

THE SOCIO-CULTURAL ASPECT OF ABORTION IN INDIA: LAW, ETHICS AND PRACTISE

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Abstract

Abortion is a phenomenon that has been deliberated upon since times immemorial and continues to be a topic of contention even today. This debate can be recapitulated in two terms- Pro Choice and Pro Life. Abortion is multi faceted because it involves the culmination of many aspects such as religion, ethics, medicine and law. Abortion is a social issue that provides liberation to women and gives them power to make their own decisions. But the abortion debate in India would be meaningless if it did not take into account the crucial problem of female foeticide. Liberation of women, therefore, needs to be equilibrated against the rights of the unborn child.

I Introduction

“There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process...The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned.”¹

-Betty Friedan.

WOMEN AND their right to determine their sexuality, fertility and reproduction are considerations that have seldom, if ever, been taken into account in the formation of policies related to abortion.² Abortion is one of the most controversial ethical issues because it concerns the taking of a human life. Generally, if we look at traditional arguments for and against abortion, we find legal and religious arguments guiding each respectively. When it comes to those who favor abortion, they point to the argument that abortion represents a woman’s “right to choose” whether to continue her pregnancy or terminate it. Anti-abortionists, generally make a religious argument as the spearhead of their collective opposition to abortion.

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¹Betty Friedan, *Abortion: A Woman’s Civil Right*, 39 (reprinted in Linda Greenhouse and Reva B. Siegel, 1st edn 1999).

²Amar Jesani and Aditi Iyer, “Women and Abortion” (6) *Economic and Political Weekly*, available at: <http://www.jstor.org/action/cookieAbsent> (last visited on Sep. 29, 2016).

Through the broad sweep of history, women have practised various forms of birth control and abortion. These practices have generated intense moral, ethical, political and legal debates since abortion is not merely a medico-technical issue but "the fulcrum of a much broader ideological struggle in which the very meanings of the family, the state, motherhood and young women's sexuality are contested".³

II Abortion as a human right

The Preamble of the Universal Declaration of Human Rights describes the Declaration as, "a common standard of achievement for all peoples and nations" and states that "the peoples of the United Nations have . . . reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women."⁴ The second article stresses further that these rights and freedoms belong to everyone, without discrimination, by virtue of being a human being: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind."⁵ In the third article, explains the first of the rights belonging to everyone, "Everyone has the right to life." The right to life is the foundation of all other human rights.⁶ Though the declaration states the understanding of the international community regarding human rights, it does not create legal obligations.

International Covenant on Civil and Political Rights (ICCPR) echoes and enforces the right to life of the declaration. The Covenant proclaims, "Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life."⁷ Notably, the covenant articulates the right as applying to every human being. Unlike the word "person" that, through judicial interpretation in the United States (US), has left the unborn outside a sphere of protection, "human being" is a scientific term for a living human organism. Thus, one view lies that the basic human-rights documents are against abortion; they certainly do not create a right for abortion.⁸

³Patchesky Rosalind Pollack, *Abortion and Women's Choice: The State, Sexuality and Reproductive Freedom*, 39 (Northeastern University Press, 1991).

⁴Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc.A/810 (1948), *available at*: <http://www.un.org/Overview/rights> (last visited on Sep. 22, 2016).

⁵*Id.*, art. 2.

⁶William Saunders, "The ABC of International Right to Abortion", *available at*: <http://www.humanlifereview.com/index.php/archives/52-2010-summer/113-the-abcs-of-an-international-right-to-abortion> (last visited on Sep. 25, 2016).

⁷International Covenant on Civil and Political Rights, art. 6.

