

Abortion Laws in India: Issues and Challenges in 21st Century

Nitesh Bhatt¹, Pooja Suman¹

¹Assistant Professor, Department of Law, Banasthali Vidyapith, P.O. Banasthali Vidyapith

Abstract

India is a nation which requires societal awakening in ample of affairs. The progress of a nation isn't solitary indomitable by fiscal eminence nevertheless by the in general wellbeing of its populace and consequently, being a "developing country" necessitate communal development. There is prevalent ignominy enclosed to abortion in the nation. The abortion law in India restrain the "reproductive autonomy" of women and the provisions of the Act are being violative of the provisions of Constitution of India. Women subsequent to passing of MTP Act are also performing unsafe abortions which have adverse effect on their wellbeing. For that reason the legal status of abortion law need to be altered according to the current scenario. The research paper intended at scrutinizing the Act and suggestion that the legislature ought to uphold while amending the present Act.

Keywords: Abortion, Right to life, Health, Fundamental right, MTP Act, POSCO Act,

Introduction

Abortion has at all times been and prolongs to be a tremendously litigious subject. Whether one must be allowed by law to have an abortion, if yes, beneath what conditions? Secondly, how does the law construe the human rights of an unborn child? Based on this the humankind is alienated into two fractions i.e. pro-life and pro-choice. India may be termed as pro-life country as the termination of pregnancy was pictured by the legislature in only certain cases as prescribed in the MTP Act, 1971. By providing legal status to the unborn child a conflict between the "reproductive autonomy" of the pregnant and "right of life" of unborn is being created.

The Constitution is preeminent law to oversee the entire country. The Indian Constitution doesn't explicitly perceive the fundamental right of "reproductive autonomy". Be that as it may, Article 21 of the Constitution of India ensures a fundamental right to life and individual freedom. The articulation life in this Article implies an existence with human nobility and not simple endurance or creature presence. It is of broad magnitude to wrap "reproductive autonomy" in it. The Hon'ble Apex Court is performing magnanimous work of construing the Constitution.

Evolution of Abortion

Till the late 1800s, females in Western region of

Europe and the U.S. endow with abortion of each other without any legal restraint. In the late 1900s abortion was restricted in most of the country since at that period it was very treacherous procedure finished with rudimentary means, hardly any antiseptics and high mortality rate.

Since abortion was dangerous and were killing a lot of women, shielding women from the danger of abortion was the prerequisite and to restricting them to traditional childbearing role. In past abortion was termed as sin or was well-thought-out a form of evil doing of morality⁴. In the late 1800s, when the birth rate of whites were breaking down, the U.S. government asked white country conceived lady to have children and cautioned to keep the birth rate and demise rate equivalent. Early ventures private undertaking enterprise relied upon women for voluntary domestic workers, little paid tedious workers, and reproducer⁵. With the lacking of lawful abortion, woman commences it complicated to oppose the restriction of their role. During the 1890s, specialists rough that there were 20, 00,000 abortion each year in the U.S., Ladies who are resolute not to bear undesirable pregnancy have always begin a few methods to endeavour to terminate pregnancy. Frequently, they have turned to dodgy, some of the time lethal techniques, such as embeddings sewing needles, coat holders and like material into the vagina and uterus to prematurely end the pregnancy. During the 1960s, energized by the social

equality and hostile to anti-violence movement, ladies started to battle more vigorously for their privileges. The quickly developing women's movement took the banned subject of abortion to the network. Ladies walked and mobilized and convince for abortion to stipulate.

Recently, March for life an organization that started a protest in Washington D.C. which is hurriedly scattering in numerous countries of different continents. This movement is begun to go up against induced abortion on both ethical and radical ground and support its lawful prevention. The movement is acknowledged as the right to life and is also called the right to life movement. This anti-abortion movement turn out to be politically vigorous and bestow to setback of the case *Roe v. Wade*. Again on 22, September, 2019 thousands of individuals march for banning abortions in Slovakia the argued that "A human being is human being in spite of its size" and "Who kills an unborn child kills the future of the country".

