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The Tussle Between Woman's Right to Reproductive Choices and the State's Interest in Regulating Abortions: A Comparative Analysis of Medical Termination of Pregnancy in India and the U.S.A.

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ABSTRACT

The development of woman's rights led to the recognition of the right to reproductive choices as a part and parcel of right to privacy, and thus, protected by the Constitution. However, exercise of such right cannot be allowed without certain restrictions as the state also has an obligation to protect the life of an unborn child. Therefore, a clear balance of these two aspects needs to be maintained; an imbalance on the either side could prove to be chaotic. The Supreme Court of the United States of America has evolved the principle for balancing these two scales from the trimester framework to the undue burden test. The undue burden test examines whether a particular law creates an undue burden on the exercise of the right of reproductive choices of the woman before the period of viability (before the period wherein the foetus cannot survive outside the womb, either naturally or by medical support). After the period of viability, the state has an inherent interest in protecting the life of an unborn child, and thus, abortion is restricted, except to save the life of the mother. However, in India, the judiciary has not developed a standard test to examine whether the balance has been achieved while restricting the right of woman to reproductive choices vis-à-vis the Medical Termination of Pregnancy Act, 1971. The present study, thus focusses on analyzing how far India has maintained the balance between woman's right to decide for her own body and the state's legitimate interest in protecting the life of an unborn child, in comparison with the United States and what lies ahead.

Keywords: *Medical termination of pregnancy, viability, right to reproductive choices.*

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I. INTRODUCTION

Abortion or medical termination of pregnancy was considered a sinful act in earlier times and the person/medical practitioner who performed abortion was penalized under the criminal law. However, with time, it was realized that there might be circumstances where termination of pregnancy is the only viable option to save the life of the pregnant woman, or to save the foetus from a life with physical or mental disabilities. This led to a philosophical shift in recognizing abortion as a legal phenomenon, in certain situations. Thus, the state started regulating abortion and only allowed it to save the life of the woman or to save the foetus from experiencing physical or mental abnormalities, if it is not aborted. This position continued for a long time.

With the passage of time, however, the mindset of the society as well as the courts changed to a more liberal approach towards the right of woman on her own body. The courts sought to recognize the right of a pregnant woman to determine what should be done to her body, as part of her personal liberty. This paradigm shift implied more weightage being given to the reproductive choices of the woman, and lesser state intervention in the exercise of such right. However, the state still had to draw a line as to in what situations can this right be curtailed and to what extent as providing absolute right to reproductive choices would act against state's interest in family planning policies as well as state's interest in saving the life of an unborn child after the stage of viability. Thus, the tussle between the two began.

II. WOMAN'S RIGHT TO MEDICALLY TERMINATE PREGNANCY V/S STATE'S LEGITIMATE INTEREST IN REGULATING ABORTION: AN ANALYSIS

One of the key challenges faced by any state is to strike a balance between individual autonomy² and the equally legitimate, but often conflicting interests of the community³. The conflict between the two forms the basis of the debate surrounding reproductive rights vis-à-vis woman's right to medically terminate her pregnancy.

(A) Woman's right on her own body: Right to medically terminate the pregnancy

India has come a long way in recognizing right to privacy as an intrinsic fundamental right and a part of right to personal liberty under Article 21 of the Constitution of India.⁴ The right to procreate is yet another aspect of right to privacy with its multi-pronged dimensions, which is also known as the right of reproductive autonomy⁵. The woman's right to make reproductive

² Libertarianism.

³ Utilitarianism.

⁴ Justices K.S. Puttaswamy v Union of India, (2017) 10 SCC 1.

⁵ R. Rajgopal v State of Tamil Nadu AIR, (1995) SC 264.

choices has been held as an important dimension of 'personal liberty' as understood under Article 21 of the Indian Constitution.⁶ Reproductive choices can be exercised to procreate as well as to abstain from procreating.⁷

Any reproductive choice is a decision having a direct impact and the greatest bearing only on the concerned individual. Marital and family life are the areas which are left to the exclusive domain of the individual discretion since they belong to the private life of the concerned individual. A citizen has a right *"to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters."*⁸ The right to make a decision about reproduction is essentially a very personal decision either on part of a man or a woman.⁹ Thus, by its very nature, the right to reproductive choices is an aspect of the right to privacy or the *"right to be let alone"* with one's body.¹⁰

As the right to reproductive autonomy has been recognized as part of Article 21 of the Constitution, it also implies that women have a right to decide whether they want to terminate their pregnancy or not. However, the legislation in India dealing with this subject matter has a different implication altogether.

