



ABORTION LAW AND SEXUAL FREEDOM IN INDIA VIS-À-VIS RIGHT TO THE UNBORN TO LIVE

Aditi Sharma

Assistant Professor in Laws, Panjab University Regional Centre, Ludhiana



Scholarly Research Journal's is licensed Based on a work at www.srjis.com

"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."

Reproductive rights are rights relating to reproduction and reproductive health and include access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making. These rights are human rights; they are universal, indivisible, and undeniable. These rights are founded upon principles of human dignity and equality, and have been enshrined in international human rights documents. Reproductive rights embrace core human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of one's children, and the right to be free from sexual violence. The World Health Organisation defines reproductive rights as rights including the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, and the right to have the information and means to implement those decisions free from discrimination, coercion, and violence. Reproductive rights also include the right to the highest standards of sexual and reproductive healthcare.

Reproductive rights may include some or all of the following rights: the right to legal or safe abortion, the right to control one's reproductive functions, the right to quality reproductive healthcare, and the right to education and access in order to make reproductive

choices free from coercion, discrimination, and violence. These rights may also be understood to include education about contraception and sexually transmitted infections, and freedom from coerced sterilization and contraception, protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM).

Right to Reproduction and International Legislative Approach

A woman's right to terminate a pregnancy emanates from her right to make decisions regarding her own body and reproductive capacity. Textual support for this right is found in a number of human rights instruments, which contain provisions that ensure autonomy in decision-making about intimate matters. Such provisions include protections of the right to privacy, the right to decide freely and responsibly the number and spacing of one's children, and the right to physical integrity. Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom. The most important right of a Human is the right to life. It is the supreme human right from which no derogation is permitted. It is inalienable. Article 1 of the American Declaration of Rights and Duties of Man and the Inter American Commission of Human Rights say that abortion is legalized until the end of first trimester.¹ The Article 6(1) of the International Covenant on Civil and Political Rights², Article 2 of the European Convention of Human Rights³ and Article 4 of the African Charter of Human and People's right⁴ prohibit the arbitrary deprivation of life. But there are some controversial issues related to this supreme right. One such issue is the question of Right to abortion. Among other rights of women, it is believed that every mother has a right to abortion, it is a universal right. But the rights of the mother are to be balanced with the rights of the unborn.

Roe v. Wade became one of the most politically significant Supreme Court decisions in history, reshaping national politics, dividing the nation into "pro-choice" and "pro-life" camps, and inspiring grassroots activism.⁵ This is a landmark United States Supreme court decision establishing that most laws against abortion violate a constitutional right to privacy,

¹ The Declaration was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogota, Colombia, in April 1948.

² *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

³ Article says that Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

⁴ Article 4 says that Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

⁵ 410 U.S. 113 (1973).

thus overturning all state laws outlawing or restricting abortion that were inconsistent with the decision. *Jone Roe*, the plaintiff wanted to terminate her pregnancy because she contended that it was a result of rape. Relying on the current state of medical knowledge, the decision established a system of trimester that attempted to balance the state's legitimate interests with the individual's constitutional rights. The Court ruled that the state cannot restrict a woman's right to abortion during the first trimester, the state can regulate the abortion procedure during the second trimester "in ways that are reasonably related to maternal health", and in the third trimester, demarcating the viability of the foetus, a state can choose to restrict or even to prescribe abortion as it sees fit.

Also the Abortion Act, 1967 of the UK in its Article 2 does not confer an absolute right to life to the unborn. It was held in *Paton v. United Kingdom*⁶, abortion is permitted if the continuance of the pregnancy involves risk. The right to life of foetus is subject to an implied limitation allowing pregnancy to be terminated in order to protect the life of a mother. The same was held in *H v. Norway*.⁷ Also, it was held in 1992 by the Supreme Court that a woman has the same exclusive right to abortion as to any of other medical treatment. The prospective fathers have no right to be consulted for the same.

Throughout history, women have practiced forms of birth control and abortion. These practices have generated intense moral, ethical, political and legal debates since abortion is not merely a techno-medical 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." Women have overtly or covertly resorted to abortion, but their access to services has been countered by the imposition of social and legal restrictions, many of which have origin in morality and religion. The norms governing the ethics of abortion have been constantly remoulded to suit the times and the social contexts, in which they are set. Despite the dissimilarities in their construct, intent and orientation, these norm's have invariably been directed to the fulfillment of social needs, that do not recognize women's right to determine their sexuality, fertility and reproduction. This paper reviews the abortion scenario, with particular reference to India.

Indian Legislative Approach

The right of the unborn child to life must outweigh the desires of others to destroy it, whatever the basis of these desires. Arguments on morality and legality tend to collide and combine, complicating the issue at hand. Abortion debates, especially pertaining to abortion

⁶ (1980) 3 EHRR 408.

