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Abortion: History and Law in India

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ABSTRACT

Even in the 21st century, most women in India is still not able to access the proper abortion facilities. Abortion is still playing a major role in the life of women. In some cases, they have to abort it in their home because the hospital will take them as a patient. Even after all the law and government practices, the women of our country are still struggling. This paper critically analyses the history of abortion law and the polices that are currently in place. The changes that took place in the Medical Termination of Pregnancy Act, including the various sections that were added into it. The paper critically analyses Section 312 of IPC and the various flaws which remained unnoticed till date. It also explains the loopholes both from the past and present by taking example of various cases. In the end, the paper suggests remedies which the government can do to improve the lack of abortion facilities.

Keywords: *abortion, section 312 IPC, sex determination, medical termination of pregnancy act*

I. INTRODUCTION

Abortions is defined differently in both legal and medical world. Legally we define induced abortion as voluntarily and untimely delivery of the foetus with the motive of destroying it. It can be done any time before the birth of the child. In medical world they define abortion as untimely delivery of a child before twenty-eighth week of pregnancy. To deal with abortion, government made the law under The Indian Penal Code,1860 which is the basic criminal law of the country. They made induced abortion punishable under section 312 to 316 of The Indian Penal Code. They made this law because of the religious and moral background of the Indian community. This paper critically analyses the history of abortion and the abortion laws mentioned in The Indian Penal Code.

II. WHAT IS THE LAW?

Section 312 of The Indian Penal Code states “Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term

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which may extend to three years, or with fine, or with both; and, if the woman be 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.”² Explanation—A woman who causes herself to miscarry, is within the meaning of this section. The interesting thing to observe is that in the whole section, there is no mention of the word abortion. They did this to protect the sentiments of religious communities of India. They also did not define the word miscarriage anywhere although it is a synonym of the word abortion. Miscarriage usually means abortion but there is voluntary miscarriage also that means when you destroy the foetus on purpose, this is an offence of criminal abortion under The Indian Penal Code.³ To understand section 312 we need to know the meaning of two words that is described in the section. First word is ‘with child’ and the second word is ‘quick with child’, the former means that when the gestation period of the woman starts and the later means that when the mother felt the motion of the foetus. The latter is obviously an advanced stage of pregnancy.⁴ According to a fact one in every three fertilized embryo dies in uterus and does not attain maturity.⁵

There are few medical grounds mentioned in section 312 of The Indian Penal Code on which abortion is allowed. It says that the foetus or the unborn child can only be destroyed to save a more precious life than the unborn child which is the mother. But the tricky part in this is that almost everyone will say that they aborted their child because the mother’s life was in risk. There will be no way to prove that it was done in good faith. So, we cannot say that all the abortions are done in good faith. It needs to be decided in each and every case. If the act is done in good faith the person is protected under law.⁶ In the case of *Rex v Bourne*⁷, a fifteen-year-old girl was criminally assaulted, and she became pregnant. When the obstetrics surgeon and gynaecologist performed abortion, they were charged under section 58 of the Offences Against the Person Act 1861 for causing abortion against the law. In this case Justice Macnaghten said that if the doctors performed the abortion to save the life of mother or to protect the mother from physical or mental breakdown then they have done nothing wrong and it is their duty to perform the abortion. If he has done the abortion in good faith, then he is entitled to an acquittal and in cases like this the Crown must prove that the abortion was

² Section 312 of The Indian Penal Code, 1860.

³ Gaur, K.D. “ABORTION AND THE LAW IN INDIA.” *Journal of the Indian Law Institute*, vol. 28, no. 3, 1986, pp. 348–363. *JSTOR*, www.jstor.org/stable/43951024

⁴ *Ibid.*

⁵ Mohan, Raj Pal, and Raj Pa Mohan. “Abortion in India.” *Social Science*, vol. 50, no. 3, 1975, pp. 141–143. *JSTOR*, www.jstor.org/stable/41885953.

⁶ Section 52 of The Indian Penal Code, 1860.

⁷ Davies, D. Seaborne. “The Law of Abortion and Necessity.” *The Modern Law Review*, vol. 2, no. 2, 1938, pp. 126–138. *JSTOR*, www.jstor.org/stable/1089231.

not done in good faith.