(B) State's interest in regulating medical termination of pregnancy

Having said that the state considers the right to reproductive choices as a part of right to personal liberty, the latter does not prevail without restrictions and is subject to certain limitations. These limitations highlight the state's stand in taking into consideration the community's interest.

*"Assuming that the Fundamental Rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a Fundamental Right, that Fundamental Right must be subject to restriction on the basis of compelling public interest."*¹¹

The Supreme Court of India has recognized that in case of pregnant women, there is also a 'compelling state interest' in protecting the life of the prospective child¹² by quoting the decision of the United States Supreme Court in *Roe v. Wade*¹³-

"it had also recognised a 'compelling state interest' in protecting the life of the prospective

⁶ *Supra* note 4.

⁷ *Suchita Srivastava v Chandigarh Administration*, (2009) 9 SCC 1 (India).

⁸ *Supra* note 5.

⁹ *B.K. Parthasarathi v State of Andhra Pradesh*, AIR 2000 AP 156 at 159 (India).

¹⁰ As recognized in the *Puttaswamy* judgment (*Supra* note 4).

¹¹ *Govind v State of Madhya Pradesh*, AIR 1975 SC 1378 (India).

¹² *Supra* note 7.

¹³ *Roe v Wade*, (1973) U.S. LEXIS 159.

child as well as the health of the pregnant woman after a certain point in the gestation period.”¹⁴

Thus, the state’s interest in putting limitations on a woman’s right to abort boils down to state’s interest in protecting a potential life.

(C) The tussle between the two

A review of the decisions of the Indian courts pertaining to the right to privacy reveals that barring a few exceptions,¹⁵ it is subject to the larger public interest.¹⁶ While the Indian courts have recognized the right of reproductive autonomy as a fundamental right guaranteed under Article 21¹⁷, it has also, on the other hand, recognized the state’s legitimate interest in protecting the life of an unborn child.

Keeping both these conflicting factors in the mind, and also the fact that there is an urgent need to balance these two scales in the present society, the legislature has placed reasonable restrictions on a woman’s right to abortion by means of the Medical Termination of Pregnancy Act, 1971. The statutory provisions thereunder can thus, be viewed as reasonable restrictions on the fundamental right available to a woman under Article 21 of the Constitution. However, the matter of concern here is the fact that the provisions of the Act do not really provide women the right to make reproductive choices, as the restrictions put thereunder are unquestionably “unreasonable”, thus giving more weightage to state’s interest than the fundamental right of the woman to decide for her own body.

III. APPROACH OF THE U.S.A.’S COURTS TOWARDS MEDICAL TERMINATION OF PREGNANCY

(A) *Roe v. Wade*¹⁸- The trimester framework

The question of whether the right to terminate pregnancy was covered under the right to privacy, and if so, to what extent, was examined in *Roe*. The decision of the Supreme Court of the United States in *Roe v Wade*¹⁹ is of specific significance with relation to the tussle between the right of woman to terminate pregnancy and state’s interest in regulating it. The court recognized both the aspects and thus, came up with the trimester framework to balance this

¹⁴ *Supra* note 7.

¹⁵ *P.U.C.L. v Union of India*, AIR 1997 S.C. 568; *District Registrar and Collector, Hyderabad v Canara Bank*, AIR 2005 SC (India).

¹⁶ *Saroj Rani v Sudarshan Kumar Chadha*, 1985 SCR (1) 303 (India).

¹⁷ *Supra* note 7; *Supra* note 4.

¹⁸ *Supra* note 13.

¹⁹ *Id.*

tussle.

1. Recognition of the right to terminate pregnancy as a part of privacy

In *Roe*, the court concluded that the constitutional right to privacy and liberty protected a woman's right to terminate her pregnancy. While the U.S. Constitution does not explicitly mention the right to privacy, a number of prior decisions had found a guarantee of certain areas or zones of privacy.²⁰ This guarantee is grounded on several amendments within the Bill of Rights and in the 14th Amendment's guarantee of liberty, which if taken together, create zones of privacy in areas of society such as marriage, contraception, family relationships and child-rearing.²¹

2. The compelling state interest in limiting the right

Having concluded in *Roe* that access to abortion is a 'fundamental right', the court declared that only a 'compelling state interest' could justify the enactment of state laws or regulations that limit this right.²² The court also recognized that the state has an 'important and legitimate interest' in protecting the health of the mother and even 'the potentiality of the human life' inside her.²³

3. The balance between the two- The trimester framework

When does the state's legitimate concern for maternal and fetal protection rise to the level of compelling interest? To answer this question, a three-tiered legal framework was created, based on the nine-month period of pregnancy, which gave the state greater interest and regulatory latitude in each successive tier.

