

COMAPRATIVE ANALYSIS OF RIGHT TO ABORTION IN INDIA AND THE UNITED STATES OF AMERICA

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INTRODUCTION

Abortion remains the sensitive matter in most countries, receiving a lot of international attention not only as a public health concern but also as an ethical and religious issue. Public discussion on abortion in India has either centered on declining sex ratios and sex selective abortions or on the proliferation of clinics across urban areas. Unfortunately, there is much less public debate on abortion related morbidity and mortality despite several national programs and campaigns for safe motherhood.

There are various reasons as to why women seek abortion. The reasons appear to range from such proximate causes as the desire to limit family size or to space pregnancies, the preference for sons and medical compulsion, to more distant determinants like poverty, violence and local belief systems.

Abortion has been a controversial issue both nationally and internationally. There are various factors that trigger a change in the type of abortion law in India and U.S.A. one pertinent question that has left everybody in dilemma is whether a mother has right to terminate her pregnancy at her will or the rights of an unborn child take a front seat.

In India, article 21 of the constitution guarantees right to life. Among various rights available to a women right to abortion is also believes to be one of its facet right to life abortion has been recognised under right to privacy which is an aspect of right to personal liberty which further

stems from right to life.¹ The question that must be considered is the question of foetal personhood ie can an unborn child be given the status of a person or not.

There are various factors that influence abortion such as development, human rights, religion and legal precedence. A foetus is not a complete person from the moment of conception². It has no interest before the third trimester³ the scientist have agreed that the foetal pain can be felt after the 26th week hence something that has not yet taken birth cannot be said to have developed its own interest.

The first striking finding of a comparative survey of abortion regulation has always been the fact that a fundamental change has occurred in this area all over the world.

This paper has been divided into 5 chapters. Chapter 2 will exam abortion laws in India, followed by Chapter 3 that will look into U.S.A's abortion laws and its comparison with India. Chapter 4 shall deal with the problem of sex selective abortions and Chapter 5 shall discuss the conclusion.

ABORTION AND THE LAW IN INDIA

Introduction

Prior to 1971, abortions were criminalised under Indian Penal Code, 1860, and notwithstanding the 1971 Act, continue to be criminalised as of date. In fact, even the pregnant woman could be found guilty if she self-aborts the child she is carrying. This position was considered unsatisfactory, and on the basis of the recommendations of the Abortion Study Committee in 1966, the MTP Act was introduced and passed in Parliament.

Law under the Indian Penal Code 1860

The Indian penal code 1860 plays a significant role in prevention of illegal abortions. The sections dealing with illegal abortion are dealt from sec 312 to sec 316.

¹ Roe v. wade 410US 113(1973)

² Ronald Dworkin, freedoms law: The moral reading of the American constitution, 90(oxford university press ed,1999)

³ *Ibid*

Sec 312 of IPC 1860⁴ deals with unlawful termination of pregnancy though the framers of this code has not used the word “abortion” instead they have used the word miscarriage. The miscarriage and unborn child has not been defined in IPC. Here causing miscarriage stands for criminal abortion. Voluntary causing miscarriage is an offence in 2 circumstances when a woman is with child (as soon as gestation begins) and when she is quick with the child (motion of the foetus is felt by the mother).

According to sec 312 of this code termination of pregnancy is only permitted when it is done in good faith in order to protect the mother’s life in extreme circumstances.

Abortions laws varies from countries to countries some have liberal approach in dealing with abortion laws and some have stringent laws. Among all countries India adopted the liberal approach by understanding the need of MTP act in 1971 which derived some exceptions to provisions of IPC.

Provisions under MTP Act 1971

The Medical Termination of Pregnancy Act, approved in India in 1971 and enacted in 1972, permits abortion (or MTP) for a broad range of social and medical reasons, including: to save the life of the woman; to preserve physical health; to preserve mental health; to terminate a pregnancy resulting from rape or incest and in cases of foetal impairment. Contraceptive failure also is sufficient ground for legal abortion.⁵

The termination of pregnancy can only be done through medical professionals up to 12 weeks and the opinion of 2 medical practitioners is required if termination of pregnancy is done between 12 to 20 weeks. As per the provisions of this act cannot be termination of pregnancy after 20 weeks of pregnancy except in special circumstances⁶ considered by only medical practitioners.⁷

⁴ Sec312 defines the offence of causing miscarriage as follows “whoever voluntarily causes a woman with child to miscarry shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman be punished with imprisonment of either description for a term which may extend to 3 years or with fine or with both and if the woman be quick with child shall be punished with either imprisonment of a description of a term which may extend to 7 years and shall be liable to fine.”

