

LEGALFOXES LAW TIMES

DECONSTRUCTING THE ABORTION LAWS IN INDIA

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ABSTRACT

Abortion has been a central point of deliberation since time immemorial. With the passage of time, diverse opinions have been presented and ample perspectives have analyzed the topic. The major discourse regarding abortion revolves around two aspects, right to abortion of the woman and right of the unborn. The present paper attempts to discuss about the abortion laws in India. Traversing from the condition before 1971, to the condition after the enactment of the Medical Termination of Pregnancy Act, 1971, the paper discusses the time-to-time developments in the abortion laws in the country, and also presents an international perspective over the issue with a special emphasis on the contemporary standpoint of the issue, and also draws out a conclusion with certain suggestions that may be included in the laws.

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TABLE OF CONTENTS

I. CONDITION BEFORE 1971.....02

II. MEDICAL TERMINATION OF PREGNANCY ACT, 1971.....03

III. STATUS QUO OF THE ABORTION LAWS.....04

IV. JOURNEY OF THE ABORTION LAWS.....05

V. COMPARING ABORTION LAWS WORLDWIDE.....07

VI. THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL2020.....09

VII. A PROGRESSIVE STEP, YET, A LONG WAY AHEAD.....10

VIII. CONCLUDING REMARKS.....11

IX. BIBLIOGRAPHY.....1

2

I. CONDITION BEFORE 1971

Before 1971, there existed no separate law dealing with abortion. The apparent cause behind it lied with the social stigma associated with abortion. Beliefs based on the sanctity of pregnancy, marked abortion as a sin, similarly, there were opinions that labeled it as evil, and contradictory to nature. Abortion was perceived as a moral, and legal wrong, this thus presented no need for enacting any law for abortion. In India, before the enactment of the famous Medical Termination of Pregnancy Act, 1971, and the amendments connected thereto, it was primarily the Indian Penal Code, namely, its provisions contained in Sec.312-316 that governed its state-of-affairs. This law describes “abortion” as “causing miscarriage” for the purpose. The cause is due to the fact that abortion implies intent, while spontaneous abortion (commonly known as miscarriage) is a natural phenomenon. Section 312 of this law criminalizes any woman who intentionally causes miscarriage with a punishment extending to three years or fine, and in a case when the woman is ‘quick with the child’, i.e., the sensation of the presence of the unborn is being felt, to a punishment extending to seven years or fine, the section however permits for a therapeutic abortion, but only in a case when it gets necessitated for the health of the woman. The exact difference in the division is however lacking. A more precise categorization is desired. Also, at the same time, around 15 countries in the world had liberal abortion laws. This fact, along with the surging no. of illegal abortions which eventually led to unsafe abortions, urged for the need for a reformation in the abortion laws in India. Consequently, a committee chaired by Shantilal Shah was constituted to draft a suitable legislation. The Committee explicated abortion from various sides, and based on compassionate and medical grounds, recommended of legalizing abortion. As a result, the Medical Termination of Pregnancy Act, 1971 was passed.

II. MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The Medical Termination of Pregnancy Act, 1971 initially gained much applause throughout the country. The issues covered in the act considerably abated the need for resorting to any illegal means of abortion. Its provisions provided a cogent outlook to pertinent issues, whenever and wherever necessary, like urgency of abortion and the recognition of the medical status of the pregnant woman¹. It also contained a provision for a proper recourse to the category of women

¹Sec 3, Medical Termination of Pregnancy Act,1971

who fronted pregnancy as a result of rape. Nonetheless, through the course of time, it could be realized that the Act was not able to keep itself consistent with the pacing advancements in technology, and with changes in the societal beliefs. Several drawbacks of the Act were confronted resultantly, and with the practical application of the Act, several inherent loopholes too were pointed out. For instance, the Act failed to provide any remedy to the pregnant unmarried women, and pregnant women in live-in relationships. Its concern with the marital status of the woman threw many women in a state of dichotomy, where they had no option except for illegal abortion that was too unsafe for them. Another very significant problem, not inherent in the Act, yet surrounding it, was its improper communication to all the categories of people. It could be found that people, most significantly, the poor and illiterate and the ones residing in rural areas, were unaware even of the existence of such a statute, thereby implicating with, barring them from availing the advantages of the Act, and secondly, becoming a leading cause for the illegal abortions and maternal mortality. In addition, it could also be realized that the Act somewhat contravened the rights of the women. As per its provisions, it was the Medical Practitioner and not the woman who had the final say in the matter which intervened with the right of personal liberty of the woman, guaranteed by the Constitution², and many other rights over herself. In cases pertaining to the pregnancy of girls aged below 18 years, it was only her guardian's decision that had consideration, while that of the girl had no weightage as per the Act, which again subdued her autonomy and freedom. Further, the provision specifying the maximum gestational limit to the 20th week created multiple problems³, because, the latter times posed situations where the abnormality of the foetus could be discerned only in the 21st or 22nd week, but due to such restrictive provision, abortion was not viable. As a result, couples in such cases were forced to carry out illegal abortions that had lethal repercussions, or had to plead before the courts for allowing them to abort and this entire process being very time-consuming, only aggravated the fetal abnormalities, in most of the situations.

