

Medical Termination Of Pregnancy In India: A Study In Legal Perspective

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Abstract: This study has been undertaken to comprehend the lacunae in the current Medical Termination of Pregnancy Act, 1971 which has arisen the need for the amendment in the present Act. The Act of 1971 though progressive at the time of its enactment is now an old restrictive law which has rendered lakhs of women in India resorting to alternative option of abortion which are not safe. It is about time now that restrictive abortion laws are liberalized paralleling societal changes.

Changes in the Act of 1971 were proposed through the Medical Termination of Pregnancy (Amendment) Bill, 2014. The Amendment bill proposes to extend the abortion period upto 20th week of pregnancy thereby providing wider window for detection of any congenital disease or abnormality in the fetus along with a series of other revisions in the Act of 1971. The Amendment Bill still has not yet been passed by the Cabinet even after dire need of it.

Keyword: Abortion, Medical Termination, Pregnancy, India, Prohibiting Law, Unsafe Abortions, Amendment

INTRODUCTION

Abortion has stayed to be an exceptionally disputable issue concerned with multidiscipline's like medicine, ethics, sociology and in legal sphere as well. Abortion may be defined as "the deliberate ending of a pregnancy by causing the fetus to be expelled from a woman's womb". Abortion may occur under any of the following circumstances: i) natural/spontaneous, ii) accidental, iii) artificial or induced abortion.

In India, an artificial or induced abortion is penalized under the law. Indian abortion laws are administered under the Medical Termination of Pregnancy Act, 1971. There have been numerous incidents in recent times which have led to the critical need for the amendment of the 46- year old abortion law operating in India. As the opening passage or the Preamble of the Act expresses, that the Medical Termination of Pregnancy Act is designed "to provide for the termination for certain pregnancies by registered Medical Practitioners and for matters connected therewith or incidental thereto"¹. The main objective of the act is to improve the maternal health of Indian women and to control the mortality rate of the women due to unsafe and illegal abortion. It was only after this act, safe abortion was available to women but that too under certain conditions. Fundamentally, it liberalizes and (endeavors to) regularize therapeutic practices and organizations in connection to abortion and, thusly, enables medicinal progression to supersede medical criminalization.

BACKGROUND OF ABORTION LAW

The Indian Penal Code 1860 and the Code of Criminal Procedure 1898, with their origins in the British Offences against the Person Act 1861, made abortion a crime punishable for both the woman and the abortionist except to save the life of the woman. The 1960s and 70s saw liberalization of abortion laws across Europe and the Americas which continued in many other parts of the world through the 1980s. The liberalization of abortion law in India began in 1964 in the context of high maternal mortality due to unsafe abortion. Doctors frequently came across gravely ill or dying women who had taken recourse to unsafe abortions carried out by unskilled practitioners. They realized that the majority of women seeking abortions were married and under no socio-cultural pressure to conceal their pregnancies and that decriminalizing abortion would encourage women to seek abortion services in legal and safe settings.

The Central Family Planning Board on August 25, 1964 prescribed the Ministry of Health to constitute a committee to consider the need of enactment on abortion. The recommendation was adopted in the latter half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee – called Shantilal Shah Committee. After analyzing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966. Based on this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and introduced liberalized abortion laws in India.

¹ Medical Termination of Pregnancy Act, 1972 (Act of 1971), Preamble.

The Shah Committee, appointed by the Government of India, carried out a comprehensive review of socio-cultural, legal and medical aspects of abortion, and in 1966 recommended legalizing abortion to prevent wastage of women's health and lives on both compassionate and medical grounds. Some states looked upon the proposed legislation as a strategy for reducing population growth. The Shah Committee specifically denied that this was its purpose. The term "Medical Termination of Pregnancy" (MTP) was used to reduce opposition from socio-religious groups averse to liberalization of abortion law. The MTP Act, passed by Parliament in 1971, legalized abortion in all of India except the states of Jammu and Kashmir.

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 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 an absolute necessity unless she is a minor or insane person when her guardian's consent is required.

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 recognize 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 fetus.

STATUTORY PROVISION

Abortion Under IPC

Under Indian Penal Code, 1860, considering the ethical, religious and moral background of the nation, induced abortion has been made out to be a punishable offence under sections 312-316 of the Act. Sec-312 of Indian Penal Code, 1860. Defines Causing miscarriage: 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 three years, or with fine, or with both; and, if the woman be quick with child, shall he punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

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

Here the term 'miscarriage' has not been defined under the act and the term 'abortion' has not been used but through legal interpretation it has been established that miscarriage, in its popular sense, is synonymous with abortion and consist in the expulsion of the embryo-fetus at any time before it reaches full growth.

