

ABORTION LAWS IN INDIA

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ABSTRACT

Abortion has always been surrounded by controversy as it carries with it a thread of theological and moral arguments. Amongst these moral arguments, what role does law play? How can a state maintain a balance between reproductive autonomy and the protection of life? Law is a dynamic phenomenon, evolving with the needs and morals of the society. In this context, this paper highlights what are the limitation of abortion laws and changes in the respective abortion laws can resolve the underlying conflict. It . Focuses mainly on the legal and social arguments pertaining to reproductive autonomy, this paper weighs the arguments of anti-abortionists against those of the advocates of abortion rights and elucidates the significance of reproductive and bodily autonomy. As also discussing the limitations of the current abortion laws in India, this paper also deals with the ethical issues pertaining to abortion such as foetal life against reproductive autonomy.

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REVIEW OF LITERATURE

Abortion and the Law in India, K. D. Gaur

This paper discusses the evolution of abortion laws in India before and after the enforcement of the Medical Termination of Pregnancy Act 1971. This paper also discusses the MTP Act in detail and also looks at the legal inadequacies to have led to illegal abortions. The paper discusses the current scenario of the rate of illegal abortion and maternal deaths and the factors responsible for these legal inadequacies. To conclude the paper suggests steps to further liberalise abortion so that safe abortion is widely available to women.

Transforming the Grounds: Autonomy and Reproductive Freedom, Stephanie Ridder.

This paper mainly focuses on the right of autonomy and advocates that it is a fundamental right of women and men. This paper via various cases including Roe vs Wade talks about the laws related to reproductive autonomy. This paper discusses the limitations of current law regarding access to abortion and also discusses the concept of foetal right. Another important aspect discussed in this paper is that of “a father’s right”. To conclude this paper talks about the significance of reproductive autonomy.

The Socio-cultural Aspect Of Abortion In India: Law, Ethics And Practise, Bhavish Gupta & Meenu Gupta

This paper first discusses abortion as a human right by examples of CEDAW, Article 12, which states that women should be ensured health care services including that of family planning. The paper further discusses with respect to the Constitution of India and Article 21 which grants Right to Life. The paper focuses on social and ethical issues of abortion in India and the social stigma of abortion. This paper also highlights the psychological effect of pregnancy on women and challenges of MTP Act.

Reproductive autonomy and the ethics of abortion, Barbara Hewson

This paper weighs the reproductive rights of a woman against that of the abstract idea of a foetal life and rights. This paper talks about the implications of pregnancy on a woman’s life and through these arguments states why the choice of abortion becomes a significant matter. Though this paper discussed the current scenario of abortion from an international perspective, but the arguments also relate to India.

Right to life of Foetus – Verification of laws in the context of female Foeticide, Emandi Ranga Rao

This paper mainly focuses on the concept of foetal right and questions the idea of ascribing life to a foetus, discussing this view from various sects of thoughts and ideas. This paper also talks about the legal perspective of ascribing life to an unborn child such as the recognition of a child in the womb as a minor in the Limitations Act, focusing on the right to life to a female child to be born and live after birth.

Abortion Law, Policy and Services in India: A Critical Review, Siddhivinayak S Hirve

This paper talks about the evolution of abortion law and reform in India. This paper discusses the situation of unsafe abortion even after its legalisation and indicates the unreliability of these laws. It also discusses the inequity of medical facilities available in rural and urban areas. This paper also talks about the limitations of the current law and to conclude it suggests further liberalisation of abortion laws to prevent the loss of life due to maternal deaths.



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INTRODUCTION

What is Abortion and its underlying conflict?

Abortion is defined as the termination of pregnancy. It can be categorised in two ways: a spontaneous abortion and an induced abortion. A spontaneous abortion takes place because of natural causes and without any intervention, in common language, it is also called, a miscarriage. Whereas an induced abortion is the deliberate termination of pregnancy.

There has been a widely held debate for decades regarding induced abortion. In this regard, two sects of thoughts form the basis of this debate, namely, pro-choice and pro-life.

Pro-life

Advocates of the pro-life theory are against abortion. They believe that life for a foetus begins at conception and therefore a foetus can be considered to be a human being. The underlying principle here is that of the potential foetal life and foetal rights. They believe that if the pregnancy is carried to its term, the foetus will eventually develop into a full-grown human with potential human rights.¹ This principle substantially stems from Aristotle's potentiality principle, which states that all living things naturally develop to their species from a potential state. Due to this attribution of life to a foetus, anti-abortionists claim that the killing of a foetus is as immoral as the killing of a human being. They believe that abortion is not merely a matter of choice but that of morality and protection of human life.

But the question that arises here is whether life can really be ascribed to the foetus and if yes then at what point?

There are multiple theories that answer this question, however at variance. For instance, Aristotle put forth the concept of 'quickening' that is when the pregnant woman first feels the movement of the foetus, and stated that it is at this stage when the foetus becomes a human being.² Whereas, the Fundamentalist Approach says that life begins at conception itself, on the other hand, many believe that life to a foetus can only be ascribed when the foetus becomes viable that is, the foetus can sustain itself outside of the womb. Though viability can be also seen from a subjective perspective as advanced medical facilities can make a foetus viable

¹ Bhavish Gupta & Meenu Gupta, The Socio-Cultural Aspect Of Abortion In India: Law, Ethics And Practise, ILI Law Review, 140-150, Winter Issue (2016).