III. STATUS QUO OF THE ABORTION LAWS

For long, the debate on abortion laws has revolved around equilibrating pro-life with pro-choice. Multiple opinions have been presented to this conundrum. In India, there are statutes that bestow

²Art. 21 of **The Constitution of the India** "Protection of life and personal liberty. —No person shall be deprived of his life or personal liberty except according to procedure established by law."

³Sec 3(2)(b),**Medical Termination of Pregnancy Act, 1971**

certain rights to the unborn and acknowledge him/her as a legal person by fiction, though he acquires an interest only after birth⁴. Bombay HC holds an unborn fetus as not an entity with human rights⁵. The pro-lifers believe abortion to be a compromise with their rights, while the supporters of pro-choice believe in the autonomy of woman's rights, and leaves over the woman the choice whether to continue pregnancy or not. Allowing the mother a choice points to another question, i.e. whether the abortion should be conducted at the request of the woman or whenever the medical practitioner deems fit, with requirement of "good faith" considered⁶. In furtherance, the discord between "woman's consent or doctor's opinion" has been recurrent. As specified above, the Acts hitherto have held only the medical practitioner's opinion as binding, and not the woman's which impedes woman's rights, contrarily, it is equally well-known that the expertise to analyze the need for abortion, and related affairs, is possessed only by the medical practitioner, therefore, the woman's rights should not override the medical front. Certain countries in the world allow abortion made "at request" of the woman⁷. In such a case, the presence of the element of "consent" is *per se* implied, thus, the women's rights are not affronted thereby.

IV. JOURNEY OF THE ABORTION LAWS IN INDIA

The wide sweep of history has endorsed a long series of cases dealing with the abortion laws. Before we proceed to discuss the recent developments in the abortion laws, it would be prudent to glance through the journey of the abortion laws that concerns with the plethora of cases presented before the Courts, Courts' interpretations of those cases, the different shades presented to abortion with their unique questions in law, and the Courts' decisions that reflect the rationale borne in mind by the judges while deciding the cases. This would resultantly provide justification to some of the questions that have been discussed above.

⁴Section 13 of *Transfer of Property Act, 1882*

⁵*High Court on its own motion vs. State of Maharashtra* 2017 Cri LJ 218, 223.

⁶Sec. 3(2) *Medical Termination of Pregnancy Act, 1971*

⁷ The amendments in the MTP Act bill are flawed , *Hindustan Time* ,(Visited on May 16, 2020)

https://www.hindustantimes.com/analysis/theamendmentsinthemtpactbillareflawedanalysis/story-H0DZJUAWWopQZKPzbLXyJL_amp.html

The Courts in India have tried to put a special emphasis over issues like urgency of abortion and medical status of the pregnant woman, as and when required. Post-enactment of the Medical Termination of Pregnancy Act, 1971, the provisions in the Indian Penal Code were defined subservient to Section 3 of the Act, which forms the main basis of the Act (*Jacob George vs. State of Kerala*)⁸. Over the years, the main questions pertaining to the abortion laws have primarily dealt with the drawbacks of the Medical Termination of Pregnancy Act, and related affairs. As highlighted above, there existed several issues that were not envisioned in the Act. In the famous case of *Dr. Nikhil Dattar & Ors. v. Union of India*⁹, also known as the *Nikita Mehra* case, arguments concerning the increase in gestational limit of 20 weeks to 24 weeks or more were raised. The suit was filed in the Bombay High Court seeking termination of a pregnancy which had surpassed 25 weeks of gestation period. In the said case, the petition was filed by a couple and their doctor. They pleaded for termination of pregnancy on the ground of the substantial fetal abnormalities that came into light only in the 24th week of gestation. The suit further talked of various aspects coupled with the pregnancy, with moral and medical justifications. But, the Court rejected this suit¹⁰, without considering the severe mental anguish that was later met by the woman. This judgment was perceived as a subordination of the women's rights to the judicial decisions, and this issue created a wide commotion in the Courts through multiple such suits, one of which was the *Suchita Srivastava v. Chandigarh Admn.*,¹¹ case, wherein the Supreme Court broadly discussed the autonomous right of the woman over her body in a case dealing with abortion of a mentally disabled, rape victim. Incorporated the women's right to reproductive choices into the ambit of right of personal liberty under Article 21 of the Indian Constitution, and laid down that "It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating." The same reasoning connoted in the case of *High Court on its own motion vs. State of Maharashtra*¹² as well, which pertained to termination of pregnancy of a prison inmate, wherein the Court allowed abortion and also issued certain guidelines dealing with termination of the pregnancy of women prisoners, in general¹³. It further recognized the primacy of women's rights

