

Research Article

Strengthening Reproductive Autonomy: Recent Legal Developments in India's Abortion Law

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Abstract

Abortion is a highly controversial and emotional subject pertaining to women reproductive rights involving issues related to law, medicine and morality. In India, the abortion law has always remained stringent until the passing of the Medical Termination of Pregnancy Act, 1971. The Act liberalised the termination of pregnancy on certain humanitarian, health and eugenic grounds up to the gestational period of 20 weeks. After 50 years of deliberations and a long battle to secure reproductive rights, the legislature finally passed the Medical Termination of Pregnancy (Amendment) Act, 2021 which has been a commendable and applaudable move by the Parliament in order to provide access to Comprehensive Abortion Care (CAC) services and safe abortion up to the gestation period of 24. Despite such changes, the law still suffers severe criticism from various sections for reflecting a need-based approach rather than a right-based approach. This research paper is an endeavour to critically analyse the modifications brought in the existing abortion law. It also makes an attempt to plug the loopholes and suggest measures to strengthen it without compromising with the dignity and reproductive autonomy of women.

Keywords: Five-year Plans, Gandhi Plan, Visveswaraya Plan, Bombay Plan, Sarvodaya Plan, Peoples Plan and Planning Commission.

1. Introduction

Abortion is a highly charged emotional subject which involves some highly controversial and complicated issues of law, medicine and morality. The problem of unwanted pregnancy and its termination is a perennial problem. The highly debatable issue has two divergent school of thoughts: one favoring the abortion and another opposing the same. Those who stand for the ban do so basically for the protection of human life, institution of marriage and family and laxness of morals. Whereas, on the other hand the basic position of the abolitionists of the ban is that the decision to have an abortion or not is the private affair of the woman and no one has the right to restrict her choice. In recent times, abortion has been propagated as a measure to birth control to contain population explosion. Access to safe abortion services is an integral part of woman's reproductive health. According to World Health Organisation (WHO), unsafe abortion is a procedure for termination of pregnancy done by an individual who either does not have necessary training to conduct abortion or who does not conform to minimal medical standards.

2. ABORTION IN INDIA: A PEEP INTO THE HISTORY

Religion and law of a very long time have been on the side of those who support for the ban of abortion. Christianity, particularly the Roman Catholic Church and Islam prescribe very stringent injunctions against abortion. From the very beginning, it has always been considered as a heinous crime. The earlier society prohibited and classified it as murder, equal to neglect of

Vedas, incest etc. The woman, who had undergone abortion was considered as an out caste or murderer of her husband or a Brahmin. Ancient Indian (Hindu) culture and traditions were absolutely opposed to it and considered it as a sin and regarded it as 'Bhrun Hatya' which means the murder of foetus.

The Catholic Churches also denounced abortion as Pope Pius XI in 1930 asserted that 'abortion' is forbidden even to save the woman's life, because foetus is 'equally sacred'. In India, the law relating to abortion has remained quite strict and harsh until 1971. A close perusal of the Indian Penal Code 1860 clearly reveals that that abortion has been strictly prohibited except when it is being conducted by a registered medical professional to save the life of the mother.

According to Halsbury's Laws of England, "any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother is guilty of the offence of child destruction, if it is proved that the act was not done in good faith for the purpose only of preserving the life of the mother. The punishment for this offence is imprisonment for life or for any shorter term." Likewise, the Buddhists who condemned the destruction of life, laid down that the bhiku "who intentionally destroys a human being by way of abortion, is no samana and no follower of Sakeyaputta.

3. INDUCED ABORTION: MEANING AND CONCEPT

The term 'abortion', which literally means the cessation of pregnancy or foetal development, is being synonymously being used for 'induced abortion', 'clinical abortion', 'induced miscarriage', 'medical termination of pregnancy', etc. According to *Black's Law Dictionary*, abortion means the expulsion of the foetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life.

As per the World Health Organization, every year globally, the number of induced safe and unsafe abortions which were being carried out between year 2010 to 2014 are estimated to be around 56 million. The number of unsafe abortions was rampant in developing countries where the laws are more strict and restrictive as compared to the developed countries. As per the study done in 2018 by the Lancet, a leading medical journal for global health, revealed that the incidence of abortion is 47 abortions per 1000 women in the age group of 15-49 in India.

