wants an abortion the state should have no say whatsoever. Abortion in such

³ Martin, Emily. “The Egg and the Sperm: How Science Has Constructed a Romance Based on Stereotypical Male-Female Roles.” *Feminist Theory and the Body*, 2017, pp. 500–501., doi:10.4324/9781315094106-22.

⁴ Whether This Case Involves A ... Vs State Of Gujarat & 2 On 16 April, 2015' (*Indiankanoon.org*, 2019) <<https://indiankanoon.org/doc/156331215/>> accessed 31 October 2019.

cases should be made legal and state should ensure a proper medical treatment for the victim, instead of making the process illegal. Subsection 4 of the Section 3 of *The Medical Termination of Pregnancy Act, 1971* defines the rules for child pregnancies and the law here too blatantly makes abortion after 20 weeks of pregnancy illegal. In many cases of child pregnancy the condition of pregnancy is detected after 20 weeks and because of stringent abortion laws these young girls are forced to go through the mental trauma and physical pain of pregnancy and childbirth. The limit on gestation period simply means forcing responsibility of a child on a girl even if the girl before 20 weeks had absolutely no idea about her pregnancy. In cases of foetus abnormalities the gestation period limit of 20 weeks is completely useless because medically it is impossible to detect any physical and mental abnormalities of the foetus before 20 weeks of pregnancy, thus, if the after the tests the foetus is detected to have some sort of physical or mental disability and the mother wants to and decides to terminate her pregnancy through abortion, the laws under *The Medical Termination of Pregnancy Act, 1971*, would not allow the mother to have the abortion legally. Similar circumstances came up in the ***Niketa Mehta case***, in this case Niketa Mehta wanted to terminate her pregnancy which had a high probability of resulting in a miscarriage or the birth of a child with a serious heart defect. This could have been an easy decision, had it not been for the fact that Niketa`s pregnancy had advanced beyond the 20 weeks during which medical termination of pregnancy is permitted in India. Rather than resort to an illegal abortion, Niketa and her husband, along with the specialist who diagnosed a congenital anomaly in the foetus, filed a petition in the Mumbai High Court asking for permission for an abortion in the 23rd week, which was when the problem was detected. The argument supporting them is that in several countries, including the United Kingdom, there is no gestational age limit set for abortion in the case of foetal abnormalities. Niketa`s personal reason for wanting an abortion was that she did not want to give birth to a severely disabled infant and witness its suffering; the trauma caused to her and her family was an additional reason. While Niketa failed to obtain a favourable judgement from the court, her case has prompted the government to announce that it will be considering a review of the law.⁵

In 2014, 2017 and 2019 different amendments have been drafted and proposed to rectify *The Medical Termination of Pregnancy Act, 1971*, but till date nothing has changed. Each of these proposed amendments talk about increasing the gestation period limit of 20 weeks to at least 24-26 weeks and after that period abortion should still be allowed in certain serious cases. All of these

⁵ Neha Madhiwalla, 'The Niketa Mehta Case: Does The Right To Abortion Threaten Disability Rights? | Indian Journal Of Medical Ethics' (*Ijme.in*, 2019) <<http://ijme.in/articles/the-niketa-mehta-case-does-the-right-to-abortion-threaten-disability-rights/?galley=html>> accessed 31 October 2019.

amendments were planned because even our policy makers knew that the law doesn't satisfy the pace of development in our present era. These amendments are targeted at giving women more control over the decision of abortion and not being dependent on either the law of the state or the medical practitioner. Such a change in the power dynamic of women in making decisions regarding abortions would decrease the vulnerability of women within the clinical setting and frees them from the subjective interpretation of abortion laws in India. There are 2 perspectives from which *The Medical Termination of Pregnancy Act, 1971* can be viewed from two perspectives. The first being the public health parameter and the other being the feminist perspective. Our policy makers while making the act might have considered the first parameter but completely neglected the other one. They forgot about how ultimately the choice to continue with pregnancy or not should be a women's choice and the medical practitioners should be just there to ensure safe and successful abortions. Under the current act the women is completely dependent upon the doctors and their opinions regarding her pregnancy. Abortion is only possible if the doctor thinks it to be the best for the mother and the child and women has no say in it. ⁶