Miscarriage technically refers to spontaneous abortion, whereas voluntarily causing miscarriage, which is an offence under the Code, stands for criminal abortion.

Abortion under MTP Act 1971

The Act contains provisions dealing with various aspects like the time, place and circumstances in which a pregnancy may be terminated by registered medical practitioners legally, it liberalizes and (attempts to) regularize medical practices and institutions in relation to abortion and, consequently, allows medical liberalization to supersede medical criminalization.

The Act lays down conditions under which a woman can get an abortion. A woman can have an abortion up to 20 weeks of her pregnancy only if doctors are of the opinion, taken in "good faith" that continuing the pregnancy involves substantial risks for the physical and mental health of the mother or of fetal abnormalities developing. As per the Act, an abortion is allowed only up to 20 weeks of pregnancy.

Abortion under Constitution

It is necessary to note here that our Constitution does not confer any specific rights for an unborn and it can never be preceded over fundamental right of a woman to electively abort as she is the one who ultimately has to carry the weight of an undefined and unborn child in her womb. Right to life and personal liberty offered under Article 21 has a very wide scope of interpretation.²

The right to life is a very broad concept and is the most fundamental of all. In India, right to life has been recognized under Article 21 of the Constitution which says that "No person shall be deprived of his life and personal liberty except according to

²Mahendra Pal Singh, V.N. Shukla Constitution of India, Twelfth Edition, Eastern Book Company

procedure established by law". Person here includes both man and woman. Among various rights which are available to a woman, the right to abortion is also believed to be one of the most essential and fundamental right.

Amongst the numerous rights available to a woman, choosing what ought to be inside her body and what not is the most crucial right and the state ought not to take away this privilege from her. In a judgment of Supreme Court of India, recognition has been given to right to abortion as it falls under the ambit of right to privacy which falls under the domain of right to life.³ The woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised either to procreate or abstain from it. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. Right to abortion coincides with the right to privacy which is a part of right to personal liberty and which further emanates from the right to life. But the question always arises whether an unborn child should be considered as a human being and be given the status of a person or not. There are various aspects such as religious, ethics, moral and legal values that rule over the aspect of right to abortion. Abortion is severely condemned in all religions. But in spite of that always the question arises whether the mother has a right to abortion or the child has a right to life. Ronald Dworkin has made a detailed study on the issue of abortion. He did not acknowledge the extreme position taken by the derivative claimers of forbiddance of abortion that, the fetus is a complete moral person from the moment of conception and that the abortion is equivalent of a murder or nearly a wrong as murder. As per Dworkin, a fetus does not hold any interest before the third trimester. A fetus cannot feel pain until late in pregnancy, since its brain is not matured enough before then. The researchers have concurred that fetal brain will be sufficiently developed to feel pain from approximately the twenty sixth weeks. Thus, whether abortion is against the interest of a fetus must depend on whether the fetus itself has interests, not on whether interests will develop if no abortion takes place. Something that is not alive does not have interests. Also, just because something can develop into a person does not mean it has interests either. Once a fetus can live on its own it may have interests. This is only after the third trimester.

THE NEED FOR AMENDMENT

The current Act i.e. The Medical Termination of Pregnancy Act, 1971 may have been advanced for the time and society it had been enacted in. However the present technology is far more progressed then it was 46 years ago, at that time there were no ultrasounds or fetal monitors to give a high-tech peek at the developing fetus. But today prenatal diagnostics can determine the height, weight, size of the brain, down syndrome, congenital heart defects, kidney functioning. The problem is that most of these abnormalities are picked up in ultra⁴sounds only by the 20th to 24th week only and that exceeds the legal abortion ceiling.

The MTP Act 1971 is restrictive in today's context. The WHO estimates that of the 26 million births in India, 2 to 3 percent have some sort of a chromosomal abnormality. That's 5 to 6 lakh babies born every year with a compromised quality of life.

Though abortion has been legal in India for over 46 years now, every two hours a woman dies because of abortion related causes. Statistics show that unsafe abortions are the third largest cause of maternal deaths in India and accounts for 8% of maternal mortalities because women do not have access to safe abortion services.

There are considerable challenges faced by women while seeking abortion care in India, which includes the limited availability of abortion services in public health centre. One of the fundamental reasons for women not receiving Medical Termination of Pregnancy services at site are non-availability of doctors, lackage of trained staff and inadequate supplies and equipment. It is due to these reasons that many public facilities don't provide abortion care.