Abortion is said to occur when the life of the foetus or embryo is destroyed in the woman's womb or the pregnant uterus empties prematurely. Abortion can take place as a result of various reasons such as:

- i) Natural Abortion: It may occur due to bad health of pregnant woman, defect in organs of pregnant woman, shock, fear, joy, etc
- ii) Accidental Abortion: it may occur as a result of any misfortune or accident or trauma consequent to accident.
- iii) Spontaneous Abortion: it may occur because of pathological reasons where pregnancy cannot be completed and the uterus empties before maturity of foetus.
- iv) Induced Abortion: it is also known as artificial abortion. It is caused where an untimely delivery is voluntarily procured with intent to destroy the foetus. It may be procured at any time before the natural birth of child.

The first three categories mentioned above does not attract any penal liability. It is only the fourth category i.e., induced abortion which is a punishable offence under the Bharatiya Nyaya Sanhita, 2023 (earlier, Indian Penal Code, 1860).

4. REASONS FOR GROWTH IN INDUCED ABORTION

The growing incidence of induced abortion reveals that there are multiple reasons responsible for the same. Abortions can be deliberately procured because of various social, economic, health or personal reasons. Some of the potential reasons are as follows:

- i) Patriarchal reasons such unwanted or unwelcoming girl child.

- ii) Social stigma in case of pregnancy of a woman being single or unmarried or divorced or separated or in a live-in-relationship.
- iii) Unplanned or unintended pregnancy
- iv) Failure of contraceptive measure
- v) Risk to health of mother
- vi) Risk to growth and development of unborn child
- vii) Pregnancy on account of sexual offences i.e., in case of victims of rape, etc.

5. ABORTION AS A FUNDAMENTAL RIGHT TO LIFE

All democratic countries recognize that every individual has a fundamental right to life. Whether woman's desire to be relieved of her pregnancy should be a part of the fundamental right to life is the question that needs a discussion. Sometimes back, this dimension to the law of abortion was given by the Supreme Court of California which recognized the woman's freedom to terminate her pregnancy at will. The California Supreme Court held that a law which made it a crime to perform an abortion-operation even with the free consent of the woman, was an improper encroachment on woman's fundamental right to choose whether or not to bear children.

It needs no reiteration that it is the woman who, bears the child and thus undergoes the risk to life which every child birth involves despite great strides that have been made in obstetrics and gynaecology. Thus, woman's right to terminate her pregnancy is part of her fundamental right to life. The next question is whether there is any social interest involved in preventing abortion for which woman's fundamental right may be curtailed. May be some countries, which are underpopulated, have a social interest in the child birth so as to facilitate population increase. But countries which are faced with the problem of population explosion certainly have no social interest in the child-birth. On the contrary, there is a social interest in the prevention of births so as to contain the population increase. It is this which justifies the expenditure of huge public money in the birth control programmes and measures. More or less, this is the reason for the liberalization of abortion laws.

It is the woman who bears the child and consequently it is her life which is endangered in the child-birth. In the child-birth there is absolutely no risk to the life of husband. And, therefore, it is the woman who has the fundamental right to bear or not to bear a child. The husband has no such fundamental right. At the same time, it is true that this step of the woman frustrates the legitimate aspiration of her husband to have a child. This may be deemed to constitute (and in fact it is so considered) cruelty on the part of the wife towards husband in the matrimonial law, and the husband may obtain matrimonial relief from the matrimonial court: in most of the systems this entitles divorce to the aggrieved party.

In *Justice K.S. Puttaswamy v. Union of India And Others*, the Supreme Court has recognized the right of women to make reproductive choices and held that these rights as a part of personal liberty incorporated under Article 21 of the Constitution, which, despite laying a robust jurisprudence on reproductive rights and the privacy of a woman, does not translate into a fundamental shift in power from the doctor to the woman seeking an abortion.

In cases of *Suchita Srivastava v. Chandigarh Admin* and *Devika Biswas v. Union of India*, the Apex Court while emphasising upon the reproductive rights of women held that a woman's reproductive autonomy is a part of her fundamental right to privacy. The decision in relation to her body and choices whether to bear a child or to continue with the pregnancy should be taken by her alone without any intervention of the State.

In *Swati Agarwal v. Union of India*, a PIL, which is pending, was filed in the Supreme Court, challenging the validity of Section 3 and 5 of the MTP Act, 1971. It was contended that these provisions violate rights of women pertaining to their reproductive choices, privacy rights and health rights granted under Article 21 of the Constitution of India.

The PIL stated that the strict and severe restrictions imposed on the exercising the reproductive choice of the woman is requiring a pre requisite of an opinion by the registered medical practitioner regarding risk to the life of the pregnant woman or of grave injury or risk of serious foetal abnormalities in case of continuance of the pregnancy. These restrictions curtail the rights of women and renders it useless and meaningless.