State failure to provide health care

The Hon'ble Apex Court has upheld that Art. 21 of the Constitution oblige positive duty on the State, the scope of Art. 21 further enlarged; in this the court held that the government possesses responsibility to provide sufficient medical support to each person and work for welfare of the common public. Additionally Art. 21 impose compulsion on the state, the state is required to defend and preserve the right of all persons²⁶. As it is held that right to safe abortions flow from right to health envisage in Art. 21 of the Constitution, the state hold a duty to provide adequate medical support to pregnant lady who wants to end the pregnancy.

The MTP Act was passed by the legislation with the purpose to reduce the occurrence of illegitimate abortion and ensuing maternal mortality and morbidity. But then also as claimed by the report of The lancet global health in 2017 Dec named as "The incidence of abortion and unintended pregnancy" in India, in the year 2015 it submitted that out of 15.6 million abortions in the year 2015 73% were performed through medical method abortion outside health facilities, 22% happened in health facilities and out of 73% abortion performed outside medical facilities 5% were done by means of unsafe method.

The Indian spend on Nov 5, 2017 had submitted that 56% of abortion in India are unsafe and 8.5% of all

maternal deaths in India are caused due to unsafe abortion and 10 women die each day because of the ground of unsafe abortion performed by themselves. Also, half of the abortion performed is unsafe and incomplete and is increased from 30% to 50% in the preceding five years. It also accounts for a shortfall of 76.3% in obstetricians and gynaecologists weigh against their necessity at Community Health Centres. Private medical facilities are costly, and economically out of the reach of a large number of women. A both public and private health facility refuses women terminating pregnancy outside the approved 20-week gestational period.

According to the report submitted the lancet global health it roughly outlined that near about half of the pregnancy is unintended, usually most of them end up in abortion. Also disallowing a woman who wanted to abort may have negative developmental and socioeconomic effects on the exiting child.

Also, the National family health survey-4 figured that approximately most of abortions as a lot of 52% were provided private health facilities 20% in private and 26% were done by women themselves.

The Handbook on Medical Methods of Abortion to develop admission to New technologies for Safe Abortions by Ministry of Health and Family Welfare, Government of India dated January, 2016 records that a significant yet prevalent cause of maternal mortality in the country is unsafe abortion Accounting for approximately 8 % of all maternal deaths, it is the third-largest cause of maternal morbidity in the country and thus an area requiring focussed attention.

The WHO has repetitively solicited legal endorsement of abortions to guarantee the better corporal protection of women. The countries where abortion law is liberal, maximum abortion are performed in a safe situation as compared to developing nations with relatively strict abortion laws.

Whether MTP Act clashes with POSCO and PC-PNDT Act?

POSCO Act - Consent of legal guardian is required for termination of pregnancy of a minor under POSCO Act. All sexual activity beneath 18 years of age is matter to legal scrutiny. As a consequence, if any pregnant minor girl wants any sort of medical assistance then the doctor is required under law to report the matter to

concern authorities. This parameter under POSCO Act works contradictory with the MTP Act where the doctor is under obligation not to disclose the personal identity of abortion seeker. The outcome of this confliction is that the pregnant minor if fright from disclosure her identity have no other option other then hunt for unregistered, unregulated and at the end of the day unsafe abortions because safe facilities turn her away.

PC-PNDT Act - The PCPNDT Act disallows the sex-specific demonstration of foetus removal. This is a result of sonography and other development innovation being contorted to choose the sex of the unborn girl and end it ahead of time in instances of unborn female child. The contradiction that arises in the way of doctors conducting safe and sound abortions is the PC-PNDT. This Act aims a criminalizing sex determination at the time of ultrasound and tackles the scourge of female foeticide.

Issues of abortion in the eyes of judiciary

Abortion after the limit specified in the MTP Act i.e. 20 weeks is subject to judicial scrutiny and Hon'ble Apex Court and High Courts have discretionary power whether to allow or to dismiss the plea seeking abortion. As every individual is being different, the courts have pronounced distinctive verdict by scrutinizing different risk factors in every case. The Courts should do liberal interpretation as MTP is a welfare statute and imperative consideration should be given to the legislative intent behind making this Act.

Hon'ble Apex Court and High Court in several cases has directed the centre for amendment in MTP Act in the following cases-

In *Anusha Ravindra vs U.O.129*, which is being sub judice in Apex Court, the Court issued notice to the centre for frame suitable medico-legal guidelines for urgent and safe medicinal facilities including abortion past 20 weeks in unusual cases.