⁷ (1992) 73 DR 155.

laws, are often spearheaded by advocacy groups belonging to one of two camps. Most often those in favor of legal prohibition of abortion describe themselves as pro-life while those against legal restrictions on abortion describe themselves as pro-choice. Both are used to indicate the central principles in arguments for and against abortion:

The Wikipedia Dictionary defines an abortion as: An abortion is the removal or expulsion of an embryo or fetus from the uterus, resulting in, or caused by, its death. “Abortion” can refer to an induced procedure at any point during human pregnancy; it is sometimes medically defined as either miscarriage or induced termination before the point of viability.

In India, the MTP Act legalises abortion within the first 12 weeks of pregnancy when one registered practitioner determines in good faith that the pregnancy poses a threat to a woman’s physical or mental health or that the foetus is likely to suffer a serious physical or mental disability. The law recognises contraceptive failure, rape and the woman’s actual or reasonably foreseeable environment as considerations affecting a woman’s mental health. After 12 weeks, but not exceeding 20 weeks, a woman may obtain an abortion if two registered practitioners agree that one of the above conditions has been met. When an immediate abortion is necessary to save a woman’s life, the approval of a single registered practitioner is sufficient. The MTP Act makes the following legal:

- (1) When the pregnancy is of 12weeks and if it exceed but less than 20weeks, with the advice of two medical practitioners can terminate if (a) women' life is in danger physically or mentally including pregnancy by rapes. (b) if there is a risk that the child will be born with abnormalities or if pregnancy is unwanted due to failure of any contraceptive.
- (2) Pregnancy of a girl less than 18 or 18 who is mentally ill with the consent of the guardian.
- (3) Informed consent is a must.
- (4) Abortion should be performed by an authorized medical practitioner and place.
- (5) To save the life spontaneous abortion is necessary.

The above listed sections have numerous defects and loopholes. It includes mentally ill women below 18 and mentally sound women above 18. What about the girls below 18 totally sound? Non inclusion of this group leads to dangerous outcomes like suicides or any form of illegal abortions leading to deaths in many cases as a law wont change the decision of not telling their parents and resorting to illegality. According to the Act women can get abortion by their wish but what about the will and wish of the spouses? Shouldn't provisions be inserted against specific techniques of abortion? Shouldn't the Act ban sale on contraceptives

like I-pills which has many side effects including loss of fertility? In addition to this, when a defect is detected in the child there should be no time limit for abortion, it should be allowed as it is not fair either for the child or the parents to give the birth. Hence, the above changes should be made to the sections of the act to enhance its capacity to reduce illegal abortions.

This is in stark contrast to the law on abortion in other major jurisdictions of the world. In the United Kingdom the period of viability is taken to be 24-weeks. In the United States, the Supreme Court in the famous *Roe v. Wade*⁸, on a controversial trimester approach, pronounced the stage of the viability of the foetus at the completion of 24-weeks that is at the end of the second trimester. On attaining the stage of viability, the state's interest in the 'potentiality of human life' represented by the foetus becomes compelling. In the pre-viability period, a woman is free to choose abortion without almost any interference by the state.

Thus while in popular jurisdictions like the UK and the USA, a liberal abortion law exists in the pre-viability stage, in India termination of pregnancy is regulated from the beginning of the gestation period as no viability period is specified. In the first trimester when mortality from abortion is lesser than mortality from childbirth, termination of pregnancy is still subjected to conditions along with the approval of one registered medical practitioner. This regulatory trend continues between the 12th and 20th week of pregnancy with the additional requirement of approval for termination of pregnancy from two registered medical practitioners. Undoubtedly the stringency in the Indian law is highlighted by an implied prohibition on abortion at any stage of pregnancy when exercised exclusively on the choice of woman. This also symbolises male's construction of women's sexuality (*vide* the male-dominated Indian legislature) mediated by expectations of believing that women should act according to her true role on issues connected with childbirth, childcare and reproduction. However this approach results in the severe restriction of the reproductive rights of women.

Judiciary v. Right to Terminate Pregnancy

The Supreme Court in India, the guardian of fundamental rights, has given wide interpretation to term life and has often quoted the following observations of Field, J. in *Munn* v. *Illinois*⁹

"By the term life as used here something more is meant than mere animal existence.

The inhibition against its deprivation extends to all those limbs and faculties by

⁸ 410 U.S. 113 (1973).

⁹ 94 U.S. 113.

which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life but of whatever God has given to everyone with life or its growth and enjoyment is prohibited by the provision in question if its efficacy be not frittered all ray by judicial decision". Right to abortion is a species of right to privacy, which is again proclaimed a continuance of the right to life under Article 21. It can also be said to be including the complete right of a woman over her reproductive organs. .