6. INCIDENCE AND IMPACT OF UNSAFE OR ILLEGAL ABORTION

Prior to 1971, the law relating to abortion has been very rigid and strict because of various traditional and socio-religious factors. The Indian penal Code,1860 (now, Bharatiya Nyaya Sanhita, 2023) has made induced abortion a penal offence. It clearly states that anyone who causes a woman with child or quick with child to miscarry shall be liable with punishment which could extend up to three years if the woman is with child and up to seven years if the woman is quick with child. The provision is strict enough that it does not even spares the women from criminal liability who causes her own miscarriage. The Code also provides severe punishment of imprisonment which could extend up to ten years along with fine when miscarriage is being caused voluntarily without the consent of the woman. Although the provision is subjected to exception which is again very limited to protect those from criminal liability who causes miscarriage in good faith for the purpose of saving the life of the women.

These provisions limited the women reproductive rights to the extent that in case a woman opted for termination of pregnancy on any ground expect her health risks, she was to be held criminally liable. The penal factor attached with abortion forced large section of women with unwanted pregnancies to resort to other unsafe and illegal measures to terminate the pregnancy. There was rampant increase in illegal abortions being conducted in a concealed or secret manner outside the hospital facility and the government had no official record of it. The government failed to record data pertaining to maternal deaths, infant mortality and number of abortions which were being conducted clandestinely.

Illegal abortion gives rise to number of problems and health hazards. It resulted into high rate of maternal deaths as they are usually performed in unhygienic conditions and that too by untrained or incompetent persons such as quacks, midwives etc. Compared to married woman, single girl is even more exposed to this kind of risk since in her case the causes may be more compelling for her to seek a non-qualified person. Illegal abortion is one of the main reasons for maternal deaths because of abortion being conducted in Even if the procedure or operation is performed in a safe manner, after-care and emergency steps are not sometimes possible in illegal abortions as they are performed in a clandestine manner. Illegal abortions give rise to emergence of black market too in services which inevitably leads to inflated fees. The quality and availability of services depend upon one's capacity to pay. Many of the times such Illegal services operate with close connivance of police and other government officials too which promotes corruption and unethical practices as well.

7. LIBERALISATION OF ABORTION LAWS: THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

Due to harmful consequences of illegal abortions, laws have been greatly liberalised in many countries. The ill effects of unsafe and illegal abortions posed the need to strengthen women's access to Comprehensive Abortion Care (CAC) services. CAC encompasses care through the entire period from conception to post-abortion care. The liberalisation of abortion laws in India started in 1960's. In 1966, the Government of India set up an eleven-member Committee popularly known as Shantilal Shah Committee headed by Shantilal H. Shah to evaluate the situation whether an abortion law is needed in the country. The Committee reviewed and analysed various social, cultural, legal and medical aspects in relation to abortion and consequently various recommendations were made in order to regulate abortion and comprehensive abortion care in the country law on comprehensive abortion care. The

recommendations of the Committee were taken into consideration by the legislature in 1970 which eventually led to the passing of the Medical Termination of Pregnancy Act, 1971.

However, even after the passage of the Medical Termination of Pregnancy Act, the penal provisions under the Indian Penal Code were not nullified and even incorporated in the new code i.e., Bharatiya Nyaya Sanhita, 2023 as well. The law on 'causing miscarriages' continues to be the part of the penal provisions as it was earlier.

'Abortion' is an ugly term. The law makers have substituted it with the words 'Medical Termination of pregnancy which clearly gives an impression that the term is more of blanket immunity to protect the medical professionals from conducting procedures pertaining to abortion rather than ensuring rights of women to access to safe abortion.

The Medical Termination of Pregnancy Act, 1971 provides for the termination of only certain pregnancies by registered medical practitioners on the ground of health, humanitarian ground and eugenic ground. It has liberalised the termination of pregnancy on certain grounds such as pregnancy caused due to failure of any birth control measure or contraceptive device, sexual offence i.e., rape, grave injury including physical or mental injury to the woman. The Act has also provided for termination of pregnancy where there is a substantial risk to the foetus or where there is an anticipation that continuance of the pregnancy may cause risk to the physical or mental development the foetus or cause any abnormality rendering the child to be born handicapped.

The Act of 1971 has allowed medical termination of pregnancy up where the gestation period is up to twenty weeks. Further, it has made it obligatory to obtain consent of the woman or where the woman is a minor or mentally ill, the consent of the guardian of such woman is required. The Act had been amended in 1975 with regard to accessibility of the services and to eliminate the time-consuming procedure. Further, it was amended in 2002 and 2005. Even after liberalising the abortion law, it was fraught with issues that were left unaddressed.