The first tier encompassed the first trimester of pregnancy. Given that during the first three months, the risks associated with abortion are actually lower than those associated with childbirth, the state has no real interest in limiting the procedure in order to protect a woman's health²⁴. During this period, the state can only impose basic health safeguards such as requiring that the procedure be performed by a qualified health professional and thus, can in no way limit access to abortion.

The second tier encompassed the period from the end of the first trimester to the point of fetal viability i.e. the point at which a fetus can survive outside the womb, either through natural or

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

artificial means, which typically takes place between about 24 and 28 weeks into a pregnancy²⁵. At this point, the state has an interest in protecting maternal health and can regulate abortion only to protect the health of the mother and cannot be aimed at protecting a fetus or limiting access to abortion services. Thus, a state law requiring a doctor to describe to a woman seeking abortion, the risks associated with the procedure before receiving her informed consent, would be constitutional as long as the requirements aimed to protect maternal health and were not created to dissuade a woman from terminating her pregnancy.

The third tier encompassed the period after the point of fetal viability. During this time, the state has an interest in protecting the ‘potential life’ and can even proscribe abortion, as long as the procedure is still allowed in cases in which the life or health of the mother is at risk.²⁶

(B) Webster v. Reproductive Health Services²⁷: A shift towards larger state interest

This case concerned a Missouri statute, which was primarily criticized for being against the *Roe*²⁸ decision for the following provisions²⁹-

- a. The provision barring public facilities from being used to conduct abortions and prohibiting public health workers from performing abortions unless the life of the mother was at risk;
- b. The definition of life as beginning at conception;
- c. The direction to the physicians to perform fetal viability tests on women who were 20 or more weeks pregnant and seeking abortions.

The court answered the issues in the following manner-

- a. The declaration that life begins at conception does not contradict *Roe* because the declaration is contained in the statute’s preamble and thus should have no real impact on access to abortion;
- b. Prohibiting the use of government workers or facilities to perform abortions is acceptable because the right to an abortion established in *Roe* does not include the right to government assistance in obtaining one;
- c. The requirement of viability testing at 20 weeks is constitutional.

With reference to the trimester framework, the court held that there is no reason why the state’s interest in protecting the potential human life should come into existence only at the point of

²⁵ *Id.*

²⁶ *Id.*

²⁷ Webster v Reproductive Health Services, (1989) U.S. LEXIS 3290.

²⁸ *Supra* note 13.

²⁹ *Supra* note 27.

viability and should therefore, be a rigid line allowing state regulation after viability but prohibiting it before viability.

This decision, thus, revealed a new majority on the court with a greater willingness to uphold state restrictions on abortion.

(C) Planned Parenthood of Southeastern Pennsylvania v. Casey³⁰: The undue burden test

The case was concerned with certain provisions of the Pennsylvania Abortion Control Act, 1982³¹, which were added by the 1988 and 1989 amendments to the Act. These provisions-

- a. Required that a woman seeking an abortion must give her informed consent prior to the procedure, and specified that she be provided with certain information at least 24 hours before the abortion is performed³²;
- b. Mandated the informed consent of one parent for a minor (expectant mother) to obtain an abortion, but provides a judicial bypass process³³;
- c. Stated that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband³⁴;
- d. Defined a 'medical emergency' that will excuse compliance with the foregoing requirements³⁵;
- e. Imposed certain reporting requirements on facilities providing abortion services

1. Dismantling of the Roe decision

The court while ascertaining the above mentioned issues, significantly modified the three-tiered framework that *Roe* had created. The states could now regulate abortion during the entire period before fetal viability, and they could do so for reasons other than to protect the health of the mother.³⁶ The court also dismantled *Roe*'s prohibition on the regulation of abortion during the first trimester and its limitation of regulation between the end of the first trimester and the point of fetal viability. The result was that a state's interest in protecting the potential life could now arguably extend throughout a woman's pregnancy³⁷.