⁸ *Ibid.*

Some jurists have asserted that the historical understanding is that the right to life, as protected by the international bill of rights, begins when a human being is born. This interpretation is supported by the negotiation history of international human rights treaties. During the negotiation processes leading up to the adoption of several international and regional human rights documents, a small number of governments proposed adding language to the provisions on the right to life, that would have protected the right to life from the moment of conception. In the vast majority of cases, these proposals have been rejected.⁹

Article 1 of ICCPR, declares that, 'every human being' has the inherent right to life, while in respect to other rights the expressions used are 'everyone' and 'every person'. This use of different terminology raises the question whether 'every human being' has a wider connotation than 'everyone' and could therefore be understood to include the unborn child. There is an absence of authoritative literature on the above contention however it is a well understood fact that the criminalization of abortion can have implications regarding the right to life. This can be backed by the instances of suicides, which young females commit as a result of failure to perform an abortion due to its criminalisation by the state which is a direct violation of right to life. Failure to prevent unnecessary deaths due to anti-abortion laws would raise issues pertaining to the obligation to ensure that everyone enjoys the right to life. Another interpretation can be drawn from article 12 of the CEDAW Convention that provides that, "States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

III Abortion and the Constitution of India

While establishing the democratic setup, our Constitution framers were vigilant and inculcated the spirit that people must be protected against misuse of power by the government and its officials. They, therefore, provided for the fundamental rights in part-III of the Constitution. The article 21 of Indian constitution provide right to life which includes within its ambit the right to privacy. Right to life and personal liberty is the most sacrosanct, precious, inalienable and fundamental of all the fundamental rights of citizens. This guarantee imposes a restraint on the government and it is part of the cultural and social consciousness of the

⁹Human Rights Watch, "Human Rights law and access to Abortion", *available at*: http://www.hrw.org/news/2005/06/15/qa-human-rights-law-and-access-abortion#_Does_the_right (last visited on Sep. 16, 2016).

community in India. In this context, every woman owe an individual right, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion.

The women have reproductive features and have right to decide about her sexual health and shape her reproductive choices. To ensure availability of human rights to women and to advance the development, the international community acknowledged reproductive rights of the woman. In order to follow the international mandate, governments from all over the world have recognized and accredited reproductive rights to women to an unprecedented heights. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus it can be reiterated that all over the World each and every woman has an unconditional right to have control over her own body and.

IV Medical Termination of Pregnancy Act, 1971

After the *Roe v. Wade*¹⁰ case, European and American countries started to legalise abortion. During the last thirty years, since 1970s many countries have liberalized their abortion laws. *Roe* case has been subsequently modified by the US Supreme Court in *Planned Parenthood v. Casey*¹¹ where the legality of the abortion law is now linked to the viability of the foetus rather than the rigid third trimester test laid down in *Roe* case.

In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The recommendation was adopted in the later half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee – called Shantilal Shah Committee. After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.¹² On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and liberalised abortion laws in India.

The committee acknowledged that there did not exist and would not exist in the predictable future either the doctors or the medical facilities to support an extensive abortion programme. It also specifically denied that its intention was to force down for the legislation of

¹⁰ 410 U.S. 113 (1973).

¹¹ 505 U.S. 833 (1992).

¹² Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966).

abortion only for the population control in India. The committee further pointed out:¹³

It is felt, that legalising abortions with a view of obtaining demographic results is unpractical and may even defeat the constructive and positive practice of family planning through contraception.

It is noteworthy that the MTP Act was implemented in the month of April, 1972 and again revised in the year of 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. This Act was amended in the year 2002 and again in 2005. The Preamble of the Act states, “An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto”.¹⁴

The Act, consisting of just 8 sections, deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. It legalizes abortion in case where there is a failure of contraceptives or where the pregnancy will adversely affect the physical or mental termination of pregnancy, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian’s consent is required.¹⁵

The Act permits abortion only in certain circumstances. It Act allows medical termination of pregnancy up to Twenty weeks’ gestation. Though the Act talks about the written consent of the pregnant mother before the technique is administered to her, the law fails to recognise the social reality that a woman cannot make a free choice. Thus, it is evident that the Act fails to achieve a equilibrium between the right of the unborn to be born and the right of the woman, who bears, gives birth and rears the child, to decide whether she wants the child or wants to abort the foetus.

In *Nikhil D. Dattar v. Union of India*,¹⁶ section 3 and 5 of MTP Act was challenged on the ground of non-inclusion of eventualities *vires* of the Act. In this case the foetus was diagnosed for complete heart block thus the Petitioner, in her twenty sixth week of pregnancy, had sought termination of pregnancy. The petitioner contended that section 5(1) of the MTP Act should be read down to include the eventualities in section 3 and consequently, a direction should be issued to the respondents to allow the petitioner to terminate the pregnancy. The court

¹³ *Ibid.*

¹⁴ Medical Termination of Pregnancy Act, 1972 (Act of 1971), Preamble.

