ABORTION LAWS IN INDIA: AN OFT-QUOTED DEAD LETTER?

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Introduction

The freedom of a human being, irrespective of what race, caste, or sex they belong to, resides in their ability to make informed and independent choices with absolute authority, as well as decisions regarding aspects of their own life. This independence doesn't need to flow from a statutory law or legal precedent to have meaning, but by virtue of being a living and breathing human. The Constitution of India protects the free will and personal liberty of human beings under Article 21 and gives every Indian citizen the most basic right to decide what is right or wrong for them. The foundation of a human being's freedom and independence is to have bodily autonomy.[1] Autonomy, which gives everyone the power and authority to decide by themselves what happens to their body, without any threats or external forces playing on their mind. Bodily autonomy, as a concept, goes beyond an individual's right. It is a source of strength and courage, and becomes a crucial element in creating an equitable and balanced societal structure.[2]

In furtherance of the supreme law of the land, there are a myriad of legal precedents and laws around the world, which protect the bodily integrity and honor of women when making the choice to abort or not abort a child. Until the crystallization of The Medical Termination of Pregnancy Act in 1971, women did not have a statutory right to get abortions. Additionally, only doctors had a say in conducting abortions as per the Act until the 2021 Amendment, where developments could be observed as an attempt to make the law, a rights-based legislation where women had the sole right to give consent for what happened with their bodies and the doctor's words were more in an advisory role than directory. The Maternity Benefit Act, 1961 provides working women 6 weeks of paid leave in cases of medical termination of pregnancy and

[1] Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161

[2] Author Undisclosed, Bodily Autonomy: Empowering Choices Without Fear, BATTERED WOMEN SUPPORT SERVICES (May 29, 2024), https://www.bwss.org/bodily-autonomy-empowering-choices-withoutfear/#:~:text=Bodily%20autonomy%20is%20a%20basic,right%20is%20essential%20for%20everyone.

additional leave as well due to illnesses arising in the process. The Protection of Women from Domestic Violence Act, 2005 protects women from all kinds of physical, mental, emotional, verbal, and economic abuse. The act of harassing, threatening, or even compelling a woman to continue with her pregnancy and prevent abortion has been interpreted numerous times by the judiciary, to be considered as physical abuse and a massive factor in causing mental trauma.[3]

The decision to access abortion is absolutely of the women and not the men they are associated with.[4] The current legal stance provides that any girl, irrespective of whether under or over the age of 18, needs to give her free consent to the act of abortion and requires her legal guardian to give written consent as well. It is universally accepted and understood that the existence of a law or statute and its on-ground implementation are vastly different concepts and may change how the citizens are affected by the said law. In India, there are a plethora of statutes providing women, the legal protection that they deserve for abortions and termination of pregnancies, yet the reality is depressing, with thousands of cases unreported, illegal and criminal abortions still heavily prevalent in the country, and factors such as caste, religion, and societal thinking influencing the actual act. Therefore, it is a hard challenge to conquer and an even harder question to answer, if the real problem lies in the implementation of the existing legal framework or the thinking of the society?

Types of Abortions: Statistics and Analysis

Abortion is the termination of a pregnancy before the gestation period of about 6 months. It may be termed as the *"spontaneous expulsion of a human foetus during early stage of gestation or expulsion of the product of conception from the uterus before the foetus is viable."*[5] The varying circumstances under which an abortion is required or advised differs based on multiple factors. The categorization is majorly based on around essential aspects which are factored into the process of a child being aborted, which ranges from the legality, purpose, and stage of pregnancy, to the manner in which it is done and consequences faced post-abortion.

Abortion can primarily be categorized into the following categories:[6]

[3] Sidra Mehboob Shaikh v. State of Maharashtra, 2021 SCC OnLine Bom 1839
[4] X v. Principal Secretary, Health & Family Welfare Dept., Govt. of NCT of Delhi, 2022 SCC OnLine SC 905
[5] J.V.N. JAISWAL, LEGAL ASPECTS OF PREGNANCY, DELIVERY, AND ABORTION, Pg. 45-48 (EBC Medico Aspects Series, 1st Edition, 2009) World Health Organization, Clinical Practice Handbook for Safe Abortion, (Issued on June 15, 2023)
[6] World Health Organization, Clinical Practice Handbook for Safe Abortion (Issued on June 15, 2023).