However, it is pertinent to note that the fact that a woman has the right to abort, by virtue of the right to privacy she enjoys, as held in *Roe*, was something which was upheld in *Casey*. The

³⁰ Planned Parenthood of Southeastern Pennsylvania v Casey, (1992) 505 U.S. 833.

³¹ Pennsylvania Abortion Control Act, 1982.

³² *Id.*, § 3205.

³³ *Supra* note 31, § 3206.

³⁴ *Supra* note 31, § 3209.

³⁵ *Supra* note 31, § 3203.

³⁶ *Supra* note 30.

³⁷ *Id.*

court also acknowledged that there is a need to balance the two scales of personal autonomy and state's interest.

2. The new standard vis-à-vis the undue burden test: A new balance

The court, after dismantling the *Roe* decision, went further and established a less rigorous standard for determining whether state abortion laws are constitutional. The court replaced strict scrutiny with a new and less rigorous 'undue burden' standard. Under the new standard, regulating abortion before the point of fetal viability would be deemed unconstitutional only if it imposed an undue burden on a woman's right to terminate her pregnancy.³⁸ The Court explained,

*"a finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."*³⁹

According to the court, after the point of viability, independent life becomes a realistic possibility so that the state is justified in overriding the rights of the woman; moreover, *"it might be said that a woman who fails to act before viability has consented to the State's intervention."*⁴⁰ After viability, states can proscribe abortion except where necessary to preserve the life or health of the mother. Before viability, any regulation found to impose an undue burden on access to abortion is unconstitutional.

With reference to the issues raised before the court, it applied the less rigorous undue burden standard to the Pennsylvania laws and, with the exception of the spousal-consent requirement, found all others to be constitutional.

Casey appeared to accommodate both sides of the abortion debate. The undue burden test is a robust check on legislations by requiring the courts to examine whether abortion restrictions deliver benefits that outweigh their real-world burdens. In the recent 2016 judgment, the court laid out the essentials of the test i.e. the court must determine that a law that burdens the right to abort⁴¹-

- a. Furthers a valid state interest: A law that burdens abortion must actually further a valid state interest;

³⁸ *Supra* note 30 at 837.

³⁹ *Supra* note 30.

⁴⁰ *Id.* at 2816-17.

⁴¹ *Whole Woman's Health v Hellerstedt*, (2016) 136 S.Ct. 2292.

- b. Confers benefits that outweigh burdens: Courts must balance any established benefits of an abortion restriction against burdens it creates for women, and find it unconstitutional if the burdens outweigh the benefits;
- c. Is based on credible evidence: Courts must consider evidence-based findings that rest on reliable methodology while assessing its benefits and burdens.

Therefore, the first step is to ascertain that the law furthers a valid state interest. If the answer to this is yes, then the court must proceed to examine whether the law confers more burden to the woman than the benefits achieved out of such provision. This analysis of burden and benefit is to be examined on the basis of credible evidence. This credible evidence is fact-sensitive i.e. it requires a case-by-case investigation into all of the effects of a regulation, both intended and incidental⁴². Further, these effects must be calculated from the perspective of those women for whom the regulation is a restriction, and not by measuring its effect on all the women to whom it applies.⁴³ A regulation may be struck down even if it only imposes a substantial obstacle on one percent of the women it affects.⁴⁴ Lastly, if the court finds out that the burden is more than the benefit, the law shall be declared unconstitutional.

IV. THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971: AN ANALYSIS OF INDIA'S STAND TOWARDS ABORTION

Prior to the enactment of the Medical Termination of Pregnancy Act, 1971, abortion was viewed as an immoral act striking at the sanctity of life, a view that was embodied in the Indian Penal Code, 1860⁴⁵ under Section 312 which made causing miscarriage an offence. However, the right of woman to make reproductive choices coupled with the fact that legalizing abortion might act as a family planning measure by regulating the population growth, led to the appointment of Shantilal Shah Committee. The Committee in its recommendations held that-

*“When the woman, with or without the concurrence of her partner, feels that a particular pregnancy is intolerable and does not desire to bear the child.... she should be the master of her own body and decide the question of motherhood for herself”*⁴⁶

This led to the enactment of the Medical Termination of Pregnancy Act, 1971⁴⁷ [referred to as MTP Act hereafter] which acts as an exception to Section 312 of the Indian Penal Code, 1860.