III. HISTORY

If we look at the history of abortion laws in India then we will realise that before Medical Termination of Pregnancy Act 1971 (MTPA), it was not able to protect illegal abortions. According to an estimate before Medical Termination of Pregnancy Act almost 500 million abortions were carried out every year, in which almost three million were illegal. The sad part in this is that the prosecution rate in this is not even one percent.⁸ According to one more study approximately one-seventh of women who became pregnant in India gets their abortion done by some unexperienced hands like quacks, unqualified nurses. This abortion ranges from Rs. 5 to Rs. 300 and they do this because they fear the law.⁹ Sometimes doctors also exploit the patient because of their desperation. They ask huge amounts for abortion and the patients also end up giving that to save themselves from legal problems. One more study showed that around 3.5 to 4% of total death of women were because of the complications arising from abortion.¹⁰

The main difficulty in dealing with this is that there is no adequate evidence to prove it. The fact that the pregnancy has been terminated can only be proved by some medical examination and according to the law of 1973 the accused cannot be forced to submit the report. In fact, the accused women will also not agree to submit the report.¹¹ There is humanitarian concept also that comes into the play. The patient who undergoes abortion are mostly unmarried girls or widows and further investigation will only harass them. According to the law, police also cannot investigate them as these comes under non-cognizable offences and for investigation, they need order of an authorised magistrate.¹² Non-cognizable offences are those types of offences where police cannot arrest anyone without warrant. Therefore, before MTPA the law was inadequate to deal with abortion.

To understand the need of Medical Termination Pregnancy Act, we need to go back in the past to know how people have different attitude toward abortion and how did the abortion law come into place. The main change in attitude started when the Central Planning Board of

⁸ Menon, N. R. Madhava. "POPULATION POLICY, LAW ENFORCEMENT AND THE LIBERALIZATION OF ABORTION: A SOCIO-LEGAL INQUIRY INTO THE IMPLEMENTATION OF THE ABORTION LAW IN INDIA." *Journal of the Indian Law Institute*, vol. 16, no. 4, 1974, pp. 626–648. *JSTOR*, www.jstor.org/stable/43950395.

⁹ Bose, Asit K. "ABORTION IN INDIA: A LEGAL STUDY." *Journal of the Indian Law Institute*, vol. 16, no. 4, 1974, pp. 535–548. *JSTOR*, www.jstor.org/stable/43950391.

¹⁰ K.N. Rao, 'Abortion and Family Planning', International Conference on Family Planning, 12-16 March 1972, New Delhi

¹¹ *Bhonder v. Emperor*, A.I.R. 1959 Cal

¹² Section 155, Cr.P.C. 1973

the Government of India proposed the idea of family planning measure in 1964. The Government was scared that the religious groups or their leaders will start protesting the liberalisation of the law. We all know that in a conservative society it plays an important role. In a society where a boy and girl cannot roam in the park in evening because they are scared that people will judge them even if they are siblings and not couple, how can we imagine liberalising abortion. According to a research conducted by Gandhian Institute of Rural Health and Planning out of every 73 live birth, there were 15 induced abortions and 10 spontaneous abortions.

IV. HOW MEDICAL TERMINATION PREGNANCY ACT (MTPA) CAME INTO THE PLACE?

To deal with this The Government of India formed a committee in 1964 which was headed by Shanti Lal Shah. The main role of forming that committee was to understand the problems relating to liberalisation of abortion laws and to suggest steps to improve the existing law. The committee submitted their report and the Government of India brought the Medical Termination of Pregnancy Bill in Parliament in 1970. The Medical Termination Pregnancy Act, 1971 is based on the British Law of Abortion, 1968 but the main idea of liberalising abortion law came from the family planner board, the government did not disclose this as they thought that they will face opposition from Mullas, Pandits and religious leaders. The act has three main objectives:

- (i) When the mother's life is in danger or there is risk to physical or mental health of the women.
- (ii) When the pregnancy is caused by rape or intercourse with a lunatic woman. (humanitarian ground)
- (iii) When there is risk that the child will be born with diseases or deformities.¹³

The Medical Termination Pregnancy Act of 1971 consists of eight sections. This was a ground-breaking act as it will give freedom to women from the exploitation of women and society. They can play a role outside home also. This act will help them to decide for herself instead of the family and society. It will be her wish whether she wants to carry the child or not. Another main object of the act beside elimination of illegal abortions is that women should get the right to privacy (whether she wants to carry the child or not).¹⁴ By this act Government is also trying to reduce population as people can now terminate pregnancy if the

¹³ Gaur, K.D. "ABORTION AND THE LAW IN INDIA." *Journal of the Indian Law Institute*, vol. 28, no. 3, 1986, pp. 348–363. *JSTOR*, www.jstor.org/stable/43951024.

