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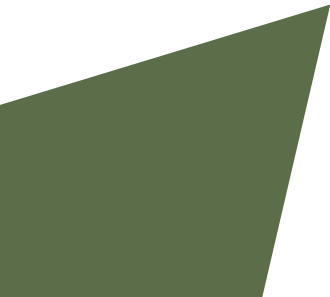
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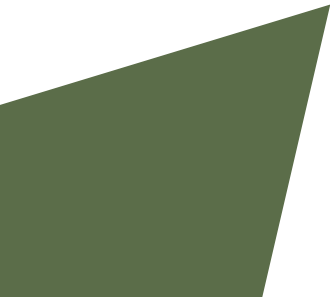
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RIGHT TO ABORTION IN INDIA

Neelima Singh Thakur

ABSTRACT

Abortion is murder or not? It is still debatable in the society. Abortion is said to be multi-faceted because it involves many aspects like religion, ethics, medicine and law. This article focuses on the laws related to Abortion in India. And demonstrates how different laws create barriers for safe abortion. This article deals with the history of abortion law and policy in India as well as the Amendment to the Medical Termination of Pregnancy Act, 1971. Abortion is a social issue which provides a platform to all those women and grants them power to make their own decision. Even though there is lack of awareness and information amongst many individuals which result in restriction to safe abortion. Many women do not know about their rights and responsibilities of the medical practitioners and the guidelines of the government in relation to the Law. There are some immediate measures needed to improve the urgent need of up-to-date technology, research and clinic for safe abortion. Although Abortion is legal in India with certain restriction, there are many drawbacks and loopholes in the system which needs to be changed.

This article deals with all the laws of Abortion in India.

Keywords: Abortion, Medical Termination of Pregnancy Act 1971, Lack of Awareness and information, Medical Practitioner, Up-to-date Technology.

INTRODUCTION

Abortion is murder or not? It is still debatable in the society. Yet the person who undergoes through this procedure will understand it better than anyone. It may sound selfish, that a person wishes to terminate the pregnancy, but the decision to do so hinge on the health and wellbeing of that person as well as the unborn child over anything. Those who go through abortion, it's not about keeping pregnancy, it's about bringing a life into this world and being able to raise it in the best and safest circumstances. And by circumstances, here, it means to provide basic facilities like healthcare, education, love and support. Abortion is considered as one of the most controversial ethical issues because it concerns with taking of a human life.

However, in India, Abortion is legal in certain circumstances; abortion can be performed on various grounds until 20 weeks of pregnancy and in certain exceptional cases a court may allow a termination after 24 weeks of pregnancy.¹

Women's reproductive rights in general and abortion rights in particular have been the popular subject to debate globally. Almost about 48 years abortion is legalized in India, a majority of women continues to lack access to safe abortion. Unsafe abortion is the third leading cause of maternal death in India.²

In many parts of the world parents prefer sons over girl child and show gender biasness, this practice is very popular in South Asia especially in India in Punjab, Haryana and Rajasthan. The contribution of modern technology in medicine like amniocentesis and ultra sound testing are examples on how the science technologies are being use in gender discrimination. And as a matter of fact, these two processes in the 1980's leads to sex determination of the fetus, which leads to sex selective abortions.³ Though sex selective abortion has been made illegal in India since 1994, yet the practice of abortion continues in part of India, and mostly in North Indian states.⁴

In past few years many countries have liberalized their abortion laws, many countries have restrictive abortion laws and there are many countries where abortion can be availed at the request of a woman. Amongst all those countries India made laws related to abortion liberal in 1971 by

¹ "India Supreme Court allows rape victim, 13, to terminate pregnancy", BBC News, Sept. 06, 2017 (Apr. 19, 2020, 10:24 PM), <https://www.bbc.com/news/world-asia-india-41172796>

² VS Chanrashekhar, "Women's empowerment is incomplete without access to safe abortion, but this just got worse", Pratigya-Campaign for Gender Equality and Safe Abortion, 30 September 2019 (19-04-2020, 10:57 PM), <https://pratigyacampaign.org/womens-empowerment-is-incomplete-without-access-to-safe-abortion-but-this-just-got-worse/>

