
INDIAN JUDICIARY AND THE ONGOING DEBATE ON ABORTION

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ABSTRACT

Abortion is defined as the artificial or spontaneous termination of a pregnancy before the embryo or foetus can survive on its own outside a woman's uterus, in the black's law dictionary. Spontaneous termination is often called a miscarriage whereas artificial termination is known as Medical Termination of Pregnancy. Abortion has become a controversial topic around the world with mainly two views: pro-life and pro-choice. This article covers the growth of judicial response in India since the enactment of Medical Termination of Pregnancy Act, 1971. The current position in India is more towards pro-choice even though the idea behind enacting the legislation was to regulate abortion for safe abortions. It also briefly covers the ethical and feminist view on the subject. In author's believe protecting access to abortion effectuates vital constitutional values, including dignity, autonomy, equality, and bodily integrity.

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Abortion is defined as the artificial or spontaneous termination of a pregnancy before the embryo or foetus can survive on its own outside a woman's uterus, in the black's law dictionary. Spontaneous termination is often called a miscarriage whereas artificial termination, under Indian Law, is known as Medical Termination of Pregnancy. Much controversy follows the deliberate termination of pregnancy around the world. Mainly oscillating between pro-life and pro-choice i.e., the foetus's right to life and a woman's right over her body. This article is focused on the growth of Indian jurisprudence towards more pro-choice since the enactment of Medical Termination of Pregnancy Act, 1971 ("MTP Act"). However, before moving to that the author also discusses ethical and feminist views on deliberate termination of pregnancy. In author's believe protecting access to abortion effectuates vital constitutional values, including dignity, autonomy, equality, and bodily integrity.

In the words of American author and social activist, Bell Hooks, "*whether an individual female should have an abortion is purely a matter of choice. It is not anti-feminist for us to choose not to have abortions. But it is a feminist principle that women should have the right to choose*".¹ The thought follows from the idea that women should have the civil right to have control over their bodies. Judith Jarvis Thomson, an American philosopher, advocated for the supremacy of a woman's right over her body as a premise of freedom. She argued that one cannot force a woman to bear a child in her womb and give birth to a child if she does not want to do so for various reasons.²

For unmarried women, bearing a child brings with itself various social and economic issues and in such circumstance, termination of pregnancy becomes a necessity. The discussion on this can be found in Kant's famous discussion of retributive punishment³ wherein he contends that while considering a death penalty for murders two instances of killing have to be considered that might not warrant this ultimate punishment: the case of military officers killed in a duel, and the case of the unwed mother who commits infanticide. In this case, the argument is not whether infanticide or deliberate abortion criminal but the fact that woman here is forced to make this choice due to unjust circumstances. Feminist and psychologist Carol Gilligan,

¹ BELL HOOKS, *FEMINISM IS FOR EVERYBODY* (Cambridge, 2000)

² Judith Jarvis Thomson, "*A Defense of Abortion*", 1(1) *Philosophy & Public Affairs* (1971).

³ Jordan Pascoe, "*On Finding Yourself in a State of Nature: A Kantian Account of Abortion and Voluntary Motherhood*", 5(3) *Feminist Philosophy Quarterly* 1, 4-6 (2019).

observes that when deciding to terminate a pregnancy voluntarily, a woman faces a true “moral dilemma” or “moral conflict,” because such a decision frequently takes into account human relationships, the possibility of not hurting others, and responsibility towards others.

On the other edge, the pro-life supporters condemn abortions believing that the death of an unborn child is a social death. A feminist scholar, Erika Bachiochi,⁴ claims that abortion has irreversible effects on women’s health as supported by studies. In her words, “*Women can rise to the challenge of an unintentional or even abnormal pregnancy — if they have the emotional, financial, and professional support they need. Carrying and giving birth to an unplanned child will take self-sacrifice. There’s no denying that. But women who have aborted — and those who have merely lived during this long era of abortion — have sacrificed far more.*” Further, the pro-life supporters such as Christopher Kaczor in his book, *The Ethics of Abortion: Women’s Rights*,⁵ have gone as far as to argue that artificial wombs might end the abortion debate.

Legal Background

Abortion has always been considered as a part of women’s liberty, equality and economic security. The World Health Organization (WHO) in “Safe Abortion: Technical and Policy Guidance for Health Systems” had recognized that states need to apply a broad interpretation of a threat to women’s life, acknowledging that both social conditions and medical can constitute life-threatening conditions. The WHO also suggested that the medical conditions that are considered life-threatening in their countries, should consider these conditions as illustrative only and not exhaustive. States should not overrule the opinion of a medical practitioner that whether a woman’s life is in danger or not.

Till 1971, Indian law dealt with deliberate termination of pregnancy through Section 313 and 314 of Indian Penal Code. In 1966, the government constituted an expert committee to review the existing mechanism dealing with abortions. The idea was that of IPC dealing with illegal abortions were enacted about a century ago and keeping with the then British Law on the subject did not make sense. Unlike many progressive law reforms introduced in India in last

⁴ Erika Bachiochi, “*How Abortion Hurts Women: The Hard Proof*”, CAN
<https://www.catholicnewsagency.com/resource/55402/how-abortion-hurts-women>

⁵ CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* (Routledge 2nd ed. 2015)

few decades which find their roots in International Treaties, MTP Act was an Act that came to be introduced pursuant to recommendations of Shantilal Shah Committee constituted in 1966.