⁸*Jacob George vs. State of Kerala*(1994) 3 SCC 430.

⁹*Dr. Nikhil Dattar & Ors. vs. Union of India*(2008) 110 BOM. L.R. 3293

¹⁰ "On the grounds of non-fulfilment of gestation period with the prescribed gestational limits."

¹¹*Suchita Srivastava vs. Chandigarh Admn.* (2009) 9 SCC 1.

¹²*Supra. Note 6*

¹³*Ibid*

and reiterated her autonomous rights over her body¹⁴. The autonomous right of woman over her body traces to another very important issue co-related with the abortion laws which is its interpretation with the right to privacy, and other cluster of rights. A lot of cases have dealt with this issue¹⁵. This discussion was initiated in the famous case of *Kharak Singh vs State of UP*¹⁶, where the Court refused to interpret the Right to privacy with Article 21 of the Constitution. It held a similar inference in *Gobind v. State of Madhya Pradesh*¹⁷ with a comment that the right to privacy must include "the personal intimacies" of inter alia marriage, motherhood, procreation, and child-rearing"¹⁸. Justifications with ambiguity of right to privacy were presented for not regarding it as a facet of Art.21 of the Constitution of India. This debate, after much discourse, however triumphed in the recent case of *Justice K.S. Puttaswamy v. Union of India*¹⁹ where the right to privacy was held to be a fundamental right. Lately, correlation of this right with right to abortion strengthened the need for enacting laws that recognized these rights. But some of the decisions of the Courts still do not seem to be instituting this right in the ambit of right to privacy, and thus, Courts' own decisions stand contrasting one another. As regards the other side of the journey, the Courts in India have also pronounced various judgments that lie either contrary to, or the questions of which were not adequately envisioned in the MTP Act, 1971. These judgments seem to have trod on the principles of justice and fairness, for example, Courts' decisions in cases like *Geeta Devi v. State of H.P.*²⁰, wherein the High Court of Himachal Pradesh allowed the abortion of a 32-week pregnant woman on the ground that the further continuance with the pregnancy could pose serious threats to her life. Similarly, in a recent case, the Supreme Court allowed a 13-year-old rape survivor to terminate her 32-week-old pregnancy after considering the medical report filed by the medical board constituted by the Court, likewise, in *Mamta Verma v. Union of India*²¹, the Supreme Court allowed the woman, running in the 25th week of pregnancy to abort, when it figured out a serious fetal abnormality. The Courts, while deciding the cases, have been seen giving due weightage to women's conditions, in

¹⁴*Ibid.*

¹⁵ "The right to privacy essentially seeks to provide the women the liberty over her choices."

¹⁶*Kharak Singh vs. State of UP*, AIR 1963 SC 1295

¹⁷*Gobind vs. State of Madhya Pradesh* AIR 1975 SC 1378

¹⁸*Ibid*

¹⁹*Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161

²⁰*Geeta Devi v. State of H.P.*, 2017, SCC Online HP 1574,

²¹ Writ Petition (Civil) No.627 Of 2017

addition to the medical opinions, and even though in some cases, their decisions have not favored abortion, yet they stand correct not only from the legal background, but from moral grounds as well, for example, it refused abortion of a 10-year old rape victim, running in 32nd week of gestation after the doctors indicated of a likelihood that it could pose serious problems to the girl but additionally provided Rs. 10 Lakh compensation. On the other hand, there have also been cases where the Courts have been unable to provide sufficient redressal to women who confronted problems due to medical practitioners' negligence or administrative incompetence, and the maximum remedy, if given, was compensation which clearly was inadequate in comparison to the problems she underwent *Ms. Z vs State of Bihar*²². Such decisions have only earmarked the vagueness in the abortion laws, and an ambiguous status of the women's rights.