8. LEGISLATIVE DEVELOPMENTS: THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

In order to provide universal access reproductive health services, India amended the Medical Termination of Pregnancy (MTP) Act 1971 to further empower women by providing comprehensive abortion care to all. The Medical Termination of Pregnancy (Amendment) Bill, 2020 was introduced and passed in both the Houses of the Parliament and finally got its assent from the President on 25 March 2021. With the new Medical Termination of Pregnancy (Amendment) Act 2021, India has become one of the few nations to have the most liberal abortion law. The amendment has introduced some much-awaited and applaudable changes to the existing law. It has extended the scope and ambit of abortion law in India and access to safe and legal abortion services on therapeutic, eugenic, humanitarian and social grounds to ensure universal access to comprehensive abortion care. The new law which found its place in the statute book on 25 March 2021, aims to contribute towards ending preventable maternal mortality to help meet the Sustainable Development Goals (SDGs).

The amendments have extended the scope of and accessibility to safe and legal abortion services for women. The current modifications have, evidently, considered the expansion of medical technology where the upper gestation limit for termination of pregnancy has been extended under specific conditions. The ultimate object is to strengthen the access to comprehensive abortion care without compromising confidentiality, autonomy, dignity and justice for women who seek to have safe and quality health services.

The key modifications made in the Medical Termination of Pregnancy (Amendment) Act, 2021 are as follows:

- **Defined the term 'termination of pregnancy'**

The amended Act has inserted a new clause i.e section 2(e) to define the term 'termination of pregnancy' as a procedure to terminate a pregnancy by using medical or surgical methods.

- **Extended gestational limit for abortion**

The new amendment has increased the maximum gestational limit for terminating the pregnancy from 12 weeks, as per the earlier law, to 20 weeks on the advice of one registered medical practitioner. Further, the pregnancies beyond 20 weeks but not beyond 24 weeks can also be terminated on the advice of two registered medical practitioners. the limit has been increased from 20 weeks to 24 weeks. These modifications clearly reflect the progress and advancements in medical technology, which now allow safe abortions beyond the first trimester of pregnancy

- **Opinion of the Doctor**

The termination of pregnancy, where the gestation period is less than 20 weeks, requires the opinion of one registered medical practitioner whereas in the case where the gestation period is between 20 weeks to 24 weeks, it requires the opinion of at least two registered medical practitioners. The opinion of the registered medical practitioner must be formed in good faith in relation to the nature of pregnancy that the continuance of the pregnancy could either risk and affect the life of the pregnant woman or the unborn child. The term 'grave injury' incorporated by the legislature is wide enough to cover injury to the physical or mental health of the woman. The mental injury or anguish caused as a result of pregnancy to a rape survivor is covered under the term 'grave injury'. The risk to the health of unborn child means any probable risk the unborn child could suffer physically or mentally as result of the continuance of the pregnancy. The norms for the registered medical practitioner for forming an opinion required for termination of pregnancy at different gestational age shall be prescribed by the Government by making rules in this regard.

- **Extended to termination of pregnancy outside the wedlock**

The cases where pregnancy results from the failure of birth control or contraceptive methods used by any woman or her partner, the amendment Act provides for the termination of the said pregnancy in case the unwanted pregnancy causes anguish to the mental health of the woman. The amendment has replaced the words "by any married woman or her husband" in the Act, with the words "any woman or her partner", thereby providing much-needed legal recognition to abortions irrespective of the marital status of the couple.

- **Failure of birth control measure or contraceptive device**

The Act provides that any failure of birth control measure or contraceptive device used for the purpose of limiting the number of children or to prevent the pregnancy would give the right to woman to get her pregnancy terminated in case the said unwanted pregnancy is causing grave injury to her mental health.

- **Privacy of woman**

The amendment Act introduces a new provision in order to maintain the confidentiality of the woman seeking the termination of pregnancy. The privacy clause has been inserted whereby the registered medical practitioners are barred from disclosing or revealing the name and other particulars of the woman whose pregnancy has been terminated. In addition to this, the amendment also provided a penalty for the non-compliance of the privacy clause. Whoever contravenes the privacy clause would be liable for punishment of imprisonment which could extend up to one year or fine or both. However, under exceptional circumstances the identity can be revealed to authorised persons under any law.