1. Accidental Abortion
2. Complete Abortion
3. Artificial Abortion
4. Incomplete Abortion
5. Criminal Abortion
6. Habitual Abortion
7. Inevitable Abortion
8. Missed Abortion
9. Septic Abortion
10. Spontaneous Abortion
11. Therapeutic Abortion
12. Threatened Abortion

In scenarios where the abortion is conducted with proper procedure and due diligence of the medical professionals, there arises an added responsibility on the said professional to abide by the legal provisions and ensure that the decision being taken is primarily and solely of the patient. Medical terminations of pregnancies are done in one of two ways which is Surgical Abortions or Medical Abortions. Although, the manner and process of 'pain-management'[7] in which they may be done differs. Under both surgical and medical abortions, the professionals may select a particular manner of recovery for the patient, depending on their body type and lifestyle which may be either non-pharmacological methods without the usage of medications or drugs where management of the body post-abortion would be handled through physiotherapy and lifestyle alterations, or pharmacological methods which would include medicated drugs to fasten the process of recovery and make the pain subside.

The routine and activity of calculating or collecting data and statistics on abortion rates in a country like India is a fascinating and strenuous process. Adding on to the extremely large population, the citizens of India are yet to be completely comfortable with the concept of abortion and not consider it a taboo or an unspoken term. Due to the shame attached to

[7] World Health Organization, Clinical Practice Handbook for Safe Abortion (Issued on June 15, 2023).

termination of pregnancies in the country, the conversations around it barely arise, and even if they do, they are often met with discomfort and awkwardness. This leads to abortions being heavily underreported and hidden, especially ones which are illegal and criminal.

As per the latest statistics for the year 2024-25, published on the Ministry of Health and Family Welfare's Health Information Management System (HMIS), the number of medical terminations of pregnancies in India were at 8.93 lakh, which was an increase from the previous years. Even though, the number rose, it was a positive sign from a legal lens where more abortions were conducted with proper procedure and medical attention. The current statistic when compared to almost a decade prior, shows significant growth and development of the medical structure where there's a massive increase in the number of MTPs being conducted by the main source of health care in the country, that being public and private sector hospitals, and well-equipped non-governmental organizations (NGOs).[8] Until a decade before, as per the report of the National Library of Medicine in the United States, nearly 75% of pregnancy terminations were done outside of health facilities. Growing from there, it is in fact a motivating factor that such services are now being availed more by women from rural backgrounds which is a sign of medical terminations of pregnancies being more accessible as well as monetarily feasible for everyone. As of 2021, the National Library of Medicine reported that only 0.25% of women in India reported a social or humanitarian reason for their abortion being conducted which is not a sign of such cases reducing but an indicator of fear of publicizing family issues and trauma induced by societal norms.

Reproductive Autonomy: The Indian Legal Framework & Stance

India is and has been the hub of *culture*, which serves as a way of life for the majority of its population. This culture is not only their faith, but also their environment, geography, and practices, all of which each individual takes great pleasure in. As a result, individuals' opinions and beliefs are profoundly shaped by their habitual settings, leading to diverse perspectives across the country. However, an equally prominent trait of this cultural framework is the support of traditions that are inherently contrary and regressive. This culture operates as rigid societal structures, thereby defining the lives of individuals, especially women, in India. These norms do not remain abstract, but manifests itself in the Indian family structure.

[8] Susheela Singh and Others, The Incidence of Abortion and Unintended Pregnancy in India, 6 LGH. 16 (2018)

A woman's bodily autonomy in the Indian Family has been a negligible topic in the Parliament and public since time immemorial. Discussions on development, education, health and a host of other related issues invariably lead to women's status in Indian society. Since India gained independence, the position of women in our society has been a subject of debate. Yet when it comes to bodily autonomy, women are not autonomous entities. It has always been Husbands, fathers, parents-in-law and other relatives, and even religious leaders deciding the rules for an ideal Indian woman – something that has never questioned. Such persuasive dominance over women occurs despite the development of human rights talk in this country.

While human rights movements have had a long and diverse history in India, Reproductive rights, more specifically has not been an idea that is adopted by the public and media as well. This delay in understanding the gravity of such a concern is justified, as securing basic human rights itself has taken decades of sustained struggle. However, the issue does not lie in the delay, but rather in the way concerns related to reproductive and bodily autonomy are treated as "less important". Women's organisations have been arguing for a more holistic approach to women's lives by including their reproductive lives, but reproductive autonomy continues to be treated as a 'debatable subject' and not a fundamental right.

