

**ABORTION IS WOMEN'S ABSOLUTE RIGHT, NO ONE CAN TAKE AWAY**Yogisri D G<sup>1</sup>**Abstract**

In country like India it is not that much easy to choose abortion as an option during pregnancy period to a woman, because lot of perils cross through. The law on abortion in India is governed primarily by Sections 312-316 of the Indian Penal Code (IPC) and the provisions of the Medical Termination of Pregnancy (MTP) Act, 1971. The methods commonly used for terminating an unwanted pregnancy are extremely unsafe and dangerous to the lives of the woman and may or may not affect the unborn baby too. These are consequence of not having right to freely demand abortion. Safe and legal abortion services must be provided. Abortion cannot be performed on the request of the husband, if the woman herself is not willing. The only discretion of terminating pregnancy to be with the woman because she is only person who knows what she actually undergoes. Still in rural areas women are standing far from decision making in terminating pregnancy or to continue. Almost 56% of abortions in India are under the category of unsafe. Abortion is a key reproductive choice but it is not a right in India. The judiciary has been playing a vital role in securing these rights to women. Each person has a right to bodily sovereignty and human rights instruments protect such rights internationally. That is the law has to take care of liberty of the mother as well as the unborn. Analysing various problems regarding abortion, number of amendments needed to be made through legislation.

**Keywords:** Legal Machinery, Unwanted Pregnancy, Unsafe Abortion, Fundamental right, Privacy, Judiciary, Bodily Sovereignty, Decision making.

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**I. Introduction**

Women's freedom becomes a huge question while going into the topic of Abortion, lot of perils cross through, especially in country like India it is not that much easy to choose abortion as an option during pregnancy period to a woman. Once she decides to abort she has to face lot of indirect cruelties from the society through the emotional threatens like 'once you abort you won't get another chance of having baby', 'this is not in our custom', 'this is against

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<sup>1</sup> Yogisri D G, Government Law College, Madurai (Affiliated College of Tamil Nadu Dr. Ambedkar Law University) Email ID: yogisridg@gmail.com Phone Number: 7094004155

our religious norms', 'you will be accused or punished in hell for this sin doings' and etc. In this article I have thrown some light on some questions which always becomes a heat of debate while focussing on whether women has the sole decision in requesting an abortion and with its branch questions like don't they have bodily sovereignty and right on their own body? Not giving sole decision making power to women won't violate privacy? Can women be given the choice to legally abort regardless of their foetus' health and their marital status? Do they have the 'right to choose motherhood'? Why not for other than situational/circumstantial reasons a woman should not prefer abortion? Do the consent of the husband matters? Actually discretion is in the hands of whom? Let us go into it.

## II. Medical Termination of Pregnancy Act in India

In India abortion is governed under the Medical Termination of Pregnancy Act, 1971. It allows to abort only if the following conditions satisfied.

A. *Therapeutic*: When the continuation of pregnancy endangers the life of woman or may cause serious injury to her physical or mental health.

B. *Eugenic*: When there is risk of the child being born with serious physical or mental abnormalities. This may occur if the pregnant woman in the first three months suffers from: German measles (incidence of congenital defects 10 to 12 %), Small pox or chicken pox, Toxoplasmosis, Viral hepatitis, Any severe viral infection, if the pregnant woman is treated with drugs like thalidomide, cortisone, aminopterin, antimitotic drugs, or if she consumes hallucinogens or antidepressants, Mother is treated by X-rays or radio-isotopes, Insanity of the parents.

C. *Humanitarian*: When pregnancy has been caused by rape.

D. *Social*: When pregnancy has resulted from the failure of contraceptive methods in case of a married woman, which is likely to cause serious injury to her mental health.

E. *Environmental*: When social or economic environment, actual or reasonably expected can injure the mother's health.

## III. Evil effects of Unwanted Pregnancy

The methods commonly used for terminating an unwanted pregnancy, can be roughly divided into three periods: 1) Up to the end of the first month, the woman may take violent exercises, hot baths and purgatives. Extreme violence may lead to internal injury. 2) Up to the end of the second month, when suspicion becomes certainty, abortifacient drugs are used. 3) About the third or fourth month, after failing to procure abortion by the above methods,

mechanical interference is done either by the woman herself or by some other person.<sup>2</sup> These are extremely unsafe and dangerous to the lives of the woman and may or may not affect the unborn baby too. These are consequence of not having right to freely demand abortion.