¹⁵ Medical Termination of Pregnancy Act, 1972 (Act of 1971), s. 3.

¹⁶ S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India), *available at*:

<http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf> (last visited on Feb. 10, 2017).

held that the courts are not empowered to legislate upon a statute. Sections 3 and 5 provide for right to terminate pregnancy only under the specified circumstances. And the remedy under section 5 can only be available when the non-termination of pregnancy would be dangerous to the life of pregnant woman. While dismissing the petition the court further held that since twenty six weeks of pregnancy has already passed the court could not pass any direction for exercise of right under section 3. This case further reiterated that the physical and mental trauma which may be experienced by women in such circumstances. It also highlighted the ethical issue faced by the doctors in similar situations.¹⁷

V Socio- ethical issues

Abortion touches social, religious, economic and political aspects. Its impact on the society seen can be looked at both in a positive and a negative manner. In the earlier years of forming abortion policy, the Western civilisations disapproved the practice. By the nineteenth century many nations passed laws banning abortion. It wasn't until late in the twentieth century when the women rights were given importance and after many awareness movements that some nations, including the US, began to legalise abortion.

In India, which is a country with immense social baggage supplemented by societal evils such as illiteracy and poverty, the impact of the MTP Act should be judged in the context of changing social circumstances, values and attitudes. The social implications of MTP Act, in its very raw form can be segregated into abortion in unmarried girls versus abortion in married woman. These two have completely different connotations. In MTP Act married woman is not considered as a social stigma, whereas unmarried girls are not easily accepted. The fact that it is unaccepted creates hindrances in safe abortions, sometimes defeating the very purpose of abortion *i.e.*, health of the woman undergoing abortion. In villages where there is in access to medical facilities, girls are taken to other distant places for MTP Act in the name of preserving the girl's future and keeping image in the society intact. The legalising of MTP Act has obviously had a positive stimulus upon the omen in need of MTP and has shown reduced incidence of suicide and betterment of health and safety. The acceptance of the family planning methods has

¹⁷ Centre for Reproductive Rights, *Human Rights Law Network*, available at: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf (last visited on Feb. 10, 2017).

also witnessed wider acceptance.¹⁸

There are however, certain undesirable implications of the MTP and these lie in the inconsistency in following prescribed standards. This problem is rampant especially in rural areas due the lack of awareness of the patients and the lack of surveillance by the government. The effectiveness and safety of these medical procedures still lie in dim light. The lack of proper cleanliness, staff and facilities sometimes results in such as infertility, menstrual disturbances and pelvic inflammatory diseases. In a few cases, this results in death as well.¹⁹

The real problem lies in the implementation of the laws and existing framework. It is the responsibility of the government to ensure that MTP Act is done by qualified surgeons in registered clinics or hospitals. The concerned authorities need to deal with another major challenge and that is of the genuineness of reasons behind requesting termination of pregnancy. There have been cases reported where in MTP Act is performed flimsy ground such as examinations, family weddings, tours etc. such abortions are conducted by the medical practioners for financial gains and go unchecked on most occasions due to fabricated reports. Such abortions have both long term and short term consequences. It is also unfortunate that abortion often is used as an alternative to regular methods of family planning.²⁰ Such issues can only be addressed by government initiatives and awareness programs. It is the social responsibility of doctors to counsel all patients coming for termination of pregnancy about the use of some contraception. It should be emphasised that contraception use is much safer than termination of pregnancy. To mitigate the ill effects on society, the balancing of the negative and positive aspects of this social legislation needs to be taken up.

The ethical debate about the legal stance of prevention of unwanted pregnancies has been continuing for many years throughout the world, and this established the idea of enacting a legislation that would balance the ethical and legal perspective. In India, in spite of legislative and judicial control, ethical controversies surrounding medical termination of pregnancy still continues. Though many people believe that medical termination of pregnancy is immoral but today it is a right that cannot be taken away from the women.