However, despite this resistance, the law has gradually been responding to issues that affect women's reproductive rights and autonomy. The earliest legislation, the Maternity Benefit Act, 1961, addressed the maternal health of a woman, which ensured maternity leave and aimed at safeguarding the health of working women and children. A decade later, the Medical Termination of Pregnancy (MTP) Act, 1971[9], was introduced, which marked a significant shift by legalising abortion in cases of contraceptive failures, rape, and danger to the mental or physical health of the mother. The Act also introduced restrictions to those who are legally authorised to perform abortions by the State. These two legislations played a significant role in building and developing the institution of motherhood and marriage. According to Ramachandar and Pelto (2010: 146), the main objective of the MTP Act was to liberalize the strict regulations on abortion previously introduced in India in the 1860s under the British regime as well as act as a means to reduce the significant level of maternal morbidity and mortality caused by illegal abortions conducted by untrained and unqualified medical staff.[10]

[9] Medical Termination of Pregnancy Act, 1971 (India).
[10] Sonia Correa et al., The Law, the Courts, and Sexual and Reproductive Rights, 22 Reprod. Health Matters 222 (2014).

More recently, the global rise of human rights language and discourse has led to a further shift away from top-down policies constructed around family planning as necessary for the nations development, to a new emphasis on the rights and choices of individual women. This is particularly visible in newer legislations such as the Prevention of Domestic Violence Act, 2005, which, in addressing the violence directed against women in the home, also draws on international human rights law.

Judicial decisions in revolutionary judgments like *Vishakha V State of Rajasthan (1997)*[11] on the issue of sexual harassment in workplaces which ultimately gave birth to the infamous Vishakha Guidelines and the POSH Act, and the case of *Laxmi Mandai V Deen Dayal Hari Nager Hospital & Ors (2008)*[12] related to the right of women to birthing facilities, explicitly draw on international human rights principles, thereby strengthening the approach of recognising these rights as fundamental, and not mere privileges that women are entitled to.

Other significant national policy initiatives, such as the National Rural Health Mission (NRHM), also outline the importance of choice in contraceptive options as part of their objective to ensure the right to health to all Indian citizens.

In recent decades, several cases have addressed reproductive and maternal justice issues and despite the increasing uptake of rights around issues of reproductive and maternal health in national policy, only one legal judgment, the 'Laxmi Mandai case', has explicitly invoked the language of *Reproductive Rights*. Moreover, the state still continues to carry out an implicit ‘family planning programme’, seeking to control fertility while simultaneously striving to facilitate reproductive 'choice and participation'. This tension is inherent in reproductive decision-making, wherein individual rights must be balanced against the collective welfare that exists at multiple levels of the State through policies around national development, and within non-state institutions such as the family, community and society.[13]

The problem lies here, where the law starts acting as a formality on paper, but these institutions remain the deciding factor of such choices to be made. The ability to make a decision and exercise choices does not change overnight with laws, literacy, or information, but when this collective process of building self-esteem amongst women is overshadowed by cultural and

[11] Vishakha V State of Rajasthan, (1997) 6 SCC 241 (India).
[12] *Laxmi Mandai V Deen Dayal Hari Nager Hospital & Ors* W.P. 8853/2008 (2010) (India).
[13] Ushma D. Upadhyay, Shari L. Dworkin, Tracy A. Weitz & Diana Greene Foster, Development and Validation of a Reproductive Autonomy Scale (2014).

social practices that add additional burden on women to maintain family status and uphold cultural and religious norms, the purpose is defeated.

Abortions of Rape and Sexual Harassment Victims

Every medium of national news in India may or may not cover corruption, entertainment, or politics on a daily basis, but it is regularly headlined by an unfortunate incident of rape. The frequency of such incidents has desensitised the public in such a manner that brutality is no longer shocking, but expected. The law starts to seem meaningless, due to its ineffectiveness and because of how rape is perceived by both the legal system and society. Even after horrifying cases such as the *Nirbhaya* case*,* the change remained minimal. The law did observe reform, but the society responded differently. Survivors of rape were made to feel more humiliated, viewing rape and sexual assault cases as cautionary tales for women, thereby shifting the accountability. This reflects the bigger picture, where laws may change on paper, but a regressive attitude and societal norms are the decision makers at the end of the day. This is clearly visible in cases where the survivor is often forced to marry their own rapist to erase the shame imposed on them, even though it being completely illegal in the eyes of law.