² Brind'Amour, Katherine, "Quickening". Embryo Project Encyclopaedia, ISSN: 1940-5030, (2007)

earlier in the duration of the pregnancy in some places over others where medical facilities are not progressively available.

Due to these varying ideas of foetal life, it becomes very difficult to come to a consensus and this vagueness renders the concept in itself arbitrary.

The Legality of Foetal Life

The constitution of India grants the right to life to every person under Article 21 of the Indian Constitution, but it remains silent on whether the foetus carries life and whether it can be entitled to rights. Whereas, under various legislations in India, life in the womb has been recognised and therefore, the foetus has been granted some rights. Such as Section 6 of The Limitations Act says that a minor includes a child in the womb, Hindu Succession Act also recognises the rights of a child in the womb. The Indian Penal Code also advocates for the protection of foetus under Section 312 which provides punishment or imprisonment to any person causing miscarriage without approval. The Nuclear installations Act of 1965 also recognises the liability for compensation in case of injury or damage caused to an unborn child by nuclear matter.³

Pro-Choice

Advocates of this group call for abortion rights and reproductive autonomy. They believe that abortion should be at the discretion of the pregnant woman. They question the concept of whether the potential rights of a foetus can be imposed over the actual human rights of the woman. In many arguments, the foetus is considered to be a trespasser to a woman's body and therefore the woman should have the right to abortion and bodily autonomy. Pro-choice advocates argue that the right of a pregnant woman is always greater than the abstract idea of rights of the foetus.

This debate is relevant because reproductive autonomy is one of the most significant parts of rights granted to women. Pro-choice advocates believe that the logic where foetal life holds a greater value than the life of the woman is flawed. For instance, a woman remains constitutionally entitled to abortion even post-viability of the foetus, when it becomes

³ Emandi Ranga Rao, Right To Life Of Foetus – Verification Of Laws In The Context Of Female Foeticide, International Journal of Law, ISSN: 2455-2194, RJIF 5.12 Volume 3; Issue 2; Page No. 33-39, (2017).

necessary to preserve her life or her health.⁴ In this case, the life and health of the woman become much more important than the foetal life, so why is it that in other cases the viability of the foetus give it a higher value. If a foetus can be considered to be a person, then killing it at any point should be immoral including when it comes to preserving the life of the woman. But this is not the case, in such a situation, a woman's reproductive right will overpower the state's interest of protection of human life and therefore the concept can be concluded to be flawed.

Another reason why reproductive autonomy becomes important is because pregnancy is not a small incident in life. It can lead to various significant changes in the woman's life such as disruption of her educational or social life, hindrance of her employment, etc.

EVOLUTION OF LAWS

Before 1971, abortion was a criminal offence under Section 312 of the Indian Penal Code except in certain cases when it was carried out to save the life of the pregnant woman. Liberalisation of abortion laws in India began in 1964 when the Ministry of Health registered a high rate of maternal mortality. Doctors frequently addressed cases where women had resolved to unsafe methods of abortion. In this context, the government set up the Shanti Lal Shah Committee, which was required to look into the socio-cultural and legal aspects of abortion. The Shah Committee submitted its report in 1966 recognising that abortion should be legalised to prevent the loss of women's life.

In 1971 the Medical Termination of Pregnancy Act (the MTP Act) was passed and enforced in 1972. Initially, the act allowed termination of pregnancy until 20 weeks if two registered medical practitioners are of the opinion that the pregnancy can be terminated and until 12 weeks if one medical practitioner believed so. The pregnancy can be terminated on certain grounds including that of injury or potential risk to the woman's physical or mental health. The MTP Act also provided legal protection to a registered medical practitioner carrying out such tasks of abortion. Though only surgical methods were recognised as legally approved. In 2002, through the MTP Amendment Act, the use of a drug called 'Mifepristone' was approved by the Drug Controller General of India for medical abortion.

⁴ Hewson B, Reproductive Autonomy And The Ethics Of Abortion, Journal of Medical Ethics, 27:ii10-ii14, (2001)

Even though abortion has been legal since 1971, India has seen an increasing rate of illegal abortion. In the initial years after the legalisation of abortion, only a marginal increase was recorded for approved abortion whereas, in the 1990s, the number of approved abortion declined.⁵ We can conclude that the lack of awareness and the lack of availability of abortion facilities had led to this situation. The question that arises here is to understand the loophole in the current legal and social scenario which has led to the increasing rate of unapproved abortion.