¹⁴ H.L. V. Matheson, 450 U.S. 398 (1980)

contraceptive device failed.¹⁵ The eight sections of this act contains various important point and rules like when pregnancy can be terminated by medical practitioners, place where it can be terminated and no legal proceedings will lie against any registered medical practitioner who have acted in good faith or does not have any intention of doing the act in any wrong sense.

V. PRE-NATAL SEX SELECTION AND DETERMINATION ACT, 2002

Another important aspect in abortion is the Pre-Natal Sex Selection and Determination Act 2002. This act prohibits the determination of sex of the foetus as many people take undue advantage of this. By doing sex determination test many families decides to abort the female foetuses. The role of Pre-Natal Sex Selection and Determination Act and Medical Termination of Pregnancy Act is different, but they are somehow linked to each other. In 2000 a PIL was filed in the Supreme Court of India by Dr. Sabu George and the NGOs Cehat and Masum against Government of India. They filed the complaint about the failure to implement the Pre-Natal Sex Selection and Determination Act. The government appointed a policy review meeting in which they decided that the Pre-Natal Sex Selection and Determination Act should not be removed and MTP should not be amended. The need of the time is to make the implementation of Pre-Natal Sex Selection and Determination Act strict.¹⁶ One of the suggestions given in this meeting was to allow abortion only up to 12 weeks of pregnancy but this will again not help as women who are above 12 weeks and wants to terminate the child will go for illegal abortion and that will again take us back to square one.

VI. CONCLUSION

The Government of India has done a lot of work to ensure safe abortion for women, but it is not enough and in the recent years many activists, NGOs and organizations have helped people to get access to safe and secure abortion. One of the most important way to deal with this is to make people aware of the law. We need to tell people about various contraceptive ways and the abortion laws. Many people in rural areas are still unaware of the Medical termination of Pregnancy Act, for people like these government have to think something innovative like voice recordings in their regional language or sending an official to talk to the panchayat and make people aware of the laws and policies. Another main problem is the overpriced medicines. For abortion either you can take medicines, or you can opt for surgery. These medicines are very costly and sometimes doctor manipulates the patient to pay them

¹⁵ Gazette of India; 17 Nov. 1969, pt. II, s, 2, p.880

¹⁶ Government of India. Minutes of Expert Group Meeting to review MTP Act in the context of PNDT Act, 17 April 2002; No.M.12015/15/98-MCH.

more because the patient is helpless. To deal with this government should add all these medicines in the national list of medicines which are sold by government at affordable prices.¹⁷ The legal process is also very slow in the case of abortion. In the past as case was recorded where the accused had HIV and she wanted to deliver the baby, but the judiciary was slow, and they did not proceed with it. Therefore, the 20-week period was lost and now both baby and mother were in risk.¹⁸ Therefore, the need of the hour is to change the policies of abortion law keeping all the issues in mind. In the current scenario abortion laws are not completely free, women can abort based on few conditions only. We need to make the act free and not restricting then only our mothers can have the right to privacy and right to freedom in a true sense.

¹⁷ Gupta, Soumya, and Isha Trivedi. "Abortion Comes at a Steep Price in India." *Https://Www.livemint.com*, Livemint, 9 Nov. 2017, <https://www.livemint.com/Science/a5QMST48DwglFGzIzIQ6H/Abortion-comes-at-a-steep-price-in-India.html>.

¹⁸ Kokra, Sonali. "Why Is India's Abortion Law Failing Its Women On So Many Fronts?" *HuffPost India*, HuffPost India, 5 Aug. 2017, https://www.huffingtonpost.in/2017/08/04/why-is-india-s-abortion-law-failing-its-women-on-so-many-fronts_a_23063014/.