Reproductive autonomy, after a situation like rape or sexual assault, is often restricted not by the Law, but by how society works in real life. Survivors face judgments, backlash and are treated as the criminal rather than the victim. Abortions are refused due to the delays in filing police reports, the absence of "consent" of guardians etc, which is something the law truly does not demand. Each delay pushes pregnancy further, which at times exceeds the legal limits for abortion as well. The truth is, many, particularly young girls/women living in abusive relationships, and often require weeks to speak up. Fear, shame, threats, and a lack of information account for this prolonged silence. By the time they actually show up at a healthcare facility, a system treats them as a 'bureaucratic challenge to be managed, rather than a person to be served'. Medical boards are established, and files are drawn out slowly while decisions are merely made on a 'rare legalistic basis', disregarding mental anguish and realworld experience.

Domestic laws in India place a clear legal responsibility on health professionals to offer immediate care and treatment to rape survivors, including timely access to abortion. It is past due time for both the government and the courts to begin to hold themselves and health professionals accountable for ensuring this care is provided. The reason is that even today,

enormous damage is inflicted on women and girls by the misinterpretation of the laws on abortion and rape, combined with a lack of understanding of the serious damage rape does, particularly repeated rape, and alongside other forms of assault and abuse.

Protection of Women: Future Prospects & Alterations in Law

Reproductive autonomy fails in India not due to an inadequate legal framework, but because the law invites and appreciates to an extent, societal intervention. Perhaps the greatest admission of such failure is seen in how rape is dealt with in India. Rape survivors are managed into "solutions" like marriage by relatives, family and community leaders as well at times. How other countries have resolved the question of rape as a bar to bodily and reproductive autonomy is by addressing the problem in the simplest, yet most vital way, which is by eliminating the moral responsibility from the legal remedy. In countries like Canada, the law governing rape and sexual assault is concerned with the absolute violation of consent, where all aspects of the law are committed to rejecting the consideration of morality.[14] The legal framework for offences in South Africa is also rooted in the idea of dignity, rather than the honour of the family or reputation,[15] which is something that Indian courts heavily rely on while sentencing an individual. This has evidently been observed in courts, especially in a case in 2021 where a bail order was granted to an accused 'IIT student' in a sexual assault case, marking that the accused was a "future asset to the country", despite the seriousness of the allegation.[16]

India, concretely, shall implement such a path as it does not need to rethink any culture, but only calls for clear legal thinking where the criminal codes can specifically, rather than implicitly, have been influenced by judicial decisions, forbid any implication of marriage, compromise, or reconciliation being entertained in sexual offence cases. The Judiciary has a prominent role to play by stressing the fact that rape is an infringement of autonomy rather than a mere social issue that can be solved through marriage and education. Without this clarity, reproductive autonomy would continuously be undermined by practical solutions that are imposed upon the victim.

With regards to the question of access to reproductive healthcare facilities after sexual assault

[14] R v. Ewanchuk, (1999) 1 S.C.R. 330 (Can.).
[15] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
[16] Gauhati High Court Grants Bail to Rape Accused on Condition That He Marries Survivor, BAR & BENCH (Sept. 16, 2019), https://www.barandbench.com/news/gauhati-high-court-grants-bail-rape-accused-conditionmarry-survivor.

or rape, it appears to be another area in contemporary Indian life where we are succeeding in terms of ideals, but failing in terms of implementation, yet again, in opposition to our declared ideals. Countries such as Uruguay are of particular interest in terms of reproductive choice because they have chosen to treat abortion not as a moral issue that must be justified, but as a *service* that must be delivered.[17] Under Uruguay's abortion law, sexual assault survivors are entitled to time-sensitive, confidential, non-directive counselling, followed by access to abortion services under the public system. The state doesn't debate, in terms of services, whether or not they think that sexual assault survivors have moral worth or deservingness of autonomous choice. The state simply presumes the autonomy. The World Health Organisation has long emphasised that timely and safe abortion services are integral to reproductive rights, particularly in cases of rape.