At present in the case of *Swati Agarwal and others vs U.O.130*, which is sub judice in the Apex Court, The Apex Court has issued notice to the centre for decriminalization of abortion and affirmation of the right of absolute independence of women to make decision-related to reproductive right.

Again on 26, May, 2019 P.I.L was filed by Amit Sahni in Delhi High Court which is sub judice, asking

the Court for extension of termination of pregnancy limit from present 20 weeks to 24 weeks. Scrutinizing that it required scientific reflection, Delhi High Court issued notice to the centre and National Commission for Women looking for their response to PIL seeking extension of time limit for abortion on a women's will to 24 or 26 weeks from current 12 week³¹.

On April 24, 2019 The Madras High Court issue notice to Centre and State governments looking for their reply in matter extension of period for abortion expressing that this issue needs urgent response as amendment is required³².

The Courts are taking a scientific loom in the direction of technologically advanced prenatal diagnosis for the assessment of foetus health. As it has been resolute previously that the foetus becomes a "life" after 20 weeks and at the same time, it is only after 18 weeks that foetal abnormalities can be monitored and can be trapped in tests.

Conclusion and Suggestions

Adolescent Pregnancy-If not terminated, pregnancy can be a cause of leaving school of adolescent girls which is a violation of their right to education under Art. 21A of the constitution of India. Based on their consequent lower education achievement, they may have less ability and opportunity meant for employment, frequently maintains succession of poverty, pregnancy diminish future retribution of girls.

The legislation is deficient in recognizing the rights of the rape victim's child. Even though the Hon'ble Apex Court has stated that every child is legitimate only parents can be illegitimate but then also they don't have equal rights as weigh against to a legitimate child, in no personal law right of inheritance is being given them. The legislation if denies to terminate pregnancy after 20 weeks then should implement laws to protect their rights. As Allahabad High Court has acknowledged inheritance rights of a child born out of rape in the property of his biological father but held that it isn't feasible judicially to put down any rule for inheritance by a minor who is born as a consequence of rape. Such effort by Court would amount to legislation by judicial verdict⁴¹.

The discrimination between a married and unmarried woman in case of termination of unwanted pregnancy is also a violation of Art. 14 of the Constitution of India as there is no nexus of discrimination. A pregnant woman

should be stated as a pregnant woman regardless of her status as “married” or “unmarried”.

As Art. 21 of the Constitution obliges positive duty on the State, the state should appoint more doctors in public health care centre as women especially in rural areas can't afford private doctors and due to which terminate pregnancy by using unsafe methods. In public health care centre, the facilities need to be urgent up-gradation to provide safe and timely abortion to women seeking it.

Basic sex education should be given to every woman to know her reproductive rights; the state should mandate schools to add a subject of sex education as a lack of knowledge in women is one of the causes of unsafe abortion.

There is a need to add medicines in national essential medicine list as medicine are very costly that a large number of women can't afford it.

The gestation limit should be increased from 20 to 24 or 26 weeks as due to advancement of science deformities in the foetus can be detected in late pregnancy.

People with disabilities are vulnerable as due to many barriers still exist in India and India has to cover a long distance to become disabled-friendly nation so, not allowing to terminate pregnancy in late stage of pregnancy if, detected any deformity is just putting a burden on parents. State although have enacted many laws in favour of disabled person then also fails to provide security to them.

The Bombay High Court rightly states that the state if, the rape victim wants, should at the time of pregnancy give the child to abortion or allow her to terminate the pregnancy⁴².