Section 312 of the Indian Penal Code, 1860, reads as follows:

“Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for 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.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.”⁷

The explanation part of this section brings about the element of criticism against the section because that part blatantly makes all the voluntary abortions illegal even when requested by the mother herself. This section completely disregards the choice of the woman and makes it compulsory for the mother to complete the gestation period and deliver the child unless the health of the mother is on stake because of the pregnancy. To attract the provisions of section 312 of the Indian Penal Code two essential elements must be satisfied-

- (i) Miscarriage should have been caused voluntarily
- (ii) Miscarriage should not have been caused in good faith for the purpose of saving the life of the woman.

⁶ SHWETA KRISHNAN, 'MTP Amendment Bill, 2014: Towards Re-Imagining Abortion Care' (*Indiaenvironmentportal.org.in*, 2019) <<http://www.indiaenvironmentportal.org.in/files/file/MTP-Amendment-Bill-unsafe-abortion.pdf>> accessed 1 November 2019.

⁷ The Indian Penal Code, 1860

According to section 312 of the Indian Penal Code, as it stood before *The Medical Termination of Pregnancy Act, 1971*, voluntarily causing a woman with child to miscarry was punishable with imprisonment of up to three years and, if the woman was quick with child, the imprisonment of up to seven years, unless the abortion was done in good faith to preserve the life of the mother. The offender could be the woman herself or any other person. Thus, this section 312 of the IPC [Indian Penal Code]⁸ deals with causing of miscarriage with the consent of the woman. The saving grace of the offence, in the section, is good faith and lifesaving necessity.⁹

The Medical Termination of Pregnancy Act, 1971 attempted to solve the problem of unsafe abortions by stressing on the importance of the opinions of medical practitioners but unfortunately the act just went a little too overboard and ended up making a monopoly for allopathy doctors, these doctors nowadays in the private sector are exploiting the women who are in dire needs of abortions and charge a lot of money for the same. No doubt the services are good in the private sector but the expenses of the process has made it inaccessible for a lot of women who cannot support such expensive procedures. To counter this problem the act should have a provision wherein mid-level practitioners and practitioners of other branches of medicine after some fixed basic course should be allowed to conduct abortions, this would make the abortions accessible for a lot more women from underdeveloped as well as rural areas where trained medical physicians are less in number. This would reduce the number of cases of unsafe abortions and risk to the life of pregnant women to resort to unsafe ways for abortions. “According to reliable estimates one seventh of the women who become pregnant in India every year resort to illegal abortions at the hands of the unqualified persons with all the attendant consequences of morbidity and mortality”¹⁰, thus, clearly the basic aim of *The Medical Termination of Pregnancy Act, 1971* which was to stop unsafe and illegal abortions stand unachieved. If so many women are forced to endanger their lives by opting for unsafe abortions at the hand of naïve medical practitioners then there is something really wrong about the law because it is clearly not helping these women to handle their pregnancies in the best possible way.

⁸ The Indian Penal Code , 1860

⁹ 'LEGAL ISSUES AND LEGISLATION IN INDIA' (*Shodhganga.inflibnet.ac.in*, 2019) <https://shodhganga.inflibnet.ac.in/bitstream/10603/55993/12/12_chapter%204.pdf> accessed 2 November 2019.

¹⁰ 'LEGAL ISSUES AND LEGISLATION IN INDIA' (*Shodhganga.inflibnet.ac.in*, 2019) <https://shodhganga.inflibnet.ac.in/bitstream/10603/55993/12/12_chapter%204.pdf> accessed 2 November 2019.

Thus, the Abortion laws in India require a lot of work to be done. They are clearly not appropriate for today's era. The Shah committee brought about changes in 1971 but nothing worthwhile has been done after that. Amendments need to be passed to give women more power over their pregnancies. Secondly, abortion services are still not good enough in rural and underdeveloped areas of our nation and steps need to be taken to provide best possible services to every woman who is unhappy with her pregnancy wish to attain an abortion. Laws of a state are meant to safeguard the citizens and not to put them under unsafe circumstances.

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