LEGALIZATION OF ABORTION

Shweta Dhir*

The most liberalizing aspect in the administration of gender justice is access to hygienic abortions. Abortion once opposed legally as well as religiously, appears to be one of the necessary requirements for female emancipation. It is a woman’s individual rights, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. To force a woman to continue an unwanted pregnancy is not only an attack on personal autonomy but also infringes her sense of right to privacy, bodily integrity and religious liberty. Laws that force women to bear children not only rob women of their bodily integrity but make women, as a class, involuntary servants to foetuses. Forced pregnancy resembles in many ways with the slavery system of the earliest times. For a more emancipated women, pregnancy is not an advantageous status but a burden which she has to bear for many months if she is forced to bear the child. Forced pregnancy is not advantageous even from the child’s perspectives. Studies in the West showed that, children born when their mothers were refused abortions they had requested, were more likely to be picked up for drunkenness, drug abuse, antisocial or criminal behaviour. In contrast, a planned child may have greater advantages and receive more individual attention from the parents. Parents may take great pride in watching the development of their planned child, or feel great disappointment or perhaps guilt if their son or daughter does not live up to planned expectations.

As the government cannot compel an individual to use his or her body as an instrument for preserving people who are already born, much less for preserving a

* Assistant Professor, GHG Institute of Law for Women, Sidhwan Khurd and Research Scholar, Panjab University, Chandigarh

foetus in the womb. For example, the government cannot force a relative of a child
afflicted with cancer to donate bone marrow or an organ to the child, even if the child
is sure to die without the donation. Then how the government can force a woman to
continue a pregnancy that might entail great health risks for the sake of a fetus. Surely
a fetus cannot have rights superior to those of a person who has already been born.  

Abortion is a highly charged emotional subject which involves some highly
controversial issues of law, medicine and morality. According to World Health
Organization estimates at least 70,000 women die from complications related to
unsafe abortion every year.  Worldwide, unsafe abortions account for 13 per cent of
all material deaths, but in some countries up to 60 per cent of all maternal deaths are
due to unsafe abortion. WHO estimates that more than half of the deaths caused by
induced abortion occur in South and South-East Asia, followed by sub-Saharan
Africa. Hence illegal abortion is the cause of serious health complications and even
death of women the world over. Legal abortion services are not easily available and it
is scandalous that such a basic right as the right to help with planning or preventing
the birth of a child has been denied to women.

Meaning of Abortion

Abortion or miscarriage means the spontaneous or induced termination of
pregnancy before the foetus is independently viable, which is usually taken as
occurring after the 28th week of conception. Children born a few days before the 28th
week are known to have survived with modern care. Medically, abortion means the
expulsion of the ovum within the first three months of pregnancy; miscarriage, the
expulsion of the foetus from 4th to 7th month; and premature delivery, the delivery of a
baby after 7 months of pregnancy and before full term. Legally, miscarriage, abortion
and premature labour are now accepted as synonymous terms, indicating any
termination of pregnancy at any state before confinement. Abortion may be
classified into various categories depending upon the nature and circumstances under
which it occurs. For instance, it may be either, (i) natural; (ii) accidental; (iii)
spontaneous; (iv) artificial or induced abortion. Abortions falling under the first three
categories are not punishable, while induced abortion is criminal unless exempted
under the law.\textsuperscript{12}

\textbf{Provisions in the Indian Penal Code}

The provisions regarding the termination of pregnancy in the I.P.C. which
were enacted about a century ago were drawn up in keeping with the then British Law
on the subject. Section 312, 313 and 314 of I.P.C.\textsuperscript{13} deals with the law on abortion and
miscarriage. Section 312 provides that if any person causes a miscarriage of woman,
he shall be punished with the imprisonment up to three years and fine or with both,
and if the woman be quick with child, he shall be punished with imprisonment up to
seven years and fine also. Under this section a woman who causes her miscarriage or
gives consent to miscarry is also liable for punishment, although this section makes an
exception for causing miscarriage in good faith for saving the life of woman. Section
313 provides the punishment for life or ten years and fine, who causes the miscarriage
of a woman without her consent. Section 314 makes a provision for imprisonment up
to ten years and fine also, who intends to causes miscarriage of a woman by doing any
act.