#### **IV. Fear of Prosecution**

The law on abortion in India is governed primarily by Sections 312-316 of the Indian Penal Code (IPC) and the provisions of the Medical Termination of Pregnancy (MTP) Act, 1971. The IPC provisions criminalise abortion; the person undertaking the abortion as well as the doctor (or registered medical practitioner) facilitating the abortion are liable to be prosecuted. However, the government enacted the MTP Act as an exception to the IPC to exempt medical practitioners from criminal liability only if they terminate the pregnancy as per Sections 3 and 5 of the Act. It is imperative to have abortion on request or at will because doctors often hesitate due to fear of prosecution under the IPC, as well as confusion and misconceptions about the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 and the Protection of Children from Sexual Offences (POCSO) Act, 2012. The conflicts between these laws also have a chilling effect on doctors' willingness to perform abortions. The law must shift from being doctor-centric to one that is based on a pregnant woman's decision, made in consultation with their doctor. Safe and legal abortion services must be provided.

#### **V. Consent of Women matters**

According to the Act, 1971, the consent of the woman is required before conducting abortion; written consent of the guardian is required if the woman is a minor or a mentally ill person. Consent of husband is not necessary. Abortion cannot be performed on the request of the husband, if the woman herself is not willing. The woman need not produce proof of her age. The statement of the woman that she is over eighteen years of age is accepted. It is enough for the woman to state that she was raped, and it is not necessary that a complaint was lodged with the police. Professional secrecy has to be maintained. The admission register for the termination of pregnancies is secret document, and the information contained therein should not be disclosed to any person. Though it has some defects they are highly appreciable on the basis of its merits.

#### **VI. Need for Medical Committee**

If we ask whether the act is as much as sufficiently good to handle abortion from every sphere, the answer will be definitely end with 'No'. It cannot be said that termination should

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<sup>2</sup> Dr. NARAYANA REDDY & Dr. O. P. MURTY, THE ESSENTIALS OF FORENSIC MEDICINE AND TOXICOLOGY 382&383 (32<sup>nd</sup> ed. 2013).

solely be at the discretion of the doctors or the law. There should be no any options in it, the only discretion of terminating pregnancy to be with the woman because she is only person who knows what she actually undergoes (she only knows her mental and physical conditions). But the Medical Termination of Pregnancy Act, 1971 says it is with law. To solve this difficulty a medical committee can be set up which solely looks into exceptional cases of serious nature. This will prevent many cases of lags that occur due to our grinding legal machinery. It is submitted that a decision as to abortion may be entirely left with woman provided if she is sane and attained majority. Only in cases where an abortion may affect her life, her freedom may be curtailed. All other restrictions on the right to abortion are unwelcome under the law.

### **VII. Women, Far from Decision making**

According to the latest estimates published in the December Issue of The Lancet, in 2015, a staggering 15.6 million abortions occurred in India. Of these 15.6 million abortions, 73% were sought outside health facilities. While unsafe abortions in the country have reduced significantly, about eight lakhs women still resort to unsafe means to end an unwanted pregnancy.<sup>3</sup> Still in rural areas women are standing far from decision making in terminating pregnancy or to continue. This conditions should be evicted by simultaneously supporting the efforts to build awareness and educate women and the community on their sexual and reproductive health and rights (SRHR), including their right to access safe abortion care. The WHO 2012 guidance on Safe abortion: technical and policy guidance for health systems also recommends reducing third party authorization.

### **VIII. Unsafe abortions-Third leading cause of Maternal Deaths**

Recent reports have shown that more than 10 women die every day and thousands more facing morbidities, due to unsafe abortions in India, and backward abortion laws only contribute to women seeking illegal and unsafe options. Almost 56% of abortions in India are under the category of unsafe. Unsafe abortions, the third leading cause of maternal deaths in India, is a common recourse for most women in the country, including in the rural pockets, due to various social, economic and logistical barriers. It should be the responsibility of the government to prevent wastage of women's health and lives on both compassionate and medical grounds.

### **IX. A Fundamental Right and Harsh realities**

The choice of abortion is a fundamental right of a woman. If the pregnant woman has not attained the age of 18, or if she is a lunatic, the statute allows a surrogate decision to be

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<sup>3</sup> HINDUSTAN TIMES, <https://www.hindustantimes.com/opinion/abortion-it-s-every-woman-s-right-to-choose/story-52qv723N3yXESybsvyHR0J.html> , updated on Jan 08, 2018 04:39 PM IST (last visited Jul. 14, 2021).

taken by the guardian. This was found to be not inviolable by the Madras High Court in *V. Krishnan v. G. Rajan alias Madipu Rajan and The Inspector of Police* (Law and Order, 1993)<sup>4</sup> when a Division Bench of the Madras High Court considered the case of a minor girl who married an adult man without her family's consent and got pregnant. Her father approached the High Court for permission to abort, and the High Court ruled after eliciting the desire of the pregnant girl that she was capable of understanding the world as well as the consequences of the pregnancy. The court said that if termination of pregnancy was to be ordered against the girl's will, it would harm her mental health and might also affect her physical health. The court asserted that it was her fundamental right to have a child having become pregnant. *Suchita Srivastava v. Chandigarh Administration*<sup>5</sup>, where the court expressly stated that reproductive choices can be exercised to procreate as well as to abstain from procreating. There could be no two opinions that a victim of rape shall be allowed the choice to abort. But why should the choice be made at a time when the foetus is viable and termination of pregnancy carried out at a belated stage could imperil the safety of the mother and the life of the foetus? In the *V. Krishnan case*, elopement against parental wishes, framing a case of rape against the man in whose company the minor girl was, and the petitioner's eagerness to subject his daughter to abortion against her will were the harsh realities.