³ V Bhaskar, "Sex selection and Gender Balance", American Economic Journal: Microeconomics, Vol iii, No 1 (Feb. 1, 2011), at 214

⁴ Krishan S. Nehra, "Sex Selection and Abortion: India, Library Of Congress", Jun,2009 (Apr. 20, 2020) <http://www.loc.gov/law/help/sex-selection/india.php>

enacting Medical Termination of Pregnancy Act (MTP Act), which creates certain restriction to the strict provisions of Indian Penal Code,1860 (IPC) and Pre-Conception and Pre-Natal Diagnostic Techniques Act,1994.

HISTORY

Before 1971, termination of pregnancy in India was a criminal offence under Section 312 to Section 316 of the Indian Penal Code, 1860; except when abortion is done to save a woman's life⁵, whereas these sections not only applied to other individuals but also to the pregnant woman herself. Indigenous methods like herbs, heavy massages, and uterine insertions were the indigenous methods which were used to conduct abortion by women themselves, nurses, doctors, other experienced women, etc.⁶

The enactment of the IPC did not lead the practice of abortion discontinue in India; these provisions were not implemented properly. These provisions faced a massive gap and shortage of implementation, particularly since MTP left no evidence as the pregnancy ceased to exist and it was in the interest of both, women and abortion providers to maintain secrecy.

Section 312 of the Indian Penal Code, 1860⁷describes abortion as intentionally "causing miscarriage" except in the cases where abortion was carried out to save the life of woman, abortion was a punishable offence and criminalized women/ service providers (medical staff), whoever voluntarily causes miscarriage a woman faces three years in prison and/or a fine, and the woman availing the service facing seven years in prison and/or fine.

In 1960s, when abortion was legal in 15 countries, that deliberation on a framework for induced abortion in India was initiated. Increase in numbers of abortion taking place put the Ministry of Health and Family Welfare on alert. To address the situation, the Government of India instated a committee in 1964 lead by Shantilal Shah⁸ to come up with suggestions to draft the abortion law for India. The committee carried out a comprehensive review of the socio-cultural, legal and

⁵ The MTP Act is an exception to these provisions and any termination done outside the purview of the Act is an criminal offence under the IPC.

⁶ N.R. Madhava Menon, "Population Policy, Law Enforcement and the Liberalisation of Abortion: A Socio-Legal Inquiry into the Implementation of the Abortion Law in India", Vol. 16, No. 4, Journal of the Indian Law Institute (JILI), Oct-Dec 1974

⁷ Alok Prasanna Kumar, "Abortion Law: In 24-week pregnancy case, Supreme Court failed to address women's right to their bodies", Firstpost, Jul. 26, 2016 (Apr. 25, 2020; 03:55 PM) <https://www.firstpost.com/india/abortion-law-in-24-week-pregnancy-case-supreme-court-failed-to-address-womans-right-to-her-body-2916174.html>

⁸ K D Gaur, "Abortion and the Law in India", Cochin University Law Review, 15, 123-143 (Apr. 25,2020; 4:20 PM) <http://dspace.cusat.ac.in/jspui/bitstream/123456789/11161/1/Abortion%20and%20the%20Law%20in%20India.PDF>

medical aspects of abortion. The committee in 1966 recommended legalization of abortion in its report to prevent wastage of women's health and lives on both compassionate and medical groups.⁹ The recommendations of the committee were accepted in 1970 and were introduced in the Parliament as the Medical Termination of the Pregnancy Act. The MTP Act was passed in 1971 by the parliament and legalized abortion in all India except in state of Jammu and Kashmir.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The Medical Termination of Pregnancy (MTP) Act was enacted in 1971¹⁰ to provide for specific exceptions to the prohibition of abortion as set out in the IPC, importantly in concern about the increase in India's population rate and lack of safety in abortion services that result in maternal mortality.