Explanation- a woman who causes herself to miscarry is within the meaning of this section

⁵ United Nations 1993

⁶ Risk to life of a pregnant woman , risk of grave injury to her physical or mental health, if pregnancy is caused by rape, the child will be born abnormal

⁷ Upendra Baxi, Abortion and the law in india , journal of the Indian law institute, 1986-87, volume 28-29

Revelation of the Legal Limits of Abortion and Challenging the Abortion Law

In 2008, Haresh and Niketa Mehta petitioned Bombay High Court to allow them to abort their 26-week-old foetus who had been diagnosed with a heart defect. For the first time, the national medical narrative took note of the fact that with the advent of medical technology, pre-natal diagnosis of defects had come a long way — and some defects could be revealed after 20 weeks has passed. The Mehtas’ plea was turned down on expert advice. But the court’s observation that only the legislature could address the demand for change in the legal limit meant that India started the process of re-evaluating provisions of the Medical Termination of Pregnancy Act, 1971. Niketa, incidentally, had a miscarriage soon after the verdict.⁸

In 2015, a 14-year-old rape victim from Gujarat sought and received permission from the Supreme Court to abort after the 20 weeks deadline had passed. Her petition was treated as a “special case”, meaning it could not be used as a precedent to grant permission in another case. Which is why the woman in whose favour the SC decided on Monday — identified in her petition as “Miss X” — needed to knock on the doors of the apex court afresh?

The draft Medical Termination of Pregnancy (Amendment) Bill, 2014, on which the Health Ministry has sought and received comments, provides for abortion beyond 20 weeks under defined conditions. As per the draft law, a healthcare provider may, “in good faith”, decide to allow abortion between 20 and 24 weeks if, among other conditions, the pregnancy involves substantial risks to the mother or child, or if it is “alleged by the pregnant woman to have been caused by rape”.

The draft law also takes into account the reality of a massive shortage of both doctors and trained midwives, and seeks to allow Ayurveda, Unani and Siddha practitioners to carry out abortions, albeit only through medical means, and not surgical ones.

The draft legislation recognises that the anguish caused by pregnancy resulting from rape “may be presumed to constitute a grave injury to the mental health of the pregnant woman”, and that such an injury could be a ground for allowing abortion.⁹

⁸ Jessica Ravitz , the surprising history of abortion in the US, The Indian express, (june 27 2016) available at : <http://indianexpress.com/article/explained/abortion-law-rape-victim-terminate-pregnancy-suprme-court-20-weeks-pregnant-2935481/>

⁹ Draft of medical bill on abortion

Need to Change the MTP Law

Legal and medical experts feel that a revision of the legal limit for abortion is long overdue. Foetal abnormalities show up only by 18 weeks, so just a two-week window after that is too small for the would-be parents to take the difficult call on whether to keep their baby. Even for the medical practitioner, this window is too small to exhaust all possible options before advising the patient to take the extreme step.¹⁰

Again, the 45 years since the enactment of the law has seen technology break new grounds — from ultrasound to magnetic resonance imaging to a range of high end foetal monitoring devices that have taken prenatal diagnosis far beyond the illegal sex determination tests that have refused to die out completely.

The rising incidence of sex crimes, and the urgent need to empower women with sexual rights and choices both in their own interest and for the sake of reducing the fertility rate as a whole, have made it imperative that the law be changed. In any case — and what is far more worrying — is the fact that the lack of legal approval does not prevent abortions from being carried out beyond 20 weeks. And they are done in shady, unhygienic conditions by untrained, unqualified quacks, putting thousands of women at risk probably every day

The Need to Increase Awareness about the MTP Act

The women and their family members , particularly those who are likely to be involved in the discussion making process need to be aware about when , where and under what circumstances abortion can be legally availed of. Women should also be made aware that they have a right to ask for information and, if necessary, question the quality of care being provided to them¹¹. They would therefore need to be educated about what constitutes safe quality services. Service providers, too, need to be clear about the provisions of the act and refrain from allowing their own apprehensions and /or moral concerns to cloud the issue.

