

LEGAL FRAMEWORKS AND ITS IMPACTS ON ABORTION IN INDIA WITH A COMPARATIVE STUDY OF ABORTION LAWS IN U.S

Written by *Sarah Shajan*

3rd Year BA LLB Student, Christ (deemed to be university) Bangalore

INTRODUCTION

The capacity of women to give life to an individual places her in both advantageous as well as disadvantageous position. But the question is whether a woman has right to terminate her pregnancy. Abortion is another word used for the act of termination of pregnancy. It means killing of the fetus when it is in the mother's womb. Abortion can be of two types- either spontaneous or induced. Spontaneous is known as miscarriage, while induced simply means that termination of a pregnancy which is planned. In medical language abortion means termination of pregnancy prior to the fetus attaining the stage of visibility. The cause for abortion can be social, economic or due to the health conditions of the woman as well. Though there are many legal restrictions which have been imposed to prohibit this heinous crime, there has been no reduction in the number of induced abortion in practice.

The paper focuses on the rights of the pregnant woman and also on the unborn child i.e, whether a pregnant women has right to terminate her pregnancy over the right of an unborn child to its life. It also makes a comparative study of the abortion laws in India and U.S.A and how effective are these laws in both the countries.

DEFINING THE CONCEPT

The Constitution of India guarantees to its citizens the right to live their life with dignity and liberty in its Article 21¹. It states as:

¹ Part III 'Fundamental Rights', Constitution of India.

'no person shall be deprived of his life and personal liberty except according to procedures established by law'.

The Supreme Court is the guardian of the Fundamental Rights of its citizens and a wide interpretation has been given to the expression 'Right to Life'. The right includes the basic rights essential for the survival of human beings which includes right to food, right to sleep etc. But do right to life includes right to die? In the case of *Gyan Kaur vs State of Punjab*². The Supreme Court of India uphold the constitutionality of Section 309 of Indian Penal Code³ By holding that right to life doesn't include right to die.

What is abortion?

Abortion is another word used for the act of termination of pregnancy. It means killing of the fetus when it is in the mother's womb. Abortion can be of two types- either spontaneous or induced. Spontaneous is known as miscarriage, while induced simply means that termination of a pregnancy which is planned. In medical language abortion means termination of pregnancy prior to the fetus attaining the stage of visibility.

When a right is guaranteed to an individual there is a corresponding duty to not interfere in their freely enjoyment of those rights. However the right of the unborn child to live collides with the right of a mother to abortion. Here the problem that encounters is whether the unborn child has a right to life and if it does whether this right has more importance than the mother's right?

Pregnant women's right to abortion over the right of an unborn over its life.

Women are blessed with the ability to give a new life. But some people see them as a child producing machine. The right to life guaranteed by the Indian Constitution includes the right to enjoy life with all limbs and faculties. This implies that the right to procreation and right to have control over reproductive organs are also included in the wider ambit of right to life. Right

² 1996 AIR 946, 1996 SCC (2) 648

³ Section 309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year [or with fine, or with both]

to procreate gives right to abort also. There are laws in India which restricts as well as permits the termination of pregnancy on certain grounds. Section 3 of the Medical Termination of Pregnancy Act, 1971 provides that termination of pregnancy can be allowed with the opinion of two medical practitioners⁴ if the period of pregnancy is not more than 20 weeks and with the opinion of one practitioner if the period is less than 12 weeks. The termination can be done only under certain grounds which are;

1. The continuance of pregnancy would cause grave injury to the physical or/and mental health of the pregnant woman
2. If the child is allowed to be born, would be born with serious mental or physical abnormalities.

But Sub-section (1) of Section 5 of the MTP Act, 1971 also provides that immediate termination of pregnancy can be performed to save the life of the woman without the opinion of two medical practitioners even if the pregnancy has crossed the period of 20 weeks. But the right to abort is not an absolute right because if considered as an absolute right, it may lead to the performance of selective abortions increasing the number of female foeticides in the country.

When it comes to the right of an unborn to its life the first question is whether the unborn can be considered as a 'person'. The Indian Constitution in Article 21 states that '*no person shall be deprived of his life and personal liberty.....*'. The right to life in the Indian Constitution is provided to 'persons'. In the mother's womb an unborn child is a fetus. Under section 2(bc) of the PCPNDT Act⁵, a fetus is defined as:

"a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation (excluding any time in which its development has been suspended) and ending at the birth."

The definition clearly indicates that an unborn child remains a fetus till it takes birth. In a famous case of Right to Abortion decided by the United States Supreme Court⁶ it had been observed :

⁴ Section 2(d) of the MTP Act, 1971 defines 'registered medical practitioner': a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

⁵ The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

⁶ Roe v. Wade, 410 US 113 (1973)

“the word person does not include the unborn child and the question when does the life begins cannot be speculated by it”

Hence, until the birth of the child, the child in the womb is not recognized by law. Therefore the right of the mother to her life prevails over the right of the unborn child.

ABORTION LAWS IN INDIA

The laws in India do not permit abortion. The two laws that prohibit abortion are MEDICAL TERMINATION OF PREGNANCY ACT, 1971 and the PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994.

MTP ACT, 1971

This legislation was enacted to reduce the incidence of illegal abortion in India. Prior to 1971, abortion was illegal in India ⁷. Section 3 of the MTP Act permits and decriminalises the termination of pregnancy if certain conditions are satisfied. Abortion is permitted until 20 weeks under certain conditions. Following are some of the grounds under which selective abortion is permitted.

