

Abortion Jurisprudence in India: Is it the woman's choice at all?

This paper aims to present a comparative analysis of ancient Indian legal systems and modern Indian legal systems' perspectives on the right to an abortion. Abortion is the simple phrase for ending a pregnancy at any point when the embryo is unable to sustain itself outside the mother's womb. It is a delicate subject that has long been the focus of discussion. The pro-life and pro-choice sides of the argument can be separated into two categories. The perspective on abortion in India can be found in literature from the Rigveda and Manusmriti school of ancient Indian law. Although produced by academics with expertise in law, these ancient Indian books were not legislative enactments.

The Medical Termination of Pregnancy Act of 1971 (MTP Act), which liberalised the legal framework for abortion, was further strengthened by Article 21 of the Constitution of India, 1950, which added further protections for the right to abortion. Abortion rights involve moral and theological considerations as well as questions of life and death, right and wrong, and sexual morality.

Introduction

“Granting women the civil right to have control over our bodies is a basic feminist principle. 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” American author and social activist Bell Hooks, ‘Feminism is For Everybody’. One of the topics that has received a lot of attention at both the national and international levels is abortion. It has turned into a contentious topic on a global scale. Whether a mother has the right to end her pregnancy whenever she wants or whether an unborn child has a right to live is a contentious issue for everyone.

The most fundamental of all rights is the right to live, which is a rather open-ended concept. In India, of the Constitution Article 21 declares that “No person shall be deprived of his life and personal liberty except in accordance with the procedure established by law.” Here, “person” refers to both men and women.

The right to an abortion is regarded as one of the most important and fundamental rights exercised by women. The right to privacy, which is a component of the right to personal liberty and stems from the right to life, has recognised the right to abortion. But whether or not to treat an unborn kid as a human being and accord them the status of a person is a constant point of debate. Several factors, including religious, ethical, moral, and legal values, govern the issue of the right to an abortion. All religions have strong positions against abortion.

Nevertheless, the debate over whether the mother has the right to an abortion or the child has the right to life continues to rage. On the subject of abortion, Ronald Dworkin has conducted a thorough investigation. He rejected the extreme stance espoused by the opponents of abortion who say that a foetus is a fully formed moral being from the moment of conception. Therefore, abortion is illegal or almost as illegal as murder, and the unborn have a claim to life. Dworkin asserts that before the third trimester, a foetus has no interest. Due to insufficient brain development before this point, a foetus cannot feel pain until late in pregnancy. According to consensus among scientists, a fetus's brain will be adequately developed to experience pain around twenty sixth week.

Determining whether abortion is in the best interest of a foetus must therefore be based on whether the foetus has interests in and of itself, rather than whether interests will arise in the absence of abortion. Inanimate objects lack interests since they are not alive. Furthermore, just because something has the potential to grow into a person does not automatically imply that it has interests. A foetus may develop interests once it is old enough to survive on its own.



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The third trimester is the only time this occurs.

Indian Jurisprudence pertaining to abortion

According to Indian law, an abortion is legal if the mother's life is in danger or she would suffer severe physical or mental harm if the pregnancy went on. Many people had abortions in the past. It was carried out covertly because it was prohibited. After the Act was passed, abortion became permissible to end a pregnancy medically, subject to a number of restrictions to protect the mother's health. *Vedic, Upanishadic, laterpuranic* (ancient), and *smriti* literature all strongly oppose abortion. In accordance with Article 3 of the Medical Council of India's Code of Ethics, I will treat all human life with the highest respect beginning at conception. According to the Supreme Court, Article 21 of the Constitution implicitly protects the right to privacy, and this right can be interpreted to include the right to an abortion.

On August 10, 1971, the Medical Termination of Pregnancy Bill was approved by both Houses of Parliament and obtained the President of India's approval. "The MTP Act, 1971" is how it was entered into the Statute Book. This law ensures the right of Indian women to have an unplanned pregnancy terminated by a licenced medical professional in a hospital run or maintained by the government, as well as in any other location the government has allowed for the purposes of this Act. Not all pregnancies were able to be ended.

