



LIFTING THE VELL OVER THE LEGAL ARCHITECTURE ON ABORTION IN INDIA: A CRITICAL LEGAL ANALYSIS

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ABSTRACT

For centuries, women have fought for their reproductive rights. Abortion and women's reproductive rights are global issues. Women have been given the ability to reproduce, which sets them apart from men. Because the circumstances were so dire at the time, women did not have a choice regarding whether, when, or how many children they wanted to have. Even they are denied the right to a safe abortion and safe methods of contraception. Everything began with a few small campaigns to educate women about their rights. Women have been granted a number of rights, but the right to have an abortion is widely regarded as the most fundamental one. Because the woman's body will give birth, she should be able to choose whether or not to have a child. Regarding its legality, abortion is a topic that elicits varying opinions. The big question for everyone is whether an unborn child has the right to life or whether a woman has the right to end her pregnancy whenever she wants. In this paper, the researcher will address all of these issues, with an emphasis on the abortion of rape victims. For this study, the doctrinal method methodology was used. As part of the doctrinal research, case law, statutes, and other secondary information from books, journals, websites, and other sources are examined.

1. Introduction

Because it is the fundamental right everyone should have to live a healthy life, human rights ought to be available to everyone. According to Article 21 of the Indian constitution, which states that "everyone within the national territory of the Indian nation is guaranteed the right to life and personally bought tea except to under procedure established by law", the right to life is the most important and supreme right of a human being. The arbitrary taking of a life is against the

International Covenant on Civil and Political Rights in Article-6.^[1] However, there is a significant concern regarding whether or not the Right to Life includes the right to abortion.

It is essential to strike a balance between women's rights to abort and the rights of the unborn in order to protect everyone's rights. Women have always had the right to have an abortion, which is now legal in India. Legally, abortion is defined as a voluntary premature delivery with the intention of

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killing the fetus. It can be obtained prior to the child's natural birth at any time.

However, in medical parlance, abortion is defined as the premature birth of a child before it is viable—that is, capable of being raised—at the time of the abortion. Beginning at the twenty-eighth week of pregnancy, a child is considered viable. The act of removing or expelling a fetus or embryo from the uterus, resulting in its death, is known as an abortion. This can take place naturally as a miscarriage or artificially through the use of chemicals, surgery, or other techniques. The idea is that the rights of the mother should take precedence over those of the unborn. Because there is no use in having that child if the woman cannot accept it or does not want to give birth, it will be a win-win situation for both the woman and the unborn child.

If a woman has the right to life, it follows that she also has the right to do whatever she wants with her body or change it in any way she wants. Whether to continue the pregnancy or have the child aborted should be entirely up to her. The Medical Termination of Pregnancy Act of 1972 made abortion legal in India. However, in the current scenario, India does not offer safe abortion services to women. Unsafe Abortion is a major cause of women's death and health complications. It is essential for women's health that they receive health care and those abortions be performed in good condition. She provides all women, including adolescents, with secure contraceptives.

2. Legislative Provisions

Now we particularize Indian law to ascertain it from both sides, i.e., mother and unborn child. These are the following legislation is governed in India for Abortion:

Section 312 of the Indian Penal Code, 1860: “Whoever causes a woman with child to miscarry shall, if such miscarriage is not caused in good faith to save the life of the woman, be punished with imprisonment of either description for a term which may be extended to three years, or with fine, or with both; and if the woman quick with child shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

It simply states that “When a woman carries miscarriage as a purpose. Nevertheless, by legal representation, by legal interpretation, we will find that voluntary causes that voluntary causing miscarriage stands for criminal abortion, not abortion and which is an offense under the Code”. The unborn child must not be destroyed unless the child's destruction is to preserve the woman's life. Abortion can only be permitted in the case of protecting the life of the mother.

The Medical Termination of Pregnancy Act, 1971: This Act states that “abortion can be carried out by a registered medical practitioner in a hospital established or maintained by the Government or a place approved for this Act by the Government. This Act highlights when the pregnancy will be terminated, the stipulated time. At what place termination will occur, and who is authorized to conduct such termination. The medical termination of pregnancy bill was passed by both houses of

Parliament and received the consent of the president of India on 10th August, 1971. Moreover, it came in this statute book as the Medical Termination of Pregnancy Act, 1971. According to the Act, a pregnancy can be terminated under a few circumstances, such as when the continuation of a pregnancy would risk the mother's life or involve significant physical or mental injury to the woman. The Act also sparks why double pregnancies, such as in the case of a lunatic woman. The Act also states that the pregnancy can be terminated within 12 weeks, and the opinion of two or more medical practitioners is required if the abortion is done within 12 to 20 weeks for various reasons.