In relation to social stigma a Supreme Court bench comprising Thakker and D.K. Jain JJ

¹⁸ Government of India, Report of Ministry of Health and Family Welfare on Rural Health Care System in India (MHFW, 2005).

¹⁹ Government of India, Annual Report, 2000–2001, Government of India Press (Ministry of Health and Family Welfare, 2001).

²⁰ Ministry of Statistics and Programme Implementation, NSSO 60th Round, Report No. 507 on Morbidity, Health Care and the Condition of the Aged, (National Sample Survey Organisation, 2004).

held in *Suman Kapur v. Sudhir Kapur*²¹ that an abortion by a woman without her husband's consent would amount to mental cruelty and a ground for divorce. To quote the bench: ²²

Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse.

In the light of such judgements, it can be said that Constitution does not guarantee right to abortion to the women in India and the MTP Act, 1971 itself limited sphere of this right and provides for the 'termination of pregnancy' in certain cases only.

In an expansion that may have far-reaching consequences, the Supreme Court of India have decided that severe foetal abnormality can be a valid ground for the medical termination of pregnancy, even if the foetus is more than twenty weeks old. The Supreme Court granted a twenty four week pregnant woman and rape survivor the permission to go for an abortion in *Ms. X v. Union of India*.²³ Here it is pertinent to specify that the International Federation of Gynecology and Obstetrics (FIGO) recognises an ethical obligation to allow women to terminate a severely malformed fetus.²⁴ FIGO emphasises that in such cases, "[t]he decision to terminate a pregnancy should rest primarily with the parents."²⁵ It is evident that many countries permit the legal abortion procedure throughout pregnancy in cases of fetal impairment to protect a pregnant woman's health.

VI Psychosocial aspects

The famous birth control activist Margeret Sanger once said that "No woman can call herself free until she can choose consciously whether she will or will not be a mother". Women have however now come a long way since those days where in abortion was illegal and medical termination of pregnancy was socially unacceptable. The crucial consequence that followed this attitude towards abortion was the psychological implications upon the pregnant woman and her

²¹ AIR 2009 SC 589.

²² *Ibid.*

²³ Writ Petition (C) No. 593 of 2016 (Supreme Court of India), decided on July 25, 2016, *available at*: http://supremecourtindia.nic.in/FileServer/2016-07-25_1469453114.pdf (last visited on Feb. 11, 2017).

²⁴ International Federation of Obstetricians and Gynecologists, Recommendations on Ethical Issues in Obstetrics and Gynecology 58 (Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, Oct. 2009), *available at*: <http://www.figo.org/docs/Ethics%20Guidelines%20%20English%20version%202006%20-2009.pdf> (last visited on Feb. 11, 2017).

²⁵ *Id.* at 75.

family. These persons were faced with distress of an uncertain future. In today's time however, it is legally available in most countries of the world and due to this the physiological trauma and social isolation have reduced. Psychologically it gives them a sense of control upon one's own future and the power to make choices. However, in the favorable social circumstances following legalised abortion, the patient's relief of getting rid of the unwanted pregnancy out shadows and feeling of guilt that either used to accompany an illegal and socially unsanctioned procedure. In a minority of patients, one sees psychological disturbances in the form of major psychoses or depression.²⁶

It was not yet recognised as a justification for abortion that the women's health would be endangered if the pregnancy is carried to the full term. That step has not been taken but perceptibly it constitutes a greater inroad in the sanctity of life of the fetus than a provision intended to guard against danger to the women's life. But each person has a right to bodily sovereignty and human rights and various international instruments protect such rights. Thus it becomes important to secure the right to abortion to every woman.²⁷

Those who are pro-life are against abortion and believe that since life begins at conception, abortion is parallel to murder as it is the act of taking human life. Abortion is in direct disobedience of the idea of the sanctity of human life and that no civilized society permits any human to harm or take the life of another human. Their answer to an unwanted child is adoption and they believe that with millions of child less parents wanting to adopt a child. In the instance of rape and incest, *etc.*, they believe that abortion punishes the unborn child who committed no crime; instead.