The Act allows an unwanted pregnancy to be terminated up to twenty weeks of pregnancy, and requires a second doctor's approval if the pregnancy is beyond twelve weeks. The grounds for termination of pregnancy include grave risk to the mental and physical health of the woman in the current and foreseeable environment, as when pregnancy results from contraceptive failure, or on humanitarian grounds, or if pregnancy results from a sex crime such as rape or sexual intercourse with a mentally-challenged woman, or on eugenic grounds, where there is reason to suspect substantial risk that the child, if born, would suffer from deformity or disease. The law allows any hospital maintained by Government to perform abortions, but requires approval or certification of any facility in the private sector.

The MTP Regulations, 2003¹¹ framed under the MTP Act, a subordinate legislation and hence contain strict confidentiality provisions such as the maintenance of a secret register with details of the patients; these details are not to be given to any person, according to Section 5 and 6 of the Regulations.

The MTP Act allows women to obtain abortion up to twenty weeks if continuing the pregnancy would involve a risk of grave injury to the women's physical or mental health or there is a

⁹ IBID

¹⁰ Ministry of Health and Family Welfare, Government of India; The Medical Termination of Pregnancy Act, 1971, Act 34 of 1971, New Delhi: MoHFW; Aug. 10,1971 (Apr. 25,2020; 05:05 PM) <https://mohfw.gov.in/acts-rules-and-standards-health-sector/acts/mtpact-1971>

¹¹ Ministry of Health and Family Welfare, Government of India; The Medical Termination of Pregnancy Regulation, 2003, New Delhi: MoHFW; Jun. 13,2003 (Apr. 25, 5:30PM) <https://main.mohfw.gov.in/acts-rules-and-standards-health-sector/acts/mtp-rules>

substantial risk of fetal abnormalities to the child. However there are certain qualifications to this provision.

The first explanation to Section- 3(2) (b) of the Act, states that where the pregnancy is alleged to have been caused by rape, then the anguish caused by such pregnancy is suppose to constitute a grave injury to mental health. The second explanation states that if the pregnancy is a result of the failure of any contraceptive method or device used by a married woman, the anguish caused by the pregnancy is presumed to constitute grave injury. In addition, Section- 3(4) (a) of the Act, states that if a woman has not attained the age of eighteen years, her pregnancy cannot be terminated without the consent of her guardian in writing.

Section- 5 of the Act allows for abortion after twenty weeks of gestation, but only to save the life of the pregnant woman. This ground has been read liberally by court and may be said to include the pregnant woman's mental health. The MTP Regulations, 2003 set forth the conditions and procedures for implementing the Act.

CURRENT LAW AND POLICY

In the late January 2020, the Union Cabinet in India amended the Medical Termination of Pregnancy (MTP) Act 1971, allowing women to seek abortions as part of reproductive rights and gender justice.

The current amendment has raised the upper limit of Medical Termination of Pregnancy from twenty weeks to twenty four weeks for women including rape survivors, victims of incest, differently-abled women and minors.

Failure of contraception is also acknowledged and MTP is now available to “any woman or her partner” replacing the old provision for “only married woman or her husband”.

Upper gestation limit not to apply in cases of substantial fetal abnormalities diagnose by Medical Board.

Details of a woman whose pregnancy has been terminated shall not be revealed to anyone except to a person authorized in any law for the time being in force. The new law is forward looking, empathetic and looks at a very sensitive issue with a human face.

It is a step towards safety and well being of the women and many women will be benefitted by recent amendment to the MTP Act, 1971.

ABORTION AND THE CONSTITUTION OF INDIA

Till date, Abortion has been one of the most controversial matters in India. Right to abortion certainly falls under the purview of Part III of the Constitution of India provides for the fundamental right. Article- 21¹² of Indian Constitution provides “Right to Life and Personal Liberty”, which includes within the ambit of the right to privacy. In this context, every woman owe an individual right; right to her life, right to her liberty and right to the pursuit of her happiness, that sanctions her right to have an abortion.

Every women have reproductive features and have right to take decision regarding her sexual health and her reproductive choices. Right to abortion is a species of right to privacy, which proclaims a continuance of the right to life under Article- 21 of COI. It can also include complete right of reproductive organs to a woman. Since, right to life includes right to enjoy life with all the limbs and faculties, therefore, it implies that right to procreation and right to have control over reproductive organs are included in the broader concept of right to life.