The legislation was not enacted based on pro-choice debates. As the statement of objects and reasons of 1971 Act says, it was enacted with a view to liberalize then existing provisions relating to termination of pregnancy. The Act was kept as concern not only health of the woman but also humanitarian & eugenic grounds, former being when pregnancy arises from a sex crime and the latter is concerned with child's health if born.

It introduced a well laid procedure for (i) who can terminate the pregnancy, (ii) when pregnancies may be terminated by Registered Medical Practitioner and (iii) the place where pregnancy may be terminated. As per the act, a pregnancy may be terminated by a registered medical practitioner up to the 20th week of pregnancy. Various reasons for which termination can be done under the act have been covered, these have been further broadened by the judiciary. Such as if upon confirmation that the continuation of the pregnancy will either be a risk to the woman's life or gravely injurious to her physical or mental health or if there is substantial risk that the child may have serious physical or mental abnormalities when born. The act also covers pregnancy caused by rape or due to the failure of contraceptives where it would constitute grave mental health injury. The Act was recently amended to include termination of pregnancy post 20 weeks in certain cases, such as if it is immediately necessary to save the woman's life. In all cases of abortion after 20 weeks that have come before the Court, the Court constitutes a Medical Board, an expert committee of medical professionals that produces a Report. The Report addresses whether, first, the continuation of pregnancy would cause grave physical or mental injury to the woman and, second, whether the child born would suffer from any mental or physical disabilities.

Judicial Perspective: Significant tilt towards the pro-choice debate

Indian courts have considered the woman's right to reproductive choice a dimension of personal liberty. It is considered a sacrosanct right to bodily integrity and an inseparable part of her personal liberty under Article 21 of Constitution. The courts have gone further to observe that "forcing a woman to continue with her pregnancy would not only be a violation of her bodily integrity but also aggravate her mental trauma."

Over the years, MTP has seen a significant tilt towards the pro-choice debate. Mainly in last two years, starting with the Supreme Court judgement in the case of *X v. Principal Secretary*,

Health and Family Welfare Department,⁶ increasing the 20 weeks period under MTP to 24 weeks. Another important amendment was in Explanation 1 and 2 to Section 3(2) extending benefit of termination of pregnancy occurring as a result of failure of any birth control device or method used any woman and her partner for the purpose of limiting the number of children or preventing pregnancy. In last few months, India has observed many progressive decisions on this subject.

In July this year, a bench comprising Justices D.Y. Chandrachud, A.S. Bopanna and J.B. Pardiwala in *X v. Govt of NCT of Delhi*⁷ observe that the decision to terminate pregnancy is firmly rooted in the right of bodily autonomy especially because foetus relies on the woman's body to sustain. Further, if the State forces a woman to carry an unwanted pregnancy to the full term, it will amount to an affront to the dignity of the woman.

In another decision of the Punjab and Haryana High Court,⁸ the Court considered the right to choose with respect to deciding to continue pregnancy. The court while stressing on that motherhood is innate, natural, and fulfilling to every woman, and held that forcing a wife to terminate her pregnancy against her will constitutes cruelty.

In a recent judgment,⁹ the court noted the importance of an informed decision being taken by the mother who, with the availability of all the facts laying down risks and probabilities involved, took a cautious and well informed decision while seeking termination of pregnancy. The court observed that the woman has understood as to what the initial pregnancy entails at such an advanced stage and therefore, her decision must be respected.

In the same case, Justice Pratibha M Singh made an interesting observation with respect to the reports of the board and on the use of technology for detecting foetal abnormalities. In her words, *“there is only one ethical concern that the court is thinking of. That is with technology, it is actually very easy to detect a number of abnormalities as of today. We are almost talking of a full-term pregnancy. And going forward, technology may become more advanced and you may be able to do DNA profiling of the foetus, may be to do IQ test of the foetus and all that. See, there are so many Acts etc which are created for persons with physical and mental disabilities...today in advanced countries, the level of testing may be even advanced than what*

⁶ (2022) SCC 905.

⁷ *X v. Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi*, (2022) SCC 1321.

⁸ *Renuka v. Shelly Kumar*, (2022) SCC (P&H) 2735

⁹ *Mrs. X v. GNCTD*, (2022) SCC (Del) 4274.

is available in India. But that's not very far off that even India will have all these technologies. So, I am not taking a view either way but I'm just saying that are we only looking at a society which only have perfect children?"

Although the court ruled in favour of the termination of pregnancy in this case, this question raised by the Justice can be an thought provoking turn in the pro-life and pro-choice debate.

Conclusion

It can be said that the Indian judiciary has moved progressively so far to unique issues and queries brought to it through the cases since the enactment of the MTP Act. However, while considering these judgments, we have to take in mind that the in such cases Judges have to grapple with issues that are not merely factual and legal, but also involve ethical and moral factors. While no woman should be forced to carry on an unwanted pregnancy and bear the burden of unwanted motherhood that affects her personal and professional life, we are far from the days when there would be no legal barrier to a woman exercising her right to abort without explanation, exercising her agency to terminate pregnancy simply because she wants to.