References

1. Paranjape NV. *Studies in Jurisprudence and Legal Theory* 463 (cited 7d ed. 2013).
2. Sec. 312, 313 and 316, Indian Penal Code, 1860, 45 of 1860.
3. Sec. 416, Criminal Procedure Code, 1973, 2 of 1973.
4. Berer Marge. *Abortion Law and Policy around the World*, NCBI (cited 2019 Sep 05, 10:41 AM). Available from : <https://www.ncbi.nlm.nih.gov/pmc/Art.s/PMC5473035>.
5. “Abortion” chapter of *Our Bodies, Ourselves* for the New Century, Boston Women’s Health Book Collective (cited 2019 Sep. 5, 10:30 AM). Available from: <https://www.feminist.com/resources/ourbodies/abortion.html>.
6. Alabama House Bill 314, AL HB314(2019).
7. *Roe v Wade*, (1973) US SC 20. Available from: <https://www.sconline.com>.
8. *Maneka Gandhi v Union of India* (1978) 1 SCC 248.
9. *Kharak Singh v. State of U.P.* AIR 1963 SC 1295: (1964) 1 SCR 332. *Gobind v. State of M.P.* (1975) 2 SCC 148. *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632, 649, 650 at para 26(1).
10. *Suchitra Srivastav and Anr v Chandigarh Administration* (2009) 9 SCC 1.
11. *K.S Puttaswamy v UOI*, MANU/SC/1604/2017.
12. Delhi High Court in *X (Assumed name of the prosecutrix) v The State (N.C.T.of Delhi) and Ors*, W.P.(CRL) 449/2013.
13. *B.K.Parthasarathi v Government of Andhra Pradesh*, 2000 (1) ALD 199, 1999 (5) ALT 715.
14. *Jack T. Skinner v State of Oklahoma*, 316 US 535.
15. *CESC Ltd. v Subash Chandra Bose*, AIR 1992 SC 573.
16. *Roe v Wade*, 410 US 113.
17. *Hodes & Nauser v Derek Schmidt Appeal No.* 114,153.
18. *KS Puttaswamy (retd) v U.O.I* ,MANU/SC/1604/2017.
19. *High Court on its Own Motion v State of Maharashtra*, 2016. Available from: <https://www.sconline.com Bom 8426>.
20. *Menka Gandhi v U.O.I* (1978) 1 SCC 248.
21. *XVZ v UOI*, 2019, Bom 550. Available from: <https://www.sconline.com>.
22. *High Court on its Own Motion v State of Maharashtra*,2016, Bom 8426. Available from: <https://www.sconline.com>.
23. *Badri Prasad v Dy. Director of Consolidation*, AIR 1978 S.C. 1557; *S. Khushboo v kanniammal & Anr*, JT 2010 (4) S.C. 478; *Madan Mohan Singh & Ors v Rajni Kant & Anr*, AIR 2010 S.C. 631; *Tusla v Durghatiya*, (2008) 4 S.C.C. 520.; *S.P.S. Balasubramanyam v Suruthayan alias Andali Padayachi and others*, AIR 1992 SC 756, (1992)

- Supp (2) S.C.C. 304.
24. High Court on its motion v the State of Maharashtra, 2016, Bom 8426 : Cri LJ 218. Available from: <https://www.scconline.com>.
 25. XVZ v UOI, 2019, Bom 550. Available from: <https://www.scconline.com>.
 26. Paschim Bangal Khet Mazdoor Samity & Ors. v State of West Bengal, (1996) 4 S.C.C. 37.
 27. Universal Declaration of Human Rights, Art. 1.
 28. Mr. X & Mrs. Y v U.O.I, W. P.(C) No. 308 of 2014.
 29. Anusha Ravindra v U.O.I, Writ Petition (Civil) No. 934/2017.
 30. Swati Agarwal and others v U.O.I, Writ Petition (Civil) No. 825 of 2019.
 31. Amit Sahni v U.O.I, Writ Petition (CRL) No. 1612 of 2019.
 32. The Registrar(Judicial)Madurai Bench of Madras High Court v U.O.I and others Suo Moto WP(MD) No. 9910 of 2019.
 33. Suchitra Srivastav and Anr v Chandigarh Administration, (2009) 9 SCC 1.
 34. XYZ v UOI, Bom 560. Available from: <https://www.scconline.com>.
 35. High Court on its motion v the State of Maharashtra, 2016, Bom 8426:2017 Cri LJ 218. Available from: <https://www.scconline.com>.
 36. 2017 Hun-Ba127 (cited 2019 April 11).
 37. Kathleen Clubb v Ayce Edwards and Anor; Matter No.M46/2018, John Graham Preston v Elizabeth Avery &Anor, Matter No. H2/2018.
 38. Hodes & Nauservs v Derek Schmidt, Appeal No. 114,153.
 39. No. 12015/49/2008- MCH.
 40. Amit Sahni v U.O.I., Writ Petition (CRL) No. 1612 of 2019.
 41. A v State of U.P and others, 2016(1) ALJ 625.
 42. ABC v State of Maharashtra , Criminal Writ Petition No. 451/2019.