The right to your body lies with every individual. Any forced act upon the person’s body without the consent of that person is a violation of that person’s basic human right guaranteed under COI. This is a major problem in India, where the right to reproduction lies within the hands of spouses and in-laws rather than the woman herself.

In case of abortion, woman have equal right to make free choice upon what she wants to do with her life and her body, as any other citizen of India. Women like unaware teenagers, sex workers, the ones who’s carrying babies with abnormalities or women whose contraceptive methods took a wrong turn are the main target groups in this area. Abortion has been legalized under the Constitution for these specific groups only.

Many people believe that abortion is moral issues, but it is also a constitutional issue. It’s a woman’s right to choose what she wants and what she does with her body, and it should not be altered or influenced by anyone else. Thus, MTP Act provides right to women for termination of pregnancy with certain limitations but do not give absolute freedom.

¹² Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

ABORTION AND SEX DETERMINATION

The use of sex selection tests in India began with the introduction of amniocentesis. A ban on government institutions providing such services, led to the proliferation of private diagnostic centers offering cheap sex determination tests to the public. This led to a corresponding decline in the female population in India. To offset the phenomena of female-fetus abortions, women's group and social activists lobbied the Parliament for over a decade to get a law prohibiting sex-determination tests on board. As a result the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in July 1994. The PNDT Act was meant to be a significant step to counter the widespread use of pre-natal diagnostic techniques, which would lead to subsequent abortion of female fetuses.

The PNDT Act 1994¹³ was later amended by Pre-Conception and Pre-Natal Sex Selection and Determination (Prohibition and Regulation) Act 2002¹⁴ prohibits the misuse of antenatal diagnostic tests for the purpose of sex determination of female fetuses which may lead to the abortion. These Acts also prohibit advertising of such use of these tests; requires all facilities using them to be registered and prohibit persons conducting such tests to reveal the sex of the fetus.

The main objective behind enacting the Act is to ban the use of Sex selection techniques after conception and to prevent the misuse of pre-natal diagnostic techniques for sex selective abortion.

The amendment of the Act mainly covered bringing the technique of pre-conception sex selection within the ambit of the Act; bringing ultrasound within the ambit of the Act; empowering the central supervisory board and constitution of state level supervisory board to make provision for more rigid punishments and empowering appropriate authorities with the power of civil court for search, seizure and sealing the machines and equipments; regulating the sale of ultrasound machines only to registered bodies.

¹³ Government of India, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Act 57 of 1994; New Delhi, Sept.20, 1994 (Apr. 25, 2020; 08:47 PM) <http://pndt.gov.in/WriteReadData/1892s/PC-PNDT%20ACT-1994.pdf>

¹⁴ Government of India, The Pre-Conception and Pre-Natal Sex Selection and Determination (Prohibition and Regulation) Act, 2002, Act 14 of 2003, New Delhi, Jan. 17, 2003 (Apr. 25, 2020; 09:30 PM) <https://indiankanoon.org/doc/19033/>

JOURNEY OF ABORTION LAWS IN INDIA

October 06, 1860: Section 312 of the Indian Penal Code, 186 criminalized abortions, dubbing it as intentionally “causing miscarriage”.

December 30, 1966: The Shantilal Shah Committee came up with the report, which recommended regarding abortion and reproductive laws that need to be regulated in India. The committee was set up in 1964 after 15 countries legalized abortion in the 1960s.

October 29, 2014: The Union Minister of Health and Family Welfare proposed a draft bill to amend the existing MTP bill. This came after the National Commission for Women had recommended that the twenty week gestation limit for abortion be raised to twenty-four weeks and urged that women, irrespective of their marital status should be given abortion rights. The bill was never placed in Parliament.