⁴² *Supra* note 30 at 2819-20, 2825-26, 2833.

⁴³ *Supra* note 30 at 2829-30.

⁴⁴ *Id.*

⁴⁵ Savithri Chattopadhyay, *Medical Termination of Pregnancy Act, 1971: A Study of the Legislative process*, 16(4) JOURNAL OF THE INDIAN LAW INSTITUTE 549, 551 (1974).

⁴⁶ The Shantilal Shah Committee Report, 1966.

⁴⁷ Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India).

(A) The restrictions under the Medical Termination of Pregnancy Act, 1971

The objectives of the MTP Act state that medical termination of pregnancy can be accorded on the following grounds⁴⁸-

- a. Health measures⁴⁹- where there is danger to the life or risk to physical or mental health of the woman or
- b. Humanitarian grounds⁵⁰- such as when pregnancy is caused as a result of rape or
- c. Eugenic grounds⁵¹- when there is a substantial risk that the child, if born, would suffer from deformities and disease.

The termination of pregnancy under the Act can take place, if-

- a. In case where the pregnancy has not exceeded 20 weeks, one medical practitioner⁵², and
- b. In case where the pregnancy has exceeded 20 weeks but has not exceeded 24 weeks, minimum two medical practitioners⁵³

are of the opinion that the below mentioned grounds have been met-

- i. If the continuance of the pregnancy would involve a risk to the life of the pregnant woman⁵⁴, or
- ii. If the continuance of the pregnancy would involve grave injury to the physical or mental health of the pregnant woman⁵⁵, or
- iii. If there exists a substantial risk of physical or mental abnormalities on the part of the child if it were to be born⁵⁶

Also, along with rape, the failure of contraceptive methods used by a woman, or her partner is considered to cause a grave injury to the mental health of the pregnant woman, and thus, qualify as a ground for seeking abortion.⁵⁷

Furthermore, a minor girl or a lunatic cannot terminate the pregnancy without the written consent of her guardian.⁵⁸ In all other cases, the medical practitioner is required to take the

⁴⁸ *Id.*, Objective.

⁴⁹ *Supra* note 47, s. 3(2)(i).

⁵⁰ *Supra* note 47, s. 3, Explanation 1.

⁵¹ *Supra* note 47, s. 3(2)(ii).

⁵² *Supra* note 47, s. 3(2)(a).

⁵³ *Supra* note 47, s. 3(2)(b).

⁵⁴ *Supra* note 47, s. 3(2)(i).

⁵⁵ *Id.*

⁵⁶ *Supra* note 47, s. 3(2)(ii).

⁵⁷ *Supra* note 47, Explanation 1 and Explanation 2.

⁵⁸ *Supra* note 47, s. 3(4)(a).

consent of the pregnant woman.⁵⁹

The restrictions under the Act are put with an intention to balance a woman's right to privacy against the state's legitimate interest in protecting the woman's health, as well as the potentiality of human life.⁶⁰ However, do these restrictions balance the two scales?

(B) The stand of Indian judiciary vis-à-vis the restrictions

1. Woman's right to control her own body

The court has held that the Medical Termination of Pregnancy Act, 1971 rests on the belief that unwanted pregnancy disproportionately burdens a woman and forcing her to continue a pregnancy represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.⁶¹

*"The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone."*⁶²

As already discussed in the second chapter, the right of women to make reproductive choices was recognized as a part of personal liberty under Article 21⁶³ of the Constitution of India.⁶⁴ The bench also reiterated the position adopted by the Court in *Suchita Srivastava v Chandigarh Administration*⁶⁵.

2. The consent of husband

The High Court of Punjab and Haryana in *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others*⁶⁶ has held that the MTP Act requires consent from just one person- the woman undergoing medical termination of pregnancy. A husband cannot force his wife to continue a pregnancy.⁶⁷

3. The consent of minor

Section 3(4)(b) of the MTP Act in plain reading permits the consent of a minor woman to be

⁵⁹ *Supra* note 47, s. 3(4)(b).

⁶⁰ *Supra* note 7.

⁶¹ *Own Motion v The State of Maharashtra*, (2016) W.P. (CRL) 1 (India); *Court on Its Own Motion Lajja Devi v State*, (2008) W.P. (CRL) No. 338 (India).