The concept of abortion is basically governed by two laws:

–Indian Penal Code

–Medical Termination of Pregnancy

Disseminating The Indian Penal Code Of 1860

Induced abortion has been made a crime under Sections 312 to 316 of the Indian Penal Code 1860, the nation's fundamental criminal code, which was created with consideration for the religious, moral, social, and ethical basis of the Indian population.

Unlawful pregnancy termination is covered by Section 312 of the IPC 1860. The word "abortion" has not been used by the code's authors in this instance under IPC 1860. Additionally, the terms "miscarriage" and "unborn child" are not specified in the code. However, according to legal interpretation, intentionally causing a miscarriage is illegal abortion, which is a crime under the code. According to Section 312, it is illegal for a woman to intentionally cause a miscarriage in two situations: when she is "with child" (i.e., when gestation begins) and when she is "quick with child" (i.e., when the mother feels the foetus moving). To save the mother's life, a pregnancy may be terminated under Section 312.

Unless the unborn child is being killed to protect the woman's life, it is forbidden to kill the unborn child. The clause makes abortion illegal and only allows it when it is necessary to save the mother's life due to medical reasons. Many nations have liberalised their abortion regulations during the past few years. Many nations have very stringent restrictions on abortion, but many others allow women to get an abortion if they so choose. Among those nations, India enacted the MTP Act in 1971, which was intended to establish some exceptions to the harsh requirements of the IPC, which state that all abortions and miscarriages are illegal unless they are performed to save the life of a child.

Provisions Under MTP Act 1971 Which Governs Abortion Laws In India:

According to the MTP Act of 1971, pregnancy terminations can only be carried out in good faith by licenced medical professionals in the locations specified by the Act. Pregnancy terminations can be carried out up to 12 weeks into a pregnancy, and between 12 and 20 weeks, multiple medical professionals' opinions must be obtained for a variety of reasons. The Act does not permit termination of pregnancy after 20 weeks. The word good faith has not been defined under this Act. It means discretion is in the hand of medical practitioners.

The Supreme Court has expanded the ambit of the MTP Act, and placed the autonomy of the pregnant person at the forefront in balancing the rights of the pregnant person and the foetus.

The Delhi High Court would have experienced an ordinary day on July 15, 2022. Hundreds of writ petitions were listed before it. The story of one such writ petition is told here. This writ petition was filed by a woman who wanted to end her pregnancy at 23 weeks and 5 days when her relationship ended. It has since become the focus of every news story in this country.

What followed was a shocking proceeding, with the bench of Chief Justice Satish Chandra Sharma and Justice Subramaniam Prasad saying, "Why are you killing the child? We are giving you a window. There is a big queue for adop



tions.” According a report in the *Hindustan Times*, the bench further said, “Your whereabouts will not be known to anyone. Deliver the baby, please come back... You ask the client. Everything will be looked after by the Government of India or the Delhi government or some good hospital. I am also offering to pay.” The court dismissed the writ petition since the pregnancy was out of a consensual, unmarried relationship.

The woman might have continued to undergo an unsafe abortion, which accounts for 67% of all abortions performed in India, and could have caused her to become one of the eight women who pass away from unsafe abortions every day in this nation. She persisted though. She filed an appeal with the Supreme Court and asked for three things: permission to end the pregnancy, protection for both her and the registered medical professional (or “RMP”) performing the abortion, and a directive to the government to bring expectant mothers under the purview of Rule 3B of the Medical Termination of Pregnancy Rules, 2003 (or “MTP Rules”).

Upholding that the right to bodily integrity should extend to women irrespective of their marital status, the Supreme Court passed an interim order in July directing inter alia that: The Director of the All India Institute of Medical Sciences (‘AIIMS’), Delhi should constitute Medical Board in terms of the provisions of Section 3(2D) of the Medical Termination of Pregnancy Act, 1971 (‘MTP Act’) to determine whether the foetus can be aborted without danger to the life of the petitioner.

In the event that the Medical Board concluded that the foetus can be aborted without danger to the life of the petitioner, a team of doctors at AIIMS should carry out the abortion in terms of the request which was made before the High Court and reiterated both in the special leave petition and in the course of the submissions before the Supreme Court by the counsel appearing on behalf of the petitioner.

“The Supreme Court held that even unmarried women could seek termination of pregnancy giving Rule 3B a broad interpretation. It held that disallowing unmarried women would be violative of Article 14 of the Constitution, and this also