Nikita Mehta's Case: A Real Breakthrough

The landmark illustration is of Nikita Mehta. The court rejected her plea for abortion of her 24 week old fetus when the doctors said the child suffers from a congenital heart blockage and misplacement of arteries. But how fair it is to born a child needs a pacemaker to survive right from the time of birth. Isn't this contrary to the clause which allows abortion when it sure the fetus suffers from some disability? The surgery of the child would take a more than a lakh and *Nikita Mehta* is a middle class lady. Did the court think how she pays? Or the Govt. will pay for her or the judge who gave such a senseless decision will pay? Looking into abortions laws of different countries like *Canada, Korea, china, Germany, France* and several European countries, we can conclude that Indian law is a bit stringent. *Canada* does not interfere into this matter leaving everything upon the women and her physician. *Korea* permits it till 24 weeks and The Abortion Act of **UK permits abortion till 24 weeks** but there is **no upper limit** if pregnancy poses a threat to a woman's life of it the fetus is likely to be born with severe physical or mental deformity. But **India has chosen a middle path** and a balanced law as usual copying certain provisions from different abortion legislation of the world! There is no reason as to why India is not ready to increase the time frame to 28th weeks or removing the time frame.

Why India has kept 20 weeks as the upper limit? The answer to this is viability as mentioned above furnished by Indian case laws. In the case of *Mr. Vijay Sharma and Mrs. Kirti v. UOI*¹⁰ which laid down that life exists in the fetus while in the womb and article 21 is applicable here making the whole MTP unconstitutional. Even in the case of *William L*

¹⁰ AIR 2008 Bom 29.

*Webster v. Reproductive health services at el*¹¹ it laid down that life of each human being begins at his conception. The same judgment was given by madras HC in *Queens Empress v. Ademma*.¹² The flaw in the judgment is that it ignores the right to life and freedom of the women who has conceived. Isn't the child still a part of her body? Isn't this violating her fundamental rights to compel her to carry on with an unwanted pregnancy? The concept of life at the conception is totally flawed. Women have a right to do anything with her body.

In India, the courts have been silent on any direct declaration of the right to abortion but impliedly court has infringes the right of women. The Supreme Court of India in numerous cases doesn't favour Right to 'Procreation' and to have control over one's reproductive organs gives birth to another right i.e. the right to 'Abortion'. The Supreme Court has somehow limited the right of having control over one's reproductive organs i.e. right to terminate pregnancy in several cases. In *Satya v. Siri Ram*¹³, the Supreme Court held that termination of pregnancy twice at instance of wife in spite of insistence on part of husband and his parents to have a child in family amounts to cruelty. Similarly in *S.k Verma v. Usha*¹⁴ it was held that aborting foetus in the very first pregnancy by a deliberate act without consent of husband could amount to cruelty. The Court in *S.K* case ignores the MTP Act where concern is not material.

Court in above case has given due regarded to the sentiments and interests of both husband and wife. What about the right of widow to terminate pregnancy?? Recently Delhi court has summoned a widow of a Delhi policeman, along with her parents and brother, for having aborted her husband's only heir to be.¹⁵ According to the mother of the deceased policeman who is the complainant, the unborn foetus would have been the only heir of the deceased son, and the widow had got pregnancy terminated so that she could remarry. Summons has been issued as the court "is satisfied that there is sufficient material on record to proceed against the respondents for the offence under section 312/201, Indian Penal Code". Here, the court gives more priority to Indian Penal Code rather ignoring the special law The Medical Termination of Pregnancy Act, 1971. And the widow has not committed offence as provision of MTP Act. Thus, it submits that widow's actual or reasonably foreseeable conditions are not difficult to visualize in our society. There have been several cases where widow want to terminate pregnancy to remarry. Because of the sentiments of the

¹¹ (1989) 492 U.S. 490.

¹² (1886) ILR 9 Mad 360.

¹³ AIR 1983 P&H 252.

¹⁴ AIR 1987 Del 86.

¹⁵ Reported in Hindustan Times, June 27, 2005.

family members she could not enjoy life i.e. Right to enjoy life according to Article 21 of Indian constitution and forcefully bears the child for family members. Thus it infringes the rights of women. Thus, the interest of the women should not be sacrificed at the altar of sentiments and emotions of those around her.

However not only judiciary, the section 312 of Indian Penal Code, 1860 "Whoever voluntarily causes a women to miscarry, shall if such miscarriage be not caused in good faith for the purpose of saving the life of the women be punished." The Explanation provided that a women who causes herself to miscarry within the meaning of this section, infringes right to life of mother.

Conclusion

Many people believes that abortion is a moral issue, but it is also a constitutional issue. It is a woman's right to choose what she does with her body, and it should not be altered or influenced by anyone else. Thus, MTPA provides rights to women for terminate pregnancy with certain limitation but doesn't give absolute freedom. The legal regulations have abrogated the women's right to liberty to a great extent, particularly with respect to right to self determination, right to have control over her body and right to abortion. These regulations shave created serious inroads into a women's right to life and liberty and it has become nothing more than an illusion. It is, therefore, submitted that females should be given right to have control over their body and consequently right to have or not to have child and there should be amendment in section 312 of Indian Penal Code and judicially should bring a judicial tools to protect the right of women to terminate her pregnancy.