⁶² *Id.*

⁶³ INDIA CONST. art 21.

⁶⁴ *Supra* note 4.

⁶⁵ *Supra* note 7.

⁶⁶ *Dr. Mangla Dogra & Others v Anil Kumar Malhotra & Others*, C.R. 6337/2011 (India).

⁶⁷ *Id.*

dispensed with, if an abortion is to be preferred on her, so long as her guardian's written permission is available. However, the Madras High Court has iterated that it does not imply that a pregnant minor's consent is dispensable in making a decision to abort. It was held that while parental consent is a pre-requisite for an abortion to be performed on a minor, it couldn't be a substitute for the minor's personal consent.⁶⁸

Recently, in 2016, the court while deciding on a matter relating to the consent of a minor, took into account the stand of English Law⁶⁹ wherein the opinion of the parents or natural guardians in the matter of abortion is considered irrelevant and if the minor girl is capable of understanding the implication, her opinion is quite relevant and important.⁷⁰ Therefore, the court, after examining that the minor girl was capable of understanding the implication of pregnancy, allowed her to carry on the pregnancy, even though there was no parental consent.⁷¹

(C) The unreasonable restrictions put by the MTP Act, 1971

Prima facie the Medical Termination of Pregnancy Act, 1971 was enacted with an intention to provide women the right to terminate pregnancy. However, on the perusal of the provisions of the Act, it becomes clear that the Act provides a very limited right and is flawed in a number of ways.

1. The circumstances in which one can medically terminate the pregnancy

Section 3 of the Act provides for the situations in which pregnancy may be terminated. The issue therein is with respect to the grounds, on fulfillment of which, the medical practitioner can allow abortion. Pregnancy caused by rape or failure of contraception used by a woman, or her partner is considered a valid ground to cause grave mental injury to the pregnant woman. However, if a woman wants to abort a child before the period of viability and is denied the right to do so, then will this denial not amount to grave injury to mental health so as to qualify as a valid ground for abortion? The bare provisions of the Act answer in no. Explanations to Section 3 provide only the situation of rape and contraceptive failure so as to cause mental injury to the pregnant woman.

It is pertinent to note that before the period of viability, should the woman be required to show that she conceived due to contraceptive failure. This approach is very narrow and fails to cover most of the situations. Shouldn't unwanted pregnancy, *per se*, be a ground of allowing abortion basing on the argument that the subsequent pregnancy will lead to grave mental injury to the

⁶⁸ V Krishnan v G Rajan, (1994) 113 Mad.L.W. 89 (India).

⁶⁹ Planned Parenthood of Central Missouri v Danforth, (1976) 49 L.Ed. 2d 788.

⁷⁰ *Id.*

⁷¹ Marimuthu v The inspector of police, Ayakudi Police Station and Ors., W.P.(MD) no. 12212 of 2016 (India).

pregnancy woman?

2. The decision to abort

The Act does not leave the decision to abort with the woman. The satisfaction of the medical practitioner(s) that the grounds mentioned in the Act are met, is a pre-requisite under the statute⁷². The Act grants the veto power to a third person, the medical practitioner. Thus, it can be concluded that abortion laws in India were drafted only as a tool for controlling population growth, rather than an expression of a woman's right to control her body.

3. The exception of rape and related issues

a. Marital rape

The act makes invisible the plight of married women who are forced to conceive and carry a pregnancy to term against their will. This is because marital rape of women older than 15 years is not legally recognized as rape⁷³.

b. Is rape required to be proven before abortion?

Abortion is permitted if the pregnancy is caused by rape.⁷⁴ In situations where rape is alleged by the woman and an FIR is filed, a man is presumed to be innocent unless his guilt is established in a court of law beyond reasonable doubt. Hence, one is not guilty of rape unless he is convicted. In these circumstances, the question arises as to whether the woman subjected to rape should postpone the procurement of abortion till the commission of offence of rape is established in a court of law and the accused is found guilty, or get the pregnancy terminated during the pendency of the case. In the latter case, if the man charged of rape is acquitted of the offence, the woman as well as the medical practitioner procuring abortion would be liable under Section 312 of the Indian Penal Code. And if the former course is adopted, abortion would not be possible because a case would take a long time before it is finally disposed of by a court of law in India.⁷⁵

c. The issue of rape cases which are not reported

Another important issue with the interpretation of the Act is whether termination of pregnancy is permissible only in those cases of rape that are reported to the police, or whether it is allowed in all cases, whether reported or not. In India, most of the cases of rape go unreported because

⁷² *Supra* note 47, s. 3(2).

