

THE FEMINIST DUALITY: EMBRACING PATERNAL INVOLVEMENT AND RECOGNITION IN ABORTION DECISION-MAKING

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ABSTRACT

Abortion is a method of terminating a pregnancy. It can be done in two ways: “medical abortion,” which involves using drugs or abortion pills to end the pregnancy, or “surgical abortion”, which involves removing the pregnancy from the uterus. Despite its growing popularity, abortion is still a difficult issue. However, as times have changed, people’s ideologies have gotten more liberal, and as a result, various laws have been enacted, legalizing abortion in India. The Medical Termination of Pregnancy Act of 1971 made abortion legal in India. While most abortion debates centre on the rights of the mother or the unborn child, the rights of the father are rarely discussed. The rights of the father in abortion are mentioned but not fully safeguarded in the various legal frameworks developed in India, thus this paper critically analyses the rights and duties of a father during and abortion. In the context of American courts, we observe that the courts have been categorical that the rights of men and women in abortion cannot be deemed equal, and that women do not require permission from their husbands to have an abortion. The Supreme Court of India in a 2017 case considered whether the husband/consent of father to abortion is relevant. The Supreme Court examined the case and dismissed the appeal filed by the father. It was discovered that a woman’s right to choose her reproductive choices falls under the purview of Article 21 of the Constitution, which deals with personal liberty. The laws in India have also been very strict and just, with the primary motivation being a mother’s right to abortion. Paternal rights activists all over the world debate how abortion laws should take fatherhood into account. However, the Supreme Court of India held that the father has a right to be heard, but the ultimate decision lies with the woman. While the Medical Termination of Pregnancy Act provides for the conditions under which a pregnancy can be terminated, it does not address the rights of the father.

I. INTRODUCTION

The legality of abortion and the extent of women’s reproductive rights have been hotly debated in India for decades. Although India’s abortion policy and regulation are progressive, effective implementation of enhanced access to safe abortion treatment is frequently lacking²²³³. Under Indian law, the right to abortion is primarily granted to women. The Medical Termination of Pregnancy (MTP) Act of

1971 establishes the conditions under which a pregnancy may be terminated also the Indian Constitution recognises the right to privacy and reproductive rights as essential rights. The Supreme Court of India has ruled in many landmark instances that a woman’s right to make decisions about one’s body and reproductive health is protected by the Constitution. While the debate has largely centred on the rights of the mother, the rights of the father in an abortion case have often been overlooked, The Supreme Court has recognized the father’s right to be heard, but the

²²³³ Siddhivinayak S Hirve (2004) Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters

ultimate decision lies with the woman. This research paper aims to explore the rights of a father in an abortion case and the concept of financial abortion.

II. MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

Abortion or Induced abortions were a criminal offence under sections 312 to 316 of the IPC 1860, unless done to preserve the mother's life. The term "causing miscarriage" has been used to allude to abortion. Thus, according to these sections, anyone who causes a miscarriage voluntarily faces three years in prison and/or a fine. Mahatma Gandhi, a well-known proponent of nonviolence, was reported as saying, Abortion appears to me to be a crime as clear as day. However, as times have changed, people's ideologies have gotten more liberal, and as a result, various laws have been enacted, legalising abortion in India. Many countries have liberalised their abortion laws in recent years. Many countries have restrictive abortion regulations, and many countries allow women to get abortions on their own desire. Among these countries, India liberalised abortion laws in 1971 by enacting the Medical Termination of Pregnancy Act, 1971, which established certain exceptions to the provisions of the IPC, which declared all abortions and miscarriages to be criminal offences unless performed to save the life of a pregnant woman.

Each woman has the entire authority and right to choose what happens to her body, no one should force her to carry or terminate a pregnancy against her desire. The Medical Termination of Pregnancy (Amendment) Act, 2021 is the primary law in India governing pregnancy termination. The Medical Termination of Pregnancy (Amendment) Act, 2021 alters the MTPA 1971, It was enacted with the intention of allowing registered medical practitioners to legally terminate pregnancies in limited circumstances as specified in the Act.

III. RIGHTS OF THE MOTHER

The Supreme Court's decision in the *Justice K. S. Puttaswamy case*²²³⁴, in which a nine-judge bench unanimously affirms the right to privacy as a fundamental right under the Constitution, reiterated *Suchita Srivastava's case*²²³⁵ and held that a woman's right to abortion falls within the purview of the right to privacy, and thus all her reproductive rights and decisions should be ensured by the state. As a result, the courts have ruled that a woman's right to abortion is a basic right. The Supreme Court extended to single women along with the unmarried ones the right to safe and legal abortion up to 24 weeks of pregnancy, stating that it is the "right of every woman to make reproductive choices without undue interference from the State". Unmarried women over the age of 18 can grant their own written consent to have an abortion. excluding single women in consensual relationships would be "unconstitutional" all women, regardless of their marital status, were entitled to safe and legal abortion

If a woman is under the age of 18, she must offer written consent. This consent must come from her guardian, coupled with a specific reason for the pregnancy termination²²³⁶. No termination of pregnancy can take place, even in accordance with the provisions of the Act, unless the woman who is pregnant consents to it.