¹⁰ Abortion and Divorce in Western Law : Mary and Glendon

¹¹ Visaria and Ramachanfran: Abortion in India, ground realities.

ABORTION LAW IN THE U.S.A

Introduction

In the 18th century, abortions were allowed in common law and were widely practised. They were illegal only after quickening i.e. when the pregnant woman could feel the foetus moving.

At conception and at the earliest stage of pregnancy no one believes that a human life existed, not even the Catholic Church. The popular ethic regarding abortion was grounded in the female experience of their own bodies.

When abortion became politicized, the church condemned it

The American Medical Association pushed for state laws to restrict abortions, and most did by 1880.

Even after abortions became illegal, women continued to have them. The work was done behind closed doors. Abortion rates increased. It was seen as an economic issue than as a women's issue.

In the 1950s and 1960s, the estimated number of illegal abortions ranged from 200000 to 1.2 million per year¹²

There was a time when abortion was a part of life in the United States. There was no protest, hue and cry about it.

The sale of drugs that induced abortions was huge and rampant and services were marketed openly. The drugs were freely available and advertised. If drugs failed, women could approach the medical practitioners.¹³

The abortion laws were first governed because of the problem of drug poisoning not morality, politics or religion.

¹² Reported by the Guttmacher Institute

¹³ Mary Ann Glendon: Abortion and Divorce in Western Law

Since 1973, *Roe v Wade*¹⁴ the court has legalised abortion across the United States. It was held that the criminal abortion statute which criminalises abortion except to save the life of the mother is violative of the Due process clause of the fourteenth amendment.¹⁵

The word ‘person’ used in the fourteenth amendment does not include the unborn child thereby eradicating the concept of foetal personhood. Also when does the life begin cannot be speculated by it.¹⁶ Though the constitution of the United States does not explicitly recognise the right to privacy but the same can be construed by the judicial precedents. They have brought it under right to personal liberty. It is broad enough to include the right to choice with respect to abortion.

Then in 1992 in the case of *Planned Parenthood Southeastern Pennsylvania v Casey*¹⁷ the court reaffirmed the *Roe’s* case. The court held that the undue burden test¹⁸ shall be applied to determine if the state can obstruct the woman’s right to abortion before viability.

The court held that the constitutional protection of woman’s decision to terminate her pregnancy derives from the due process clause of the fourteenth amendment.

In the case of *Whole Woman’s Health v Hellerstedt*¹⁹ the US Supreme court ruled 5-3 that Texas cannot place restrictions on the delivery of abortion services that create an undue burden for women seeking an abortion.

Analysis of Historical Precedents

ROE V WADE

The Constitutional Question:

Whether the constitution gives right to the women to obtain an abortion nullifying the Texas probation (which criminalizes abortion except to save the life of mother)?

The ruling allows for legal abortions during the entire pregnancy, but set up conditions to allow

¹⁴ 410 US 113 (1973)

¹⁵ US Supreme Court Reports, Vol 35 , The lawyers cooperative publishing co., New York , pg 147-199

¹⁶ *Ibid*

¹⁷ (1992) 120 L.Ed 2d 67

¹⁸ ‘undue burden’ is defined as the the effect of placing obstacles in the path of a woman’s choice

¹⁹ 579,US (2016)

states to regulate abortion during the second and third trimesters.

The Decision:

The Court held that a woman's right to an abortion fell within the right to privacy (recognized in *Griswold v. Connecticut*) protected by the Fourteenth Amendment. The decision gave a woman a right to abortion during the entirety of the pregnancy and defined different levels of state interest for regulating abortion in the second and third trimester the Supreme Court said that the word person does not include unborn child in the fourteenth amendment

PLANNED PARENTHOOD SOUTHERN PENNSYLVANIA V. CASEY

This case was decided by the U.S.A Supreme Court in 1992.²⁰ This case law tried to give new variables to abortion rights to women. The court said instead of adoption trimester framework “undue burden test”²¹ should be adopted to determine whether state regulations has some purpose of placing substantial obstacles in the path of a women for seeking abortion before validity.

The due process clause of fourteenth amendment gives constitutional protection to women to take decision to terminate her pregnancy. It declares that the state shall not deprive any person life, liberty, or property, without due process of law. This clause is applies to both substantial and procedural matters²².