- 1) The continuance of a pregnancy would be a risk to the pregnant woman's life.
- 2) A risk of grave injury to her physical or mental health.
- 3) If the pregnancy is caused by rape.
- 4) If there exists a substantial risk that, if the child were born, it would suffer from physical or mental abnormalities.
- 5) Failure of any device or method used by the married couple to limit the number of children.

This Act prohibits pregnancy termination after twenty weeks. According to Section 4 of the Act, the termination of a pregnancy must be carried out in accordance with its provisions and in,—

- i) A hospital established or maintained by the Government; or
- ii) a place for the time being approved for the Act by the Government.

The Constitution of India: The Constitution of India also talks about the idea of abortion. The right to abortion might come under Article 21 of the Indian Constitution, which States the “right to life and personal liberty. It is the woman's choice to carry out the pregnancy or not because she has the complete freedom to enjoy her liberty or to the alternate body in any way she can. All the restrictions in the path of the right to abortion are unwelcome. It is rightly said that the woman's decision to abort should always depend upon the woman itself as depending upon various factors like physical and mental health. There are many scenarios in which the family is not financially well off to a bought up a child, but because of social pressure, they want to give birth to a baby. For example, when she wants to change her profession, she requires free time and hard work, which can be a valid reason to abort. Her relationship is not well with her husband, so instead of giving birth to a baby, sometime should be given to your spouse. All these factors are relevant, and the Indian statutes on abortion do not pay any respect to them. The law, thus, is unreasonable and could find out violative of the principle of equality provided under Article 14 of the Indian Constitution”.

3. Comparative Analysis

The majority of our society's most contentious issues involve abortion. In the United Kingdom and the United States, there was a movement for women's health. Abortion is still illegal or restricted in many nations. In many places, women's decision to have an abortion is ignored.

Illegal abortion has led to numerous health problems and deaths. The laws that apply outside of India are as follows:

United States: Roe v. Wade is the landmark judgment of the US: “Their abortion law is based on this case law. The gestation period varies from 8 to 12 weeks. This period varies from State to State in the US. States like Arkansas, Georgia, Louisiana, Kentucky, Mississippi, Missouri, Ohio, Utah, and Alabama ban abortion in their respective states. Centre for its reproductive rights is fighting to keep it that way. Women do not have the privilege of aborting their children. The successive landmark cases like **Gonzales v. Carhart** and **Whole Woman’s Health v. Hellerstedt** further respected women’s stand and removed all the lacunas and limitations on women’s access to Abortion.”

United Kingdom: Abortion is legal in the United Kingdom for up to 24 weeks, but after that, it will only be punished if it puts the mother’s life in danger.

Germany: Abortion in Germany is illegal, but it is not punishable under any law during the first 12 weeks of pregnancy. Nevertheless, it can be permissible if it is a matter of the physical and mental health of the pregnant woman. The gestational limit is 14 weeks, calculated from the first day of the last menstrual period.

Brazil: Abortion in Brazil has been illegal for women since 1890. Women will be punished with up to 3 years imprisonment. However, there are exceptions to it in cases of rape and life-threatening conditions.

Canada: Abortion in Canada is legal at all stages of pregnancy and funded by medical procedure effects of the Federal Canada Health Act, 1984 and provincial health care systems. These services vary by region.

Sri Lanka: Abortion in Sri Lanka is illegal and restrictive, with exceptions being that until and unless it is a matter of a woman’s life. Causing abortion is a criminal act under the Sri Lankan Penal Code with imprisonment from three to ten years, with or without a fine. There are many deaths have been reported from an illegal abortion.

4. Judicial Interpretation

Judiciary plays a vital role in the interpretation of the laws in India as it checks and balances that no one’s right should not be infringed. In a way, these are the judicial decisions that upheld that women’s rights cannot be infringed, and if it is done, stricter punishment should be imposed on the wrongdoer:

X v. Principal Secretary, Health and Family Welfare Department, Government NCT of Delhi and Anr.: The petition was filed by 25 years old unmarried woman in a consensual relationship who wanted to terminate the 24 weeks pregnancy. In this case, The Apex Court ordered to allow an unmarried woman to abort her pregnancy of 24 weeks. Abortion cannot be denied because a woman is unmarried. It emphatically recognized entitlement to abortion as a constitutionally protected ‘reproductive right’. The Apex Court declared that Rule 3–B must also extend to unmarried women who experience a change in their relationship [even if not marital] status, whether due to separation from, desertion

by, or death of their partners. This is because the Medical Termination of Pregnancy Act, 1971 and its rules allow abortion when pregnancies become unwanted due to significant changes in women's lives, affecting their physical and mental health."