- **Medical Boards**

The amendment of 2021 has empowered the State Government or Union Territory to constitute of Medical Board in order to carry out the provisions under the Act and to exercise such powers and discharge functions as prescribed by the concerned government by formulating rules under the Act from time to time. The Medical Board should be consisted of a Radiologist or Sonologist, Gynaecologist, Paediatrician and other members as notified the State Government or Union Territory in the Gazetted notification. The amendment in the Act allows the termination of pregnancy after 24 weeks only in cases where a Medical Board diagnoses substantial foetal abnormalities

9. CRITICAL ANALYSIS OF THE MTP (AMENDMENT) ACT, 2021

Undoubtedly, the amendments made to the MTP Act has been a highly welcoming and applaudable step but it has received severe criticism from many other sections of the society as well. There have been different theories and opinions in relation to termination of pregnancy. One such liberal view suggests that termination of the pregnancy is the part of a reproductive right of the woman. Also, the Constitution of India guarantees us Right to life and personal liberty under Article 21 which implies the right of a woman to relive of her pregnancy. The right to choose and continue or discontinue with the pregnancy is the personal right of the woman which needs to be recognised and no State or legislative interference should abridge this right and curtail the right of a woman to decide about her body and choices.

A section of experts has shown resentment to the fact that the Act is still lacking in amplifying provisions for those with limited resources and poor access to services which results in a denial of reproductive rights to a section of women. Since the Act clearly mandated for the termination of pregnancy to be conducted by doctors with specialisation in gynaecology or obstetrics. Also, if it is to be terminated when the gestation period is beyond 24 weeks, it needs the approval of the medical board. The All-India Rural Health Statistics of 2018-19 indicates that there are 1351 gynaecologists and obstetricians in Community Health Clinics in rural areas across India, and the shortfall is 4002, i.e., 75% shortage of qualified doctors. The shortage of medical professionals in rural areas which would pose great hardship to pregnant women in rural areas to access facilities for safe abortions. This clearly gives the impression that the Act is riddled with accessibility issues and still lacks the rights-based approach making it women to justify abortion for one or the other reason given under the Act.

So far as the termination of pregnancy between 20 to 24 weeks is concerned, the Act clearly state that this provision will not apply to all the women but to certain categories of women. The categories are to be notified by the Central Government. It is being argued by women right activists that all women should be included under the ambit of MTP Act instead of certain categories. While some other people are of the view the categorisation of women should be done by the Parliament itself and not to be delegated to the Government.

The Act has not mentioned anything pertaining to the time frame within which the medical board should take its decision in relation to termination of pregnancy beyond 24 weeks. Since termination of pregnancy is a sensitive matter and any delay in it may cause further complications to the pregnant women. Therefore, the Act lacks any time bound frame for the medical board to make its approval.

The MTP Act only provides for the termination of pregnancy of 'pregnant women' on certain ground or under certain circumstances. The amendment Act has failed to recognise the rights of the 'transgender person'. In India, the Transgender Persons (Protection and Rights) Act 2019 has recognised transgender as an additional gender In India. There are various medical studies showing that the persons identified as transgender (and not women) can become pregnant even after receiving hormone therapy for transition from female to male, and may require termination services. The new amendments are completely silent on this issue

10. Conclusion and Suggestions

Undoubtedly, the replacement of archaic law of 1971 after five decades is not only a bold step to keep up with the medical advancement, but a progressive and significant step forward as well to ensure that women across India, legally and rightfully get access to safe abortions. Although the amendment brings about some progressive reforms in the law of abortion, it still lacks in modifying the strict paternalistic doctor-centric framework of the legislation whereby the decision of abortion still vests with the medical professionals and not the pregnant woman. This makes abortion a conditional provision and not an absolute right of the women.

The Act fails to provide reproductive autonomy to the woman they deserve and continues to reflect a needs-based approach instead of a rights-based approach. Further, the Act is also unclear, impractical, restrictive and deficient in many aspects and still leaves many areas unaddressed which receives severe criticism and become an impediment in access to safe abortion. Also, the religions raise objections to terminating a pregnancy by abortion on the basis of morality.

It is imperative that the recent modifications should be widely communicated, publicised and disseminated to not only to service providers but also other stakeholders, such as NGO's, women institutions and organisations, programme managers and the community to accelerate achievement of 'universal reproductive health' in India. The government needs to ensure that all norms and standardised protocols in clinical practice to facilitate abortions are followed in health care institutions across the country. Legislative initiatives need to be taken in order to plug the loopholes in the existing law.

Though the communities are aware of family planning strategies, still there is a need to accelerate the process on a broader scale. The subject related to abortion, reproduction, sex and reproductive health within family institutions in both urban as well rural set up needs to be discussed openly and in a loud manner so as to convey a positive message out to the masses. Since the long overdue amendment has now become the part of the legislation, we can hope that the nation is on the road to advancement where women issues are being addressed more fiercely than ever.

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