There are a number of steps to improve the availability and quality of abortion services in health facilities; including training and certifying more doctors to provide abortion care. It is likewise suggested that permission should be granted to trained nurses, AYUSH doctors (practitioners of indigenous medicine) and auxiliary nurse midwives to provide MMA (medical methods of abortion). This would substantially expand the number of providers and facilities, qualified to offer safe abortion services. Mid-level providers (which include nurses, AYUSH doctors) are not only available at all levels of the health system but global experiences suggest that these cadres of trained providers can safely offer abortion services.

³ Mahendra Pal Singh, V.N. Shukla Constitution of India, Twelfth Edition, Eastern Book Company

Statistics as provided by research bodies show that three to four million unsafe abortions are happening in the country every year, a major number of these are done under the radar by swindlers.

These are women adolescent girls and those who are poor, unmarried, less educated, and those who live in rural regions are particularly at risk of unsafe abortion. Despite the fact that protected, uncomplicated, efficient primary healthcare level interventions exist; numerous women still do not have access to them, setting their lives superfluously in danger. It is pertinent to note here that our Constitution does not confer any specific rights for an unborn and it can never be preceded over fundamental right of a woman to electively abort as she is the one who ultimately has to carry the weight of an undefined and unborn child in her womb.

The Medical Termination of Pregnancy (Amendment) Bill of 2014 proposes to replace ‘registered medical practitioners’ with ‘registered healthcare providers’. More importantly, it intends to expand the permissible period for abortion from 20 weeks to 24 weeks if the healthcare provider deems that the pregnancy involves a considerable threat to the health of the mother or the child or if it is “alleged by the pregnant woman to have been caused by rape”. If significant fetal variations from the norm are recognized, the amendment likewise permits an exemption on as far as possible for pregnancies to be terminated.

However, these amendments are being passed back and forth without any effective action, forcing pregnant women seeking abortion to run to courts. The amendment still also needs cabinet’s sanction in order for it to be presented before the parliament.

The judiciary has at times been progressive, pronouncing judgments that support reproductive rights. But at times, the courts have succumbed to the old 1971 law as well. The Apex Court of India has held that a crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. In a suo moto case, the Bombay high court – while dealing with the medical termination of pregnancy of two under-trial prisoners in Thane jail – clearly stated that it is applicable to all women irrespective of their marital status or whether she was a working woman, a homemaker or a prisoner.

Even the term ‘mental injury’ has been given wider interpretation by the courts. Concerning the right to abortion, the US Supreme Court has held that it is the woman who suffers and thus she has the right to make the decisions. Its Indian counterpart allowed an alleged rape victim to abort a 24-week old fetus with severe abnormalities in January 2017, as the medical board thought that the pregnancy could put her life in danger. Decisions made by courts therefore have not always been on an even footing, thereby necessitating changes to the current law.

The pro-liberalization movement

It is about time now that restrictive abortion laws are liberalized paralleling societal changes. Immaterial to the marital status of women, access to safe abortion services and quality post-abortion care, including counseling, need to be guaranteed. A strong recognition of women’s right to unreservedly practice their reproductive and sexual rights, including the right to abortion, ought to be there. The Medical Termination of Pregnancy (Amendment) Bill 2014, alongside other revisions, provides for elimination of the word ‘married’ and substituting ‘husband’ with ‘partner’, should be pulled up from under the heap and enforced at the earliest. Stalling of a progressive law cannot be justified with the excuse that sex-selection abortions will occur more often. Preventing the misuse of law cannot happen with the suppression of another’s right. Moreover with the effective implementation of the Pre-Conception and Pre-Natal Sex Selection and Determination (Prohibition and Regulation) Act 2002 abuse of law can be hindered rescinding the possibilities of sex selective abortion.

CONCLUSION

Despite more than 46 years of liberal legislation, however, the majority of women in India still lack access to safe abortion care. This paper studies the history of abortion law and policy reform in India and epidemiological and quality of care studies since the 1960s. It identifies barriers to good practice and policy and program changes necessary to improve access to safe abortion care. No woman gets pregnant for the sake of getting an abortion there is a lot of thoughts and emotions put behind taking that massive step, which not only affects women’s physical health but mental health as well. Modification in the Medical Termination Pregnancy act, 1971 is a cry of those determined women who have resorted to abortion after diligently considering the pros and cons of the procedure.

Even after 4 years of its proposal the Medical Termination of Pregnancy Amendment Bill, 2014 is still kept on hold jeopardizing the access to safe abortions for lakhs of Indian women.