### **X. Realm of Privacy**

Abortion is a key reproductive choice but it is not a right in India. A woman cannot walk into a health facility and demand an abortion with no questions asked. This is the sad reality. Perhaps the right of a woman to choose what to do with the foetus has to be balanced with the right of the foetus to survive. The judgment further states that "a woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy."

### **XI. Vital role of Judiciary in securing Reproductive Autonomy**

Each and every women has an absolute right to have control over her body, most often known as bodily rights and widely it is human rights. In the 2017 decision of *Justice K.S. Puttaswamy v. Union of India*<sup>6</sup>, the Supreme Court recognised privacy as a fundamental right under the Indian Constitution, including within its scope the rights to bodily integrity, reproductive choice and decisional autonomy. In *Mrs. X v. Union of India*<sup>7</sup>, The Supreme Court

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<sup>4</sup> (1994) 2 MWN (Cri) 333

<sup>5</sup> (2009) 9 SCC 1

<sup>6</sup> (2017) 10 SCC 1

<sup>7</sup> 2017 SCC OnLine SC 745

has recognised women's right to make reproductive choices and their decision to abort as a dimension of their personal liberty. Subsequently, the Supreme Court 2018, *Navtej Johar v. Union of India*<sup>8</sup> and *Joseph Shine v. Union of India*<sup>9</sup> – recognised the importance of sexual autonomy and linked it to reproductive autonomy. Thus, above cases show that a woman has an absolute right to abortion and no one can take away this right from her. The judiciary has been playing a vital role in securing these rights to women. Right to abortion is a fundamental right of privacy. So many previous cases can be easily discussed and welcomed but its easy implementation is possible only through legislations and its implementations.

## **XII. Bodily Sovereignty**

Women have their bodily sovereignty. If suppose abortion is banned, a woman does not want to carry her pregnancy, she would carry it and then abandon the new born child. This would be more dangerous to the life of the baby. Thus, it is better to terminate the pregnancy at an earlier stage when it is demanded by that woman. The unborn was treated as equal to human being at least for the purposes of its protection. But as times have brought about revolutionary changes, each person has a right to bodily sovereignty and human rights instruments protect such rights internationally. Thus it becomes important to secure the right to abortion to every woman. That is the law has to take care of liberty of the mother as well as the unborn.

## **XIII. Failure of Legal Machinery**

Yet, current abortion laws fail to allow to exercise the right. While the MTP Bill, 2020, is a step in the right direction, it still fails to address most of the problems with the MTP Act and it is hoped that MTP Bill, 2020 will not lapse in Parliament like its predecessors, it is evident that it does not do enough to secure women's interests, and there is still a long road ahead for progressive abortion laws. Even if there is no threat to the mother's life, she would be able to procure an abortion as soon as a substantial foetal abnormality comes to light. While this is an important step and would have in the past helped many women who fought long battles in Court without recourse, it is crucial that it is accompanied by appropriate rules for the Medical Boards that guard against unnecessary delays, which only increase the risks associated with a late abortion. Several cases have followed since. Only in some of them has the Supreme Court allowed the termination of a pregnancy beyond 20 weeks (i.e.24 weeks), based on the advice by the Medical Board regarding the threat to the mother's life. Thus

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<sup>8</sup> (2016) 7 SCC 485

<sup>9</sup> 2018 SCC OnLine SC 1676

analysing various problems regarding abortion, number of amendments needed to be made in laws.

#### **XIV. Conclusion**

Still the religious, moral and cultural sensibilities continue to influence abortion laws throughout the world. Myths and ignorance regarding abortion should be curtailed and it should be completely put to be free in the hands of women. In Germany, the law permits abortion after mandatory counselling and a three-day waiting period. Rather than criminalising abortion, German law focuses on counselling, employment security, social welfare, and financial support to persuade pregnant women to give birth to their children. In this way, German law successfully achieves some degree of protection for the unborn by obtaining voluntary recognition of personal responsibility and respect for the personhood of the unborn and women's right. The law followed by Germany is very much efficient and it meritorious because there is no evil effects in following those ways. This way is really a welcomed one and India also in need to adopt this kind of ways which neither affect women's liberty on decision making regarding abortion and life of unborn ones also. There should be no obstacle in women's right to decide whether she prefer to abort or to continue and there can't be. It should be changed from women can request abortion to demand abortion.