IV. RIGHTS OF THE UNBORN CHILD

Religious, moral, and cultural sensibilities continue to shape abortion legislation around the world. The right to life, the right to liberty, and the right to personal security are key problems of human rights that are sometimes used to justify the existence or absence of abortion regulations. The foetal life issue, which raises the question of whether one person's desire for autonomy can extend to extinguishing the life of another. Killing innocent people is a crime, and a foetus is likewise an innocent life. Another argument is that an

²²³⁴ Justice K. S. Puttaswamy (Retd) & Anrs. v. Union of India and Ors., (2017) 10 S.C.C. 1

²²³⁵ Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC 1

²²³⁶ MYADVO, Antim Amlan, civil, Is Abortion legal in India?, 12-sep-2019

embryo (or, in later stages of development, a foetus) is a human being who, from the time of conception, is entitled to protection and so has a right to life that must be respected. Abortion, according to this reasoning, is homicide. The primary question now is whether or not the unborn kid is considered a person. The child's position in the mother's womb is now that of a foetus until birth. There were various theories given to consider the position of a foetus to be considered as a subject that can be protected by law.

1. The Supreme Court stated in the most famous US case, *Roe v. Wade*²²³⁷, that the foetus is not living until after the period of quickening.
2. According to Dworkin, the foetus has no interest before the third trimester²²³⁸.
3. According to scientists, the brain develops sufficiently to feel pain during the twenty-sixth week, hence the foetus does not sense pain before that.

As a result, whether abortion is in the foetus's best interests or not is determined by whether the foetus has any interests at all or if he is considered as a living creature for the law to operate, since a non-living creature cannot have interests. Only after the third trimester will the foetus have interests and be able to live on its own²²³⁹. In law and reasoning, no harm may be done to someone prior to their existence. As a result, we find that, on the basis of existence and interests, the rights of the woman must take precedence over the rights of her unborn child.

V. RIGHTS OF FATHER

While most abortion conversations centre on the rights of the mother or the unborn child, there have been initiatives to elevate fathers' rights in abortion decisions. Expectant fathers may object to a pregnant mother's decision to terminate a pregnancy, or they may object to

taking on the responsibilities of fatherhood and opposing the continuation of a pregnancy to term. In most cases, courts have seen father's rights in abortion decisions as secondary or irrelevant to those of the mother.

If a father's pregnant partner wants to have an abortion, the father's approval is not legally necessary; the person carrying the child may choose to terminate a pregnancy notwithstanding the father's objections. The legal justification for this is twofold. It is based on a woman's right to privacy in her medical decisions, as well as the fact that pregnancy has a greater impact on the mother. Respect for the pregnant party's reproductive rights was crucial in both cases. The Supreme Court has ruled that statutes demanding a spouse's consent for an abortion are unconstitutional. Considering, If a guy wishes to have a child but the same is opposed by his spouse, and subsequently the spouse becomes pregnant and chooses to abort the child, the Father in this case is bound to face mental harm and distress.

If the father has made conscious preparations to have a child and the woman deceives him by agreeing to it but then aborting the embryo, some say that this is ethically repugnant and should not be legalised. A woman if she wishes can force a man to become a father by choosing not to abort the child and ask maintenance for the child in return, and since the Father cannot demand an abortion he is now liable to pay maintenance. Also a woman may deny a man the opportunity to become a parent by getting an abortion; yet, a man cannot force a woman to continue her pregnancy. The duality is a mockery to a Father's rights, autonomy and desires. Many arguments to expand rights for fathers who want to keep their children are based on this duality.

a) Father's Rights and Abortion: Notice Requirements

In *Planned Parenthood v. Casey*, the Question was centred on, Should a woman

²²³⁷ *Roe v. Wade*, 410 U.S. 113 (1973)

²²³⁸ Ronald Dworkin, *Freedom's Law: The moral reading of the American constitution*, 90 (Oxford University Press ed., 1999)

²²³⁹ Sai Abhipsa Gochhayat, *Understanding of Right to Abortion under Indian Constitution*

be obligated to notify the father of her pregnancy before deciding to terminate it? the Supreme Court of United States examined this issue and ruled that such a law was unconstitutional. According to the Court, while most women discuss abortion with their partners, those who do not are far more likely to be in abusive situations. The Supreme Court viewed spousal notification rules as imposing an unreasonable burden on women who may be concerned about their own or their children's safety.²²⁴⁰

b) Harm to the Father (the ethical issues)