To understand the evolution of law, two major cases are of significant importance:

Roe vs Wade

It was a landmark in The United States which challenged the Texas law that prohibited except in cases when it was necessary to save the life of the woman. In 1969, Jane Roe, a pseudo name used to hide the identity of Norma McCovey, sought to terminate a pregnancy in Texas. As the Texas law prohibited abortion, after unsuccessful trials to get an illegal abortion, McCovey was referred to two attorneys Linda Coffee and Sarah Weddington, who were interested in challenging the anti-abortion laws against Henry Wade, the district attorney. In 1973, the supreme court ruled with a majority of 7-2 and struck down the Texas law. In the judgement, Justice Harry Blackmun stated that the right to abortion was guaranteed to a woman under right to privacy granted by the 14th amendment. The court further divided the pregnancy in three trimesters, and stated that abortion in the first trimester was solely at the discretion of the woman, whereas in the second trimester abortion can be regulated by the government and in the third trimester abortion can be prohibited by the state in regard with the viability of the foetus.⁶

Mrs X vs Union of India

In this case Mrs X approached the court seeking to terminate a pregnancy which was 22 weeks old in the light that the foetus has a condition known as Bilateral renal agencies and an hydramnios. The court constituted a medical board to examine the woman and it was concluded that there was a risk of foetal death and there was no chance of long term post natal survival. The board also concluded that no cure was available and therefore the court granted Mrs X the option of abortion.⁷

⁵Siddhivinayak S Hirve, Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters, 12:sup24, 114-121, (2004).

⁶ Roe v. Wade, 410 U.S. 113 (1973)

⁷ Mrs. X v. Union Of India 4 SCC (Cri) 388 (2016)

CURRENT LAWS IN INDIA

The Medical Termination of Pregnancy Act, 1971, Section 3 currently provides certain grounds on which the pregnancy can be legally terminated. It states that if the length of the pregnancy does not exceed 12 weeks, and one medical practitioner is of the view or if the pregnancy exceeds 12 weeks but not 20 weeks and two medical practitioners are of the view that: if the pregnancy is continued it would involve a risk of life of the woman or injury to her mental or physical health or if the child is born it may suffer from serious physical abnormalities in the future, pregnancy can be terminated. The section further explains that if the pregnancy is caused by rape or by the failure of a contraceptive method for a married couple, the anguish caused will be considered to be a grave injury to the mental health of the woman and therefore can be a valid ground for an abortion.

The section further explains that if the woman above the age of 18 years, only her consent is needed but if she is below the age of 18 years or is a mentally ill person, the consent of her guardian is required.

Section 4 states that the termination of pregnancy can only take place in a place approved by the government or.

Section 5 explains that the provisions mentioned in section 3 and section 4 shall not apply in case the medical practitioner is of the opinion that the termination is immediately necessary to save the life of the woman.⁸

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LIMITATION OF ABORTION LAWS

It is necessary to understand the loopholes that the abortion law in India carries in order to bring about effective change. There are multiple limitations that exist, such as:

1. It should be noted that under Section 3 of the MTP act, failure of a contraceptive device or method is only recognised as a legal criterion for married couples. The fact that this criterion is exclusively available to married couples only is highly criticised. One reason behind this could be the social stigma attached to the pre-marital sexual life and the acceptance of the same.⁹ Due to this social stigma, the government by adding such a clause of contraceptive failure to all women may not have wanted to create a controversy, nevertheless this clause is exclusionary and unfair. It has been suggested by the recent amendment bill to change this clause to include

⁸ The Medical Termination Of Pregnancy Act, 1971

⁹ Supra, 1

“all women” instead of married women. Another proposal of the bill is to raise the gestation limit to 24 weeks as advanced medicinal technologies have made it safer for abortion to take place even in the later parts of the pregnancy.

2. The second issue related to the clause of rape as a ground for termination of pregnancy. If pregnancy is caused by rape, when can a woman terminate the pregnancy: during the pendency of the case or after the trial? Can the woman obtain termination before the man is convicted guilty? If not, then what if the period of the trial exceeds the 20 weeks’ gestation period? If yes, then how can we address the possibility of misuse of the stated clause.¹⁰

3. Another major issue is that of availability of resources in urban as well as rural areas. It is evident that medical facilities are not equally within the reach in rural areas and therefore abortion services are not extensively available to rural women. They either have the option to travel to urban cities to get an abortion from an approved hospital, which is not only an inconvenience but also a hinderance of her right to privacy. In this situation, rural women usually resort to unsafe means of abortion.

4. Awareness of the law is another significant consideration. The lack of awareness of the legality of abortion has also led many women to believe that they cannot obtain approved abortion and they are therefore compelled to take resolve to unsafe means.

CONCLUSION

After an extensive study, the researcher concludes that the current law pertaining to abortion in India is inadequate. It has various limitations due to which many women are still compelled to take recourse to unsafe and illegal means of abortion. Even in the social realm, it suffers from various social stigma and ethical issues. To prevent such loss of life due to maternal deaths, there should be further liberalisation of abortion laws. The grounds for abortion should be equally available to all women and greater significance should be given to bodily autonomy over an abstract idea of potential foetal life. Various ethical arguments are based on arbitrary ideas. To give women greater reproductive rights it is important to make abortion widely and freely available.

¹⁰ Gaur, K, Abortion And The Law In India, Journal of the Indian Law Institute, 28(3), 348-363, (1986).

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