\textbf{Abortion as a Human Right}

Globally, both in terms of human rights and concern for women’s health,
reproductive right is the greatest need of the human society.\textsuperscript{14} Without reproductive
freedom, including the right to abortion, women will never achieve equality with men
and will be deprived of benefits regarding their health, employment, education and
their roles in family affairs. It is a woman’s individual rights, right to her life, to her
liberty, and to the pursuit of her happiness, that sanctions her right to have an
abortion. Reproductive rights are internationally recognized as critical both to
advancing women’s human rights and to promoting development.\textsuperscript{15}

Since its inception the United Nations has maintained that reproductive
freedom is a basic human right. Promotion of women’s reproductive rights has
recently gained momentum, in large part, due to the 1994 International Conference on
Population and Development (ICPD), held in Cairo, and the 1995 Fourth World, UN

\textsuperscript{13} Act 45 of 1860.
\textsuperscript{14} See \textit{Supra} note 4 at 134.
\textsuperscript{15} See \textit{Supra} note 2.
Conference on Women, held in Beijing.\textsuperscript{16} The consensus statements created at these conferences touch on women’s right to abortion, and thus provides additional support for the notion that women’s reproductive rights are human rights. Treaty – monitoring bodies’ interpretations and jurisprudence have also played a large role in advancing women’s reproductive rights.\textsuperscript{17} Similar to the UN system, regional human rights systems monitoring states’ compliance with regional human rights treaties like European Convention on the Protection of Human Rights and Fundamental Freedoms, Inter-American Commission, African Commission on Human and Peoples’ Rights. While international and regional human rights treaties and treaty – monitoring bodies have yet to directly address the issue of abortion on request, there is strong textual and interpretive support for the above-listed related rights which have been used by national legislatures and courts around the world to guarantee a women’s right to abortion, and which have been used by national legislatures and courts around the world to guarantee a woman’s right to abortion, and which can be used by advocates to promote women’s right to abortion on request.\textsuperscript{18}

\textbf{Legalization of Abortion in other Countries of the World}

Despite moral dissension, the 20\textsuperscript{th} century has been a liberalization of abortion laws.\textsuperscript{19} Due to harmful consequences of illegal abortions and also due to more liberal attitude towards sex and individual freedom, laws have been amended in most countries to allow late abortions. The U.S.S.R. legalized abortion in 1920, followed after World War II by Japan and several east European countries. Abortion was legalized through much of Europe, Asia and the United States in the 1960s and 1970s\textsuperscript{20}. In England, Abortion Act, 1967 also legalized termination of pregnancy on certain situations followed by the Human Fertilization and Embryology Act, 1990. Now the law allows abortion in cases where pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health or where there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Thus, in Britain an abnormal

\begin{footnotes}
\item[20] \textit{Ibid.}
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foetus can be aborted at any stage of pregnancy provided specialists agree that there is a possibility that the foetus if born would have a significant disability.

In America liberalization has been effected by the judicial pronouncement in *Roe v. Wade.* The Court held that the Texas criminal abortion statute restricting legal abortion without regard to: (i) pregnancy stage, and (ii) other interest involved, is violative of the due process clause of the Fourteenth Amendment to the United States’ Constitution, which protects against State’s action the right to privacy, including a woman’s qualified right to terminate her pregnancy.

The countries can broadly be classified into four categories, viz:

1. **Conservative Approach:** Countries that do not permit abortion under any circumstances are Indonesia, Philippines, and Ireland where termination of pregnancy is illegal and punishable under law.
2. **Limited Approach:** Countries like Bangladesh, Pakistan, Sri Lanka and Malaysia permit abortion only to save the life of the mother.
3. **Liberal Approach:** Countries like India, United Kingdom, and United States of America permit induced abortion under prescribed conditions as provided under the abortion legislations of the concerned country; and
4. **Complete freedom to choose:** Countries like Singapore which permits abortion at the discretion of the woman with no restriction of any sort except that it should be performed by a registered medical practitioner in a hospital or a clinic approved by the government.

### Indian Legal Scenario

With the model of the Abortion Act, 1967 of England, the Medical Termination of Pregnancy Bill, 1969 was passed in Parliament followed by the assent of President in 1971 and the Medical Termination of Pregnancy Act, 1971 was

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22 See *Supra* note 12 at 236.
25 Abortion Act, Sec. 7 (2).
26 Bangladesh Penal Code, Sec. 312.
27 Pakistan Penal Code, Sec. 312.
28 Penal Code of Ceylon, Sec. 303.
29 Malaysia Penal Code, Exception to Sec. 312.
30 Medical Termination of Pregnancy Act, 1971, Sec. 3.
32 Termination of Pregnancy Act (Ch. 324), Sec. 3 (1).
enforced from 1st April, 1972 in India. Implemented rules and regulations were again revised in 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available.

**Grounds for Termination of Pregnancy**

The MTP Act, 1971 guarantees the right of women in India to terminate an unintended pregnancy and thus empower a woman to decide whether to continue her pregnancy or to terminate it and thus sparing many women from being ‘forced motherhood’ and ‘inflicted pregnancy’.