- to save the life of the mother (life ground)
- to preserve her physical or mental health (health ground)
- in case of rape or incest (juridical grounds)
- in case of suspected foetal impairment (eugenic grounds) ⁸

Before the enactment of this Act, the Indian Penal Code (Act No. 45 of 1860) permitted abortion if it was to save the life of the woman. The Code provides that whoever performs an illegal abortion shall be subjected to imprisonment for three years and/or a fine. Abortion of a female child leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it; morality decries it and social science abhors it⁹

THE PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994

⁷ (Kaushal, 2014)

⁸ (Kaushal, 2014)

⁹ voluntary health association of Punjab v UOI, (2013) 4 SCC 1 at 10

With the medical advancements to determine genetic abnormalities which could also detect the sex of the fetus and with the liberation of law of abortion has proliferated the misuse of techniques for selective abortions of female child. In a patriarchal society like India, these technologies have been used for the elimination of girl child. This led to the enactment of Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 on September 20, 1994 and it came into force from January 1, 1996, covering all India. It aimed at regulating medical centers which performed pre-natal diagnostic tests, resulting in sex-determination and female foeticide. The abuse of these technologies have affected the status and dignity of women by discriminating against the female sex.

Comparative study of abortion laws in India and USA

The abortion laws in UK can be traced back in 1800. The state of Connecticut implemented the laws related to abortion in 1821 in US which was similar to that of the Ellenborough's Act of England. By the time in 1828 laws against abortion was passed in New York and treated the act as a crime. Within the time induced abortion was banned in whole of US. Colorado in 1967 was the first state to legalize abortion.

One of the famous and important cases related to abortion in USA is *Roe v Wade*¹⁰. In this case an unmarried woman, on behalf of herself and other women filed a petition against the District Attorney of Dallas Count, Texas questioning the constitutionality of the Texas Criminal Abortion Laws where the women had intended to have a legal abortion which was to be done by skilled and qualified medical practitioner. The Supreme Court said that the laws of Texas make abortion illegal unless it is performed to save the life of the mother. The court held that an unborn child does not fall under the ambit of a 'person'.

The decision on the case *Griswold v. Connecticut*¹¹ was looked into while giving the judgment in the *Roe* case. It was held in the case that right to privacy was not explicitly stated anywhere in the US Constitution but is covered by the Fourteenth Amendment's Due Process Clause. It was held that the right to privacy was a fundamental right and was advanced to let the women choose whether to abort or not to abort but it also allowed the state intervention where the state had "legitimate" interests i.e. where both the life of the mother and the unborn child were concerned. It was held that only when the fetal viability is reached the state can intervene.

¹⁰ *Roe v. Wade*, 410 US 113 (1973)

¹¹ 381 U.S. 479 (1965)

The reason behind doing a comparison of abortion laws in India and US is the tremendous public debate and also that U.S has been constitutionally and legally advanced regarding this issue. Though abortion laws have been legalized at the present in U.S, earlier the practice of abortion was banned in the country. There were anti-abortion groups guided by the religious beliefs. According to them, life begins at the stage of conception and hence argues that a fetus qualifies as a constitutional person and enjoys the right to life under the American Constitution. This resulted in the State banning all the abortion laws. Thus it can be observed how the religious beliefs of the community or interest of the community prevailed over the individual interest. The laws against abortion was gradually legalized with feminist's movements and was judicially acknowledged by the Supreme Court of U.S in 1973 in the landmark case of *Roe v Wade*¹². The women's reproductive rights in India are a major legal issue. However it has not been given much importance as it should be. Section 312 of IPC punishes whoever causing miscarriage. In India abortion is allowed only on medical grounds to protect the life of the mother. The word abortion has not been used in the code to prevent offending the sentiments of the Indian Community where abortion has been condemned since ages. Before the enactment of MTP Act, the laws were strict and the provisions under IPC were rarely implemented due to the fear of revolt from the fanatics and conservative societies. We see that in both the countries religion plays a dominant role in the issue of abortion. Thus the MTP Act was enacted to liberalize the abortion laws in India. The act provides the grounds on which termination of pregnancy is permitted with the opinion of a medical practitioner. The act justifies that it does not exist to protect the right of privacy of women but is a tool for family planning. The Indian judiciary disregards the right to privacy of women and her right to reproductive choice¹³. In India if the wife aborted the child without the consent of the husband, this can be a ground for divorce¹⁴.

The U.S. judiciary, conversely, has been sensitive to the fact that pregnancy has a strong impact on a woman's health and lifestyle, and that the effects of pregnancy are borne by the woman alone¹⁵. Such a discussion is entirely missing from Indian decisions that touch upon the issue

¹² *Roe v. Wade*, 410 US 113 (1973)

¹³ Priyaranjan Kumar Shukla, *Woman's Right to Abortion at Legal Crossroads* 19 IND. BAR REV., 89, 95 (1992)

¹⁴ *Satya v. Siri Ram* AIR 1983 P H 252

¹⁵ *Roe v. Wade*, 410 U.S. 113, 148-150 (1973). And *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 912 (1992).

of reproductive autonomy. Hence, there is a sharp contrast between the judicial attitudes towards the reproductive rights of women in India and the U.S.

Thus it can be seen how the U.S seeks to protect the reproductive rights of the women in contrast to India where the State does not allow women to freely exercise their reproductive rights and intervenes in their choices placing the privilege of the community like family planning over the individual rights like the choice of women to abort. The Indian Judiciary by placing the community interest over individual interest in most of the cases violates the very aspect of the right to privacy under Article 21 of the Indian Constitution and has not been fully able to recognize the reproductive rights of the women.

CONCLUSION

To conclude, the health of the woman is of prior concern than the right to life of the unborn child. A fetus can be termed as a person only on its coming into existence. Only a healthy woman can deliver a healthy child. Therefore the right to procreation of women includes the right to abort on certain grounds. The MTP Act, 1971 permits termination of pregnancy of period not more than 20 weeks. In India these laws need to be enacted considering the right of women to reproductive choices.