Major amendments proposed included:

1. Raising the gestation limit for terminating abortions to twenty-four weeks.
2. Increasing the provider base of abortion services by including registered health practitioners to conduct abortions after specified training.
3. It also eliminated the pre-condition opinion required in registered medical practitioner, whether to abort or not, in case of pregnancies not exceeding twelve weeks.
4. In case of pregnancies exceeding twelve weeks but not twenty-four weeks, it reduced the number of opinions required by a medical practitioner from two or one, extending more rights to women over their pregnancies.
5. The bill replaced “married women” to “all women” under the contraceptive failure clause which would help unmarried women to access safe abortion.

November 06, 2014: The Bill was opposed by the Indian Medical Association, questioning the amendment which increased the provider base of abortion services.

August 04, 2017: MTP Amendment bill, 2017, was introduced in the Rajya Sabha which intended to raise the pregnancy period to twenty-four weeks.

January 22, 2018: MTP Amendment bill, 2018, was introduced in Lok Sabha with the same demand to substitute the twenty weeks duration with twenty-four weeks. Additionally, added that the time period should be raised to twenty-seven weeks in case of rape survivor.

December 28, 2018: The Women’s Sexual, Reproductive and Menstrual Rights Bill have been introduced by Shashi Tharoor, which also sought to do away with the pre-condition of a medical

practitioner's opinion in case of pregnancies not exceeding twelve weeks. But the proposed bill did not tamper with the gestation period limit of twenty weeks.

April 24, 2019: Madras High Court issues notice to the Centre and State Government seeking their response in extending the period for termination of pregnancy, stating that it is a matter of urgency.

May 26, 2019: PIL filed by Amit Sahni in the Delhi High Court asking to raise the twenty weeks limit to twenty-four weeks.

May 28, 2019: Delhi High Court issues a notice in plea to the central government asking to extend the duration of termination of pregnancy by 4-6 more weeks, in case health risks mother or fetus.

July 17, 2019: Supreme Court allows woman to abort "abnormal" fetus at twenty-six weeks, not a crime anymore.

July 19, 2019: Swati Agarwal, Garima Sekseria and Prachi Vats filed a petition at the Supreme Court and also challenged the twenty weeks gestation limit saying that advancements in science and technology have made it possible to terminate pregnancies at larger stages. It also asked for amendments in Section 3(2) (a) of the MTP Act on grounds that they violate Article 14 and 21 of the Constitution of India.

August 02, 2020: Affidavit submitted by Union Health Ministry in response to the PIL filed by Amit Sahni. It stated that draft MTP Amendment Bill, 2019 has been sent for inter-ministerial discussion.

August 06, 2019: Supreme Court of India issues a notice to the Central Government seeking its response to the PIL filed by Swati Agarwal, Garima Sekseria and Prachi Vats.

November 01, 2019: Karnataka Medical Council stated that husband's consent not needed for termination of pregnancy.

CONCLUSION

Abortion is a universal phenomenon and is defined as and has existed throughout recorded history, yet it continues to be a highly charged, controversial issue, raising extreme passions among people, as well as politicians, religious leaders, and health and rights advocates. Although abortion services in India were liberalized, access to safe services remains limited for majority of women.

The liberty of the mother as well as the public interest has to take care of the law. The fact that India has legalized abortion does not necessarily mean that abortion is always available to every pregnant woman who would like to terminate her early pregnancy. The reason for this is that the majority of the populations, being in rural areas and far away from government hospitals and clinics, have no access to the facilities promised by the government. And equally important is the fact that it will take some time before the information that abortion is now legal and available reaches all the needy mothers in India. In today's era when women have finally come at par with the men and our Constitution boasting of Equality and Right to Life and Personal Liberty under Article- 21 of Constitution of India, the women should get full right to make their own decisions pertaining to their body and reproductive options. There could be a lot of reasons why a woman would want to terminate their pregnancy, there could be financial difficulties, yet it could be a pregnancy before marriage or it could be a third pregnancy or could be a pregnancy as a result of incest or rape. These are just a few basic reasons; one must know that pregnancy is not just about child bearing but it is about child rearing.

Abortion is a painful process that any woman undergoes, but for a lot of women the laws make it tougher. This also holds true in medical cases, where a mother has to seek permission from higher authorities to proceed with the termination of an abnormal fetus beyond a certain week.