V. COMPARING ABORTION LAWS WORLDWIDE

The recent developments in the abortion laws in India have ensued India fall under a broad social or economic category. Countries belonging to this category hold a liberal approach towards abortion. The abortion cases are perceived not only based on health of the woman, but on several other grounds too. Presently most of the countries often consider a woman's actual or reasonably foreseeable environment and her social or economic circumstances while considering the potential impact of pregnancy and childbearing. To this category, there remain 14 countries with 380 million women of reproductive age, amounting to 23 % reproductive age women living in countries that allow abortion on broad social or economic grounds²³. By the recent amendments in 2020, India has made its position much stronger in the league of countries succoring women who wish to make individual choices from their perspectives and predicaments. On the other hand, the Western countries hold a retrogressive approach towards abortion laws. With the European Court of Human Rights having never deliberated over the issue of abortion or its legality, the abortion laws in the countries are divergent. In a general sense of comparison, the Abortion laws in Northern Ireland and the Irish Republic lie being most restrictive in Europe. Ireland legalized abortion in 2018²⁴. As regards India, abortion was legalized in the late 70s

²²*Ms. Z v. State of Bihar* 2017 SCC Online SC 943

²³ World Abortions Law, Reproductive rights (Visited on May 16, 2020)
<https://reproductiverights.org/worldabortionlaws>

²⁴ Abortion laws around the world: from bans to easy access, *The Guardian* (Visited on May 16, 2020)
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itself. This move had come at a time when the landmark case of *Roe v. Wade*²⁵ in the Supreme Court of the United States was under trial and scrutiny. Even though the majority of the states in the US have legalized abortion, the situations in its states are still very wide-ranging. In some, abortion has been perceived negatively and though it is not banned outright, restrictions such as waiting periods to delay women, along with arduous requirements causing abortion clinics to shut down, have been imposed, and thus, limited access to providers can amount to a de-facto ban on abortion. However, position in states like Alaska, New Jersey, New Hampshire, Oregon and Vermont of the US is pole apart, with abortion an easily accessible option²⁶. Similarly, abortion in Canada is legal at all stages of pregnancy and is partially funded by the Canada Health Act, after the Court's decision in case of *R. v. Morgentaler*²⁷ allowing abortion to women without any menacing of criminal sanctions. In the African continent, Kenya recently in 2012 withdrew its standard and guidelines on Reducing Maternal Mortality and Morbidity from Unsafe Abortion which held abortion illegal, holding abortion lawful on both physical and mental health grounds by the order of High Court²⁸. Countries like South Africa , Mozambique fall under "On Request" (with variance in Gestational Limits) category of abortion²⁹. Recently, South Korea's Constitutional Court declared restrictive abortion laws as unconstitutional and the lawmakers were provided the time till 2020 to pass a new legislation legalizing abortion. Thus, there lies a serious dichotomy all around on this issue.

VI. THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL, 2020

²⁵*Roe v. Wade*, 410 U.S. 113 (1973) "The landmark decision of the U.S. Supreme Court in which the judges held that the constitution of USA safeguards a pregnant woman's liberty to choose to terminate her pregnancy without any government restriction."

²⁶States with Gestational Limits for Abortion, **Kaiser Family Foundation** (Visited on May 17, 2020)
<https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions>

²⁷*R. v. Morgentaler* [1988] 1 SCR 30, **Supreme Court of Canada** (Visited on May 17, 2020)
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²⁸Abortion is illegal in Kenya but allowed on conditions, order High Court, **Devdiscourse** (Visited on May 16, 2020)
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²⁹ Seeking a more progressive abortion law, **The Hindu** (Visited on May 17, 2020)
<https://www.thehindu.com/opinion/op-ed/seeking-a-more-progressive-abortion-law/article30777394.ece>

The Medical Termination of Pregnancy (Amendment) Bill, 2020 was introduced in Lok Sabha³⁰ on 02-03-2020. This bill seeks to amend the Medical Termination of Pregnancy Act, 1971. As on today the bill has received approval from the Lok Sabha, but stays pending in the Rajya Sabha. The bill has been hailed as a move furthering towards welfare of women and maintaining their safety. This bill expands the purview of the safe and legal abortions without any compromise with the safety of the women, or their personal rights. The pivotal attributes of the bill include: -