Their basic premise is that for women who demand complete control of their body, control should include preventing the risk of unwanted pregnancy through the responsible use of contraception or, if that is not possible, through self-restraint. In short, it can be said that abortion should not be used as another form of contraception.²⁸ On the other hand, those who are pro-choice support abortion and believe that since the fetus cannot be regarded as a different entity in the first trimester as a fetus cannot exist independent of the mother. This is so because it is

²⁶ Siddhivinayak Hirve, "Abortion Policy In India: Lacunae and Future Challenge" Abortion Assessment Project 2004, India Centre for Enquiry into Health and Allied Themes, Bombay (2004).

²⁷ *Ibid.*

²⁸ Abortion Arguments from Pro-Life and Pro-Choice Sides & Main Points of Debate, *available at*: <http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm> (last visited on Sep. 3, 2016).

attached to the mother by the placenta and umbilical cord and its health is dependent on her health, and cannot be regarded as a separate entity as it cannot exist outside her womb.²⁹

Another contention that they put forward is that the concept of human life is totally different from the concept of personhood. At the time of conception human life occurs, but fertilized eggs that used for in vitro fertilisation, in many times, are not implanted and are routinely thrown away and it is not considered as murder, then how would abortion be considered as murder? They also believe that the concept of adoption is not an alternative remedy to abortion. Even in the case of rape or incest, *etc.*, often a woman is unaware that she is pregnant or is too afraid to talk about, thus the contraceptive pills are ineffective in these situations. This group of persons believes that although abortion should not be used as a form of contraception but even with responsible contraceptive use pregnancy can take place.³⁰ Another aspect that they rest their case on is that teenagers who become mothers have harsh prospects for the future such as leaving the school, health issues, inadequate prenatal care combined with social stigma. Thus they believe it to be against the very fundamental concept of civil rights and right to make choices.

VII Conclusion

Before concluding and drawing an inference, it would be relevant to understand the basic aim behind legislating with regards to abortion. One can deduce that the foremost objective is to provide all women with quality abortion care, which is sensitive to their needs by increasing aspects such as easy accessibility and affordability to safe abortion services. This may be done by mobilising human, financial and material resources for provision of care and safety in abortion procedure and increasing the number of trained persons and equipped abortion centers. In addition to this by efficiency is increased and ambit is broadened by integrating abortion services into primary and community health centers, increasing investment in public amenities, broaden the base of abortion providers by training paramedics to do first trimester abortions, simplifying registration procedures, link policy with up-to-date technology, addressing the need for appropriate post-abortion care *etc.*

In India, legalising abortion through the MTP Act, which was done in 1971 has not yielded the expected outcomes. Despite the existence of moderate policies, the majority of women still resort to unsafe abortion. This contributes substantially to the burden of maternal morbidity and

²⁹Abortion Arguments: 10 Arguments For Abortion, 10 Arguments Against Abortion, *available at*: <http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm> (last visited on Sep. 3, 2016).

³⁰*Ibid.*

mortality. The MTP Act currently contains explanations to section 3 stating that terminations for rape and contraceptive failure are permissible because the anguish caused by each constitutes a “grave injury to her physical or mental health.” The MTP Act needs to be recognised that a diagnosis of fetal impairment could likely to produce distress constituting a severe injury to mental health and that such an exception must be existed during entire pregnancy period, since certain fetal anomalies cannot be detected within the stipulated 20th week period of pregnancy. The great Tamil Saint Thiruvalluvar said, "The touch of children is the delight of the body; the delight of the ear is the hearing of their speech". It is a natural duty of the mother to provide the best to her children. However, sometimes she involves in such activities that affect the fetus injuriously. It may occur due to lack of knowledge, negligence or sometimes due to willful acts.

Abortion includes various social, ethical and financial issues. Thus it can be concluded that mother’s right is limited to have a termination of pregnancy.³¹ It is on the shoulders of the law to take care of the independence and freedom of the mother as well as the life of unborn. The medical community and society needs to offer love and support to women with unplanned pregnancies and to assist them in finding empathetic alternatives to abortion.

³¹ Patchesky Rosalind Pollack, *Abortion and Women's Choice: The State, Sexuality and Reproductive Freedom* 13 (Northeastern University Press, 1st edn., 1991).