Moreover, in India, abortion policy is already relatively liberal under the Medical Termination of Pregnancy Act. However, there is a delay, medical boards, family pressures, and denials. What can help improve this is making a specific policy of a mandatory hospital procedure, which is a single process or package incorporating forensic, contraception, abortion, and a psychosocial component, mandatorily provided to rape survivors in each hospital. This should be non-discretionary. Reproductive decisions should not be in the hands of a provider who can opt out due to their own conviction, nor should access depend upon a sympathetic hospital administrator.

The recognition of autonomy need not necessarily arise from hospitals, but research from Latin America[18] and the WHO[19] proves that self-managed abortion centres are more effective for timely access. It should be understood that medical or reproductive decisions are ultimately made despite legal or social impediments. Therefore, countries that experience a deficit are those that embrace this fact, hence regulating it instead of denying it. WHO introduced their

[17] Ley No. 18.987, Interrupción Voluntaria del Embarazo [Voluntary Termination of Pregnancy Law] (Uruguay 2012).
[18] Lucía Vázquez-Quesada et al., Abortion Self-Care: A Forward-Looking Solution to Inequitable Access, 46 Int'l Persp. on Sexual & Reprod. Health 91 (2020).
[19] World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems (2d ed. 2012).
[20] Maria Endler et al., Online Access to Abortion Medications: A Review of Utilization and Clinical Outcomes, 63 Best Prac. & Rsch. Clinical Obstetrics & Gynaecology 74 (2020).

self-care intervention guidelines in 2019, which included self-care for abortion.

This could be achieved by protecting doctors and pharmacists who provide the correct information regarding medical abortion and allowing "telemedicine counselling" without fear of prosecution.[20] Government-sponsored hotlines and info portals in regional languages will then empower autonomy devoid of reckless behaviour. When information is not available, autonomy is in the hands of the community and relatives who turn into the biggest villains who coerce survivors into silence.

Lastly, countries that are further ahead on reproductive freedom acknowledge that stigma is not addressed through mere moral lectures. Spain provides a good example as reproductive freedom is a public health and equity issue in Spain. Denial of services based on moral grounds is monitored, tracked, and monitored for audit. The ability to create change is not focused on converting minds; it's about creating a culture of state services that are state-neutral. This is integral because stigma thrives in a discretionary environment. This strategy may be followed in the case of India by treating the denial of reproductive health services as an administrative, rather than a personal act. Accountability for this may be gauged by the extent to which the victim regains power over choices related to pregnancy, privacy, or health, even after the assault, rather than by the success rate of convictions achieved by the authorities.[21]

In a nutshell, reproductive autonomy is not about providing individuals with "choices" but rather, it is about taking away the social negotiations that accompany sexual violence.[22] Comparing other nations demonstrates that this can be done if, in fact, the same is considered a priority, not just in theory. Dignity over compromise, health over morality, and autonomy over expediency is the fact that should be acknowledged. The country does not need new ideals but needs to have the courage to implement the ones it has always boasted about.

Concluding Remarks

The laws in India are crystal clear. Legal precedents are set in stone which provide women the right to get pregnancies medically terminated and also provide them the absolute autonomy to

[20] Maria Endler et al., Online Access to Abortion Medications: A Review of Utilization and Clinical Outcomes, 63 Best Prac. & Rsch. Clinical Obstetrics & Gynaecology 74 (2020).
[21] Bela Ganatra et al., Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14, 390 Lancet 2372 (2017).
[22] Rebecca J. Cook, International Human Rights and Women's Reproductive Health, 24 Stud. Fam. Plan. 73 (1993).

decide what happens with their body. The framework is strong too, with sanctions and punishments clearly inked in the books to punish individuals violating women's abortion rights. With such a strong legal stance, the amount of issues that we witness, shouldn't be practically arising, but yet they do. And as repetitive as it sounds, it's the Indian mindset. For two hundred years, our ancestors were colonized and pressured into thinking a certain way and acting as per the whims and fancies of others. And even after 78 years of independence, the herd mentality and sheep-like thinking has carried forward. Citizens wish to blend in and not speak up, they remain silent and let things happen, which is the root of all predicaments. Societies feel an unnecessary obligation to achieve perfection, but not the kind which the law promotes, but the kind they desire. Such behaviour is derived from an East Asian concept "Fileal Peity" which states that human beings should respect their elders and abide by rules of the community for societal peace and order. This has been ingrained in our brains and influences our daily functioning. And until human beings speak up, not on behalf of their family or society or religion, but for themselves, the problem shall remain, and we can only discuss, not change.