Many fathers-to-be are ecstatic at the idea of having a kid. Someone intentionally depriving them of this through deception can be extremely devastating to that man, who may regret the abortion for the rest of his life. It is not uncommon for people to wonder who their child might have been, or to be enraged at the loss of their potential family. Where a father wants a child and is able and willing to take care of the child, it can seem incredibly unfair to deprive him of this²²⁴¹. Arguments against father's rights in abortion cases assert that the rights of the mother and foetus must always take precedence. Her right to choose what happens in her own body is a feminist tenet that is widely acknowledged. A father has no right to demand an abortion if he does not want the child. This is because the woman bears the burden of pregnancy, childbirth, and (typically) the majority of the care, and forcing her to have an abortion would be unconscionable and cruel.

VI. FINANCIAL ABORTION: THE STEP FORWARD

Once a child is born, a father cannot escape his legal responsibilities to the child. Regardless of the father's objections to taking the pregnancy

to term, the father is normally responsible for paying for the child after birth. As a result, some fathers' rights campaigners have come out against what they regard as a double standard in family planning. Father's rights supporters claim that a man should be entitled to choose whether or not to be a father after conception. Brown University professor Frances Goldscheider has advocated that dads should have the right to "financial abortions".

A "financial abortion" right would require a pregnant woman to tell a prospective father. If the father does not wish to be a father, he would be able to decline financial or legal responsibility for the child. If the child is born anyhow, the biological father is not legally or financially liable for the child's upbringing²²⁴².

if we expect men to be responsible, isn't it right to give them some choices too?

introducing financial abortion is a legal stunt, but as a way of calling attention to double standards and unintended consequences. Matt Dubai, a 25-year-old computer programmer from Michigan, was forced to pay child support after his ex-girlfriend gave birth to their child. He claims he made it plain during their relationship period that he did not want to have children; she said she couldn't get pregnant anyhow due to a medical ailment. He claims that if she had become pregnant, she could have opted to have an abortion. So shouldn't he have a say in whether or not to support a child he never wanted?²²⁴³

The court rejected his argument that because a woman can avoid motherhood through abortion, a man has the right to abdicate responsibility for a kid born against his desires. The court recognised the issue as one of the child's right to parental support rather than one of the father's vs the mother's interests. Parents

²²⁴⁰ Father's Rights and Abortion, FindLaw, (Apr. 16, 2023). <https://www.findlaw.com/family/paternity/fathers-rights-and-abortion.html>.

²²⁴¹ The Rights of the Father in Abortion Cases, The Ethics and Financial Committee, (Apr. 16, 2023), <https://www.efc.org.uk/the-rights-of-the-father-in-abortion-cases/>.

²²⁴² Father's Rights and Abortion, FindLaw, (Apr. 18, 2023). <https://www.findlaw.com/family/paternity/fathers-rights-and-abortion.html>.

²²⁴³ Gibbs, Nancy. "The Abortion Campaign You Never Hear About." Time, March 26, 2006, <https://content.time.com/time/nation/article/0,8599,1173414,00.html>.

were responsible for their children's support and education once they were born.

Private agreements between spouses are another option for fathers who want to have a child but their partners do not. A father and a pregnant partner may be able to reach an arrangement outside of the judicial system if the father wants the mother to keep the kid. If a potential mother decides to abort a pregnancy against the wishes of the father, an attorney may be able to create an agreement in which the father agrees to cover prenatal costs and obtain complete custody after birth.

VII. CONCLUSION

This research paper explores the rights of a father in an abortion case in the Indian context, taking into account the legal framework in place, judicial decisions, and recommendations. Under Indian law, the right to abortion is primarily granted to women, and the Medical Termination of Pregnancy (Amendment) Act of 2021 establishes the conditions under which a pregnancy may be terminated. The Indian Constitution recognises the right to privacy and reproductive rights as essential rights. The Supreme Court of India has ruled that a woman's right to make decisions about her own body and reproductive health is protected by the Constitution. The father's right to be heard has been recognized by the Supreme Court, but the ultimate decision lies with the woman. The paper also explores the rights of the mother and the unborn child in abortion cases. It also discusses the issue of father's rights in abortion decisions. It explains that while most abortion conversations centre on the rights of the mother or the unborn child, there have been initiatives to elevate father's rights in abortion decisions. However, in most cases, courts have seen father's rights in abortion decisions as secondary to those of the mother. It explores the issue of whether a father has the right to be notified before the abortion takes place and whether it is a breach of paternal rights if that notice fails to occur. Further the idea of "financial abortion" as a way to address the

double standard in family planning is shown and an alternate of private agreements between partners is also suggested in cases where the father wants to nurture the child but the mother is insisting an abortion. Thus it is essential to continue to strive towards a more equitable and just society, where the rights of all individuals are respected, and decision-making power is not based on gender.

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