⁷³ Indian Penal Code 1860, s. 375, Exception.

⁷⁴ *Supra* note 47, s. 3.

⁷⁵ K D Gaur, *Abortion and the Law in India*, 28(3) JOURNAL OF THE INDIAN LAW INSTITUTE 348, 352 (1986).

of the fear of social stigma.⁷⁶ In the former situation, it would be practically impossible to take advantage of the Act and get abortion procured since hardly any case of rape is reported to the police. In the latter case, if the provisions are liberally interpreted, any woman can get her pregnancy terminated merely on making the statement that it was caused as a result of rape.

Therefore, the Act, in its present form, does not provide woman the right to reproductive choices, and more weightage is given to the state's interference in the exercise of this right, by means of the restrictions put forth by the Act. However, these restrictions (inclusive of the inadequate provisions of the Act) cannot be considered to be "reasonable" so as to curtail a woman's right to reproductive choice.

V. CONCLUSION AND SUGGESTIONS

An analysis of the stand of the Indian judiciary in the matter of reproductive choices brings us to the conclusion that, first, woman enjoys the right to reproductive choices as part of their right to privacy under Article 21 of the Indian Constitution. However, such right does not exist without reasonable restrictions so as to protect the life of an unborn child. Therefore, there is a need to balance the right and the restrictions put on the exercise of this right.

A perusal of the Medical Termination of Pregnancy Act, 1971 highlights the clear imbalance between the right and the restrictions, where the restrictions outweigh the rights.

The standard applied by the courts in the U.S.A. to scrutinize the balance between the right and restrictions is an example of how such balance has to be achieved.

When we come to India, the judiciary has not come up with any test to scrutinize the provisions which restrict the medical termination of pregnancy. However, such scrutiny is desirable to evaluate whether the restrictions put forth by the state are reasonable or not. The Indian judiciary, though, has dealt with certain issues in the MTP Act, however, no uniform standard has been applied and the interpretation was based on the bare provisions of the Act. The strictness of the Indian legislation leads to a number of illegal abortion cases, which jeopardise the health of the pregnant woman.

The issues in the Act can be dealt with by providing that if a woman seeks to abort the child stating that the conception is "unwanted", such statement should be enough to provide her the right to terminate the pregnancy, as continuing unwanted pregnancy will cause her grave mental injury, thus violating the very objectives of the Act. This interpretation of Section 3 will

⁷⁶ Pramit Bhattacharya, *99% cases of sexual assaults go unreported, govt data shows*, LIVE MINT (Apr. 24, 2018), <https://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html>.

allow a number of women to exercise their right over their body. This choice of terminating unwanted pregnancy should be given before the period of viability⁷⁷. If the woman does not terminate the pregnancy before the period of viability, she could be deemed to have waived off her right, and thus, beyond the period of viability, the state should restrict abortion to exercise its legitimate right to protect the right of an unborn child, unless the life or physical health of the pregnant woman is in danger.

Also, before the period of viability, the state should restrict the reproductive choices to the extent of providing safe medical procedures and for taking informed consent of the woman. Thus, the restriction that the termination procedure be carried out only by a registered medical practitioner and that such medical practitioner should take the consent of the pregnant woman before operating, should not be deemed to be unreasonable restrictions.

Lastly, even after incorporating such changes in the Act, the judiciary should adopt a standard test to scrutinize such provisions. The undue burden test adopted by the USA Supreme Court in *Casey* can act as a guideline for the Indian judiciary as it seeks to balance both sides of the scale. The test evaluates, whether the restrictions put on the right of reproductive choices by the state before the period of viability are an undue influence on the exercise of the woman's right. If yes, then such provision is unconstitutional. The test also lays down the factors to be taken into consideration while deciding whether such restriction acts as an undue burden on the pregnant woman. Thus, a similar test can be adopted by the Indian judiciary to strike a balance between the woman's right to decide for her own body and the state's legitimate interest in protecting the life of an unborn child.

⁷⁷ The 2021 Amendment Act to the MTP Act restricts the period of viability after 24 weeks. Thus, before 24 weeks, the state from restrict from imposing unreasonable restrictions on the right of pregnant woman.