Analysis of Right to Abortion in India and U.S.A

U.S.A has recognised right to abortion as a facet of right to privacy. The interest of the unborn child can be protected by the state only after the stage of viability.²³ The right to choice of women takes precedence. The woman can get the child aborted on her sole discretion upto 12 weeks of pregnancy. As per the fundamental right of life and liberty, the mother’s health and life is prioritised over the unborn child. The State cannot interfere without having the compelling State’s interests of its own. The legitimate interest of the State is in protecting and

²⁰ (1992)120 L.Ed 2d 67

²¹ *Supra* 18

²² (1992) 120 L.Ed 2d 6, para5

²³ *Roe V Wade*, 410 US 113 (1973), *planned parenthood Southeastern Pennsylvania V Casey* (1992) 120 L.Ed 2d 67

preserving the health of the pregnant woman. The courts in the U.S.A have upheld the interest of the pregnant woman and her rights over her body, thereby allowing her to make decisions.

Since the Supreme Court's decision in *Roe v Wade*²⁴ abortion has been available on the request of the pregnant woman until viability, subject only to regulation after the end of the first trimester in the interest of protecting the health of the woman. A state law requiring second trimester abortion to be performed in a hospital was held unconstitutional.

In *Planned Parenthood association v ashcorft*²⁵ , calling into question whether any significant regulation prior to viability would pass constitutional muster. After viability, which the Supreme Court has estimated as occurring between twenty four and twenty eight weeks, state regulation to protect the foetus is not constitutionally required but is permitted, except where abortion is necessary to "preserve the life or health of the mother."²⁶ However, state laws attempting to require doctors performing abortions to try to preserve the life of a viable foetus were struck down.²⁷ , casting doubt on the extent to which state regulation in the interests of the foetus even in late pregnancy will be upheld²⁸

In India, IPC and MTPA cumulatively do not confer right to abortion to the woman for terminating her pregnancy. This ultimate choice affecting the interest of the woman and her body is taken by medical practitioner. If the medical practitioner in good faith believes that the pregnancy can be terminated, the woman can go ahead with abortion.

These statutes²⁹ infringe a woman's right to dignity, right to health, right to privacy which have been guaranteed by the Indian Constitution under Article 21.

Another problem that the researcher has analysed is about illegal abortions. If medical practitioners deny abortion to a woman, she resorts to illegal means of abortion which are both unhealthy and unsafe. In case of a rape, a woman loses her dignity in the society, her first priority is to survive her reputation than keeping and upbringing the baby. If abortion is not in demand, she may resort to illegal abortion.

²⁴ *Ibid*

²⁵ 462 U.S. 476 (1983)

²⁶ *Ibid*

²⁷ *Colautti v. Frank*, 439 U.S. 379 (1979), *Thornburgh v. American college of Obstetricians and Gynecologists*, 54 Law Week 4618(1986)

²⁸ *Ibid* see also pp.22 – 24, 33 - 39

²⁹ IPC, MTPA

Another conflict that the researcher came across is regarding conflict of interests of the mother and the unborn child. In India, an unborn has been defined as a legal person by fiction in various statutes³⁰, the researcher believes that an unborn acquires rights only after being born alive. An unborn has no interests of its own because its right cannot be recognised. Property right is a contingent interest upon the unborn. The interest of a living person shall hence be prioritising over the rights of an unborn. Since, it cannot take decisions; it lacks the capacity to choose. When the child is in the mother's womb, it is a part of the mother's body and she shall have the sole discretion to take the final choice.

SEX SELECTIVE ABORTION

Sex selective abortions have increased due to the rampant discrimination faced by the girls. Indian families prefer boys over girls. Before the emergence of pre-natal sex determination techniques in the 1970s and 1980s, female infanticide was practiced in some regions of India, (in the north and north-west of the country).

While the deliberate elimination of female infants is thought to have radically declined since the 18th and 19th centuries, many academic and NGOs believe the passive elimination of the girl-child continues to this day through neglect such as lack of food, reduced immunisation rates and restricted access to medical care.

Between the ages of one and 59 months, girls in every region in India have higher death rates than boys, and inequities in access to care, rather than biological or genetic factors are the most plausible explanation.³¹ A study carried out by the Government's Ministry of Women and Child Development found that 70.57% of girls reported neglect of one form or another by family members; 48.4% of girls wished they had been born a boy; and in Bihar 65.63% of girls reported being given less food than their brothers.