The Act authorizes a registered medical practitioner to terminate the pregnancy of a woman on the prescribed grounds when pregnancy does not exceed a period of twelve weeks. However, in case of a pregnancy exceeding twelve weeks but not exceeding 20 weeks the concurring opinion of at least two registered medical practitioners who are of opinion formed in good faith that:

- The continuation of the pregnancy would involve a risk to the life of the pregnant women, or
- A risk of grave injury to her physical or mental health; or
- If the pregnancy is caused by rape; or
- There exists a substantial risk that, if the child were born it would suffer from some physical or mental abnormalities so as to be seriously handicapped; or
- Failure of any device or method used by the married couple for the purpose of limiting the number of children; or
- Risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment.

In 2002 and 2003, the Indian Parliament passed the Medical Termination of Pregnancy (Amendment) Act and amended the Rules and Regulations to strengthen the MTP Act and improve the availability of abortion services. Most significantly, the amended MTP Rules sanctioned medical abortion.

The MTP Act 1971 recognizes the free choice of woman to decide whether and when she will terminate her pregnancy and makes guardian’s consent irrelevant in case the woman is of the age of eighteen years or above. The question arises whether woman can terminate her pregnancy without the consent and against the wishes of her

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36 Supra note 24 at 203.
husband and if so, whether such action on her part would amount to cruelty under section 13(1) (ia) of Hindu Marriage Act, 1955 and would entitle the aggrieved husband to obtain a decree of divorce against her. The question came for the decision in *Satya v Shri Ram*\(^ {37} \) in which the High Court observed:

> In this sort of a case, the Court has to attach due weight to the general principle underlying the Hindu Law of Marriage and Sonship and the importance attached by Hindus to the principles of spiritual benefit of having son who can offer a funeral cake and libation of water to the manes of his ancestors and held that termination of pregnancy at the consent of her husband amounts to cruelty.

The Bombay High Court, upholding the provisions of the MTP Act, which bans the abortion of fetus more than twenty weeks old, refused permission to the petitioner Niketa and Harish Mehta to abort their twenty five weeks old fetus, which was diagnosed with congenial cardiac disorder. Division Bench of the court asked the couple to seek help from the legislature.\(^ {38} \)

**Right to Abortion vs. Right to Life of the Unborn**

The validity of the abortion laws have been questioned on the ground of constitutionality of 'right to life of an unborn vis-a-vis right of the mother to bear or not to bear a child. The mother, therefore, has become a subject of debate among advocacy groups belonging to one of two camps. Those who are against legal restrictions on abortion describe themselves as pro-choice while those who are in favour of prohibition of abortion are considered as pro-life advocates. Pro-life individuals generally believe that human life should be valued either from fertilization or implantation until natural death.\(^ {39} \) Hence it is the God who is the giver of the life and death and not the parents. On the other hand to be “pro-choice” is to believe that individuals have unlimited autonomy with respect to their own reproductive system as long as they do not breach the autonomy of others.\(^ {40} \) Pro-choice individuals accept that woman should have complete control over the fertility and pregnancy. It is personal choice of woman to have children as it affects her body, personal health and future. These are two extreme views. One view opposes abortion and another gives freedom to the expectant mother to terminate her pregnancy even after viability of


\(^{38}\) “It is a job of the legislature to help you alter the provision. We cannot Legisllate the Provision”, the Judges observed. For details “HC says no to abortion of 25 Wk foetus”, *The Tribune*, Aug 5, 2008 at 2.

\(^{39}\) Available at: http://en.wikipedia.org/wiki/Pro-life.

\(^{40}\) Tom Head, “Civil Liberties, Pro-life vs Pro-Choice”, available at: http://www.about.com Guide.
After making a careful study of the pros and cons of the entire issue and taking a pragmatic view of the socio-economic and legal problems involved in the case, it may be argued that a pregnant woman should have “personal liberty” to destroy any foetus of her own if she finds it “intolerance”. To force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her or at least to infringe her sense of self-respect and dignity. The foetus may have a right to life, but not a right to be kept in a woman’s body against her will. After all foetus is a parasite and has less claim to life, than the host i.e. the mother. Hence the foetus in utero is not in the ordinary sense another person distinct from its mother. Even if the foetus is a person, it might be argued that pregnant women have the right to use self-defense in order to protect them from the physical invasion of unwanted pregnancy.

It is submitted that it is the mother next to God who provides the maximum best possible to her child without any reciprocal favour. If she opts for an abortion there might be some reason either due to ignorance, carelessness or acts done willfully. Abortion is an issue to be left to the decision of the mother. It is further argued that if there is no possibility of begetting a living child with all human potential it is better to prevent such child to be born and thereby save it from earthly miseries.

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43 G.V. Ramiah, “Right to Conceive vis-a-vis Right to Birth” AIR Jour 139-140 (1996).