R. v. Government of NCT of Delhi: The Delhi High Court allows "medical termination of pregnancy for a 16-year-old rape victim having a fetus beyond 28 weeks. The Court further directed AIIMS to preserve the terminal fetus for DNA testing, which would be required for the pending criminal case".

X. v. Union of India: Kerala High Court allows "14 years old girl to get medical Termination of her 28 weeks of pregnancy. The victim is permitted to get her pregnancy terminated at a government hospital. The superintendent of the Hospital shall take immediate measures to constitute a medical theme for conducting the procedure".

D. Rajeswari v. State of Tamil Nadu and Ors.: The case involves "an unmarried 18-year-old woman requesting the issuance of a directive to end the pregnancy in her womb because carrying the unintended child for three months caused her to become mentally unwell. The Continuation of the pregnancy would cause her to relapse into pregnancy and has caused her significant distress, which would cause severe harm to her mental well-being because the pregnancy was the result of rape. The Court authorized this to end the pregnancy".

Dr. Nisha Malviya and Anr. v. State of Madhya Pradesh: A young girl was being raped by

accused, who was 12 years old and becomes pregnant. Two other people are being accused to take this girl and abort her unborn child. The first accusation against them is that they caused a miscarriage without the girl's consent. The Court held that the three defendants are guilty of an unconsented pregnancy abortion.

Shri Bhagwan Katariya and Ors. v. State of Madhya Pradesh: The woman was Navneet's wife. "While Bhagwan Katariya was the father of stated Navneet, the applicants are his younger brothers. The complainant's spouse and other family members disapproved of her pregnancy, took her for a pregnancy test and performed the abortion without obtaining her permission. A doctor is permitted to end a pregnancy under certain conditions, according to Section 3 of the Medical Termination of Pregnancy Act, 1971. If the pregnancy ended in line with the law, it must be assumed that it was impossible to carry out without the woman's consent. In this case, permanently depriving the lady of her kid has left a scar on her heart and spirit. Furthermore, the physician is responsible."

As a result, the case laws demonstrate that "a woman has an unalienable right to an abortion, which no one can deny. The judiciary has been crucial in ensuring women have access to these rights. A fundamental right to privacy is the Right to an abortion."

Ms. X Thru. Her Legal Guardian Bharat Lal v. State of Uttar Pradesh: Allahabad High Court permits "the medical termination of pregnancy of 23 weeks of a 12-year-old rape victim. The Court

ordered that the petitioner be provided due medical care equipped with all the necessities required. The Court also permitted the medical board to obtain all necessary concerns of the victim's father before the termination of the pregnancy."

Bhavikaben v. State of Gujarat: Given the rape survivor's young age and good health, the severe mental harm brought on by the unwanted pregnancy, and the medical opinion suggesting no risk to her life from termination of the pregnancy, the Gujarat High Court permitted medical termination of the pregnancy.

Ashaben v. State of Gujarat: The Gujarat High Court "adopted a strict interpretation of Section 5 of the Medical Termination of Pregnancy Act, 1971 holding that it only permitted the termination of pregnancies longer than 20 weeks if the pregnant woman's life would be in danger if the pregnancy continued and not because the pregnancy was the result of rape."

5. Conclusion

Abortion is that issue which should be left to the decision on the mother. The researcher found that India is becoming more liberal regarding women's choices and opinions. However, some more changes and liberty should exist to uplift, pregnant women. Women's health should be given priority as this is her basic fundamental right according to

Article 21 of the Indian Constitution. It is also said that delivering 25 million children annually would be a tremendous strain on the Nation's medical service and economic resources rather than performing 10 million abortions yearly.

There is no relevance to giving birth to a child if a mother is unwilling to take care of a child or does not want to even give birth to it because, at last, only that child will suffer the most in the future. There should be awareness spread in our society of unplanned and unwanted pregnancies. We as a society should also help rape women who got pregnant and later, due to health issues, cannot able to abort. We must support and love them. The legislation should make specific laws relating to rape women's pregnancies. The state should take steps to protect maternal health all the time and then the unborn child.

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