³⁰ Section 13 of Transfer of Property Act, 1882, Hindu Succession Act

³¹ The Million Death Study Collaborators, 2010

Since the introduction of sex determination techniques, it has been estimated that between 10 and 60 million girls that should have been born in India have been aborted, with an additional 60,000 going missing every year.³²

Reasons behind the Ban on Sex Selective Abortions in India

One of the most commonly cited reasons is that of the history of the dowry in Indian culture. While Indian law forbids the provision or acceptance of a dowry, the enforcement of the law is weak, and so families continue to offer and accept dowries and subsequently dowry disputes remain a serious problem.³³ The fear of being unable to raise a dowry in the future and the economic burden that doing so may place on a family, forces families into believing they have no other option than to abort a female foetus.³⁴ Sonography clinics wanting to increase their own financial gains will often exploit this fear of raising a dowry through their advertising campaigns by using slogans such as “Invest only Rs. 500 now and save your precious Rs. 500,000 later³⁵. When a woman marries she moves into the family of the husband however the vice versa is not the culture

Son Preference

In Indian culture, men are also the only ones allowed to perform death rites. Inheritance law in India is highly patrilineal and discriminatory towards women, resulting in them often being unable to inherit anything from their families. Even when there are no sons, inheritance will pass to uncles and male cousins before it reaches female heirs

Preventing the birth of female child or ensuring the birth of a male one, often under pressure from conjugal and extended families, is a major reason for abortion in most settings. While the use of modern sex determination tests is more common in western and northern part of the country, studies in southern India also show that the women here rely on more traditional methods of predicting the foetus, their objective is the same: to prevent a female child from being born. While a campaign mode is increasingly used to address the issue of “missing girls” and to advocate saving the daughters, it is important to assess whether these methods are able

³² The Guardian 2011, pg 11

³³ U.S. State Department, 2012

³⁴ UNFPA, 2013

³⁵ The Guardian, 2012

to bring about , in the short range , necessary changes I the behaviour of people, and in the long range , social transformations.³⁶

The UNFPA study “Sex-selective abortions and fertility decline in Haryana and Punjab” revealed that 62,000 sex-selective abortions were recorded in Haryana from 1996 to 1998, with 81% of them involving the abortion of a female foetus. The report also revealed that Haryana and Punjab had the highest percentage of missing female children under the age of six in the 1991 census.

Link between the Pre-Natal-Diagnostic Techniques Act (PNDT) and MTPA

Although the two legislations are independent of each other, our studies suggest that this distinction is hard to maintain in actual practise. The wide spread campaign against sex determination has enhanced awareness of the PNDT act among communities; knowledge of the legality of abortion services and of the MTPA, however, is still adequate. Under the MTPA abortion (on economic and social grounds) is one among the many rights that Indian women enjoy today. Yet there is some evidence that it is being equated with the ban on sex detection test and with killing of girls.³⁷ Further the PNDT act is interpreted to mean that all abortions (whether sex selective or not) have now become illegal .Surprisingly, even providers often link the provisions of the two acts. As studies show the most common reason for women to have an abortion is still linked to limiting and spacing their children (irrespective of sex composition), and unless we maintain a clear distinction between these two issues and understand the reasons underlying the PNDT act, efforts to expand access to safe abortions are bound to receive a setback in the coming years.

³⁶ *Supra* 10

³⁷ *Ibid*

CONCLUSION AND SUGGESTION

When a woman conceives, the time from which the foetus comes to life has not been mentioned by any statute. The researcher analysed the constitutional provisions of India and U.S.A and witnessed that a woman has the right to choose abortion and her interest shall precede over the interest of a foetus as it is still an unborn person.

The researcher believes that India shall liberalise its abortion laws so that women's rights of health, dignity, liberty and privacy are not violated. The law must permit abortion according to the woman's choice so that illegal abortions and their health hazards are combated. The State shall also endeavour to protect the maternal health of the woman all the time while, the interest of the unborn child only after viability. According to the researcher's findings not all para functionaries are aware of the MTP act some of the formally trained providers are informed in general terms, though not necessarily familiar with the situations in which the act is applicable. Even when they are, many insist that clients fulfil certain requirements that are not mandated in the act.

For instance, though providers know that the families consent is not necessary, most insist on it in order to protect themselves.

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