- 1) The bill enhances the lower gestation limit for termination of pregnancy from 12 weeks to 20 weeks and necessitates the approval of one medical practitioner in such a case.
- 2) The upper gestation limit is enhanced from 20 weeks to 24 weeks for specific categories of women, the categorization is however yet to be prescribed by the central government. The approval of two medical practitioners has been mandated for such a termination of pregnancy.
- 3) The bill has broadened the scope of the explanation clause in the unwanted pregnancy to "any woman" as against "married woman". Prior to the bill, the provision for the unwanted pregnancy included failure of a contraceptive method used by a married woman or her husband but excluded the same situation for unmarried women. But the inclusion of the words "any woman" will now allow even the unmarried women to abort using the facilities of the bill. This further indicates to the rightful recognition of the recent trends of relationships, for example, live-in relationships, etc.
- 4) The bill no longer mandates the upper gestation limit for termination of pregnancy to apply to cases of substantial fetal abnormalities. For the same, it relies on diagnosis by the Medical Board.
- 5) The bill expects the state governments or a union territory to constitute medical boards consisting of medical practitioners, with certain qualifying criteria's to be necessarily fulfilled.
- 6) Another essential feature of this bill is its provision for protecting the privacy of the women. The bill mandates the medical practitioner not to divulge any particular of the pregnant woman

³⁰THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL, 2020
<https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020>

to any person except to the one authorized by law. This provision is consistent with the growing recognition of several rights of the women, including right to privacy and other clusters of rights.

VII. A PROGRESSIVE STEP, YET, A LONG WAY AHEAD

The current MTP Amendment Bill 2020 attempts to address many issues that weren't dealt with in the former act. The amendments proposed by the bill have assured some relief to the women. As we discussed above, over the course of times, several problems had surfaced due to the restrictive provisions of the MTP Act, a majority of them owing to the restrictions in the gestational limits, but as this bill increases these limits, it is hoped that no such problems would occur. Furthermore, the amendments protecting the privacy of the women, at every stage of the abortion, again serve as representatives of her rights, the fact that in cases of substantial fetal abnormalities, abortion would now be readily available, with not many restrictions to it, are definitely the indicators of the improvement in the abortion laws. While this is the positive side of the bill, it is notable that these developments are not entirely at par with the current decampments in the society, and they still suffer from many fallacies. For example, many situations still lie impetuous by the Act, the provisions of the bill still do not fully recognize the rights of the women, rather impose contingencies to it, everywhere. With regards to the increase in the gestational limits, the Act can still be seen as including instances where the women's rights may easily succumb to the doctor's discretion. It is ponderable that such a question would not have arisen had the right to abortion not been made condition-dependent. As highlighted above, there are many countries where the abortion is done only at the request of the woman, and at every point, it is the woman who bears the final say, as opposed to Indian abortion law wherein the doctor's opinion has a final value, notwithstanding the opinion or final consent of the woman. Thus, the autonomous rights, and other assemblage of rights assured to women do not really seem to be adequately applied.

Therefore, it can be said that women's right to abortion is conditional in India. This issue deserves a stricter introspection. The autonomous rights of the woman over her body must be rightfully, and in real sense, be reinstated by endowing upon her the agency and power over her sexual and reproductive rights.

VIII. CONCLUDING REMARKS

To conclude, it may be said that the abortion laws in India are significantly progressive. India's take on the issue stands far more radical than the majority of the countries in the world. The recent developments have been pioneering and hold a quasi-liberal approach towards the tender issue of abortion. However, there still remains a vast scope of improvement in the laws, allowing a room for a handful of relaxations to be conveniently brought in the laws. It needs to be realized that the rights of the women as per the current abortion laws stand at a very susceptible position. This issue has not yet received as much attention as it deserves. Similarly, many issues such as that of gestational limit abortion on request or not, are still dichotomous; therefore, deliberations regarding it should be encouraged so as to allow a more constructive solution for the problem. The amendments are fair enough as the changes brought in the act reflect the major health issues regarding abortion and the amendments stand on the parameters of societal changes. Framing is one of the main aspects of Public health. But, the Reproductive health care requires requisite attention and needs to be addressed seriously and the standard guidelines that may govern the clinical practicing are required to be issued so as to facilitate abortion, furthermore, emphasis over a strict adherence to these protocols too needs to be ensured.

Better coordination between the administrative authorities and standard procedures for maintaining the intactness in privacy of the women is desired. It has been often seen that problems crop up due to poor coordination. Also, the redressal mechanisms for women's grievances need to be made more efficient. An adequate solution should be looked out at in every case. This will only strengthen people's confidence in the Judiciary.

Based on the different economic, social and religious aspects, abortion is still a sensitive issue. A significant strata of the society is still unaware of the existent laws, thus, states should try to invest more in spreading awareness of the various legislations. Appropriate measures are required to be followed in this process. The Government carries along with itself an onus of ensuring maintenance of rights for everyone, which should invariably include a woman's right to her own body facilitated by an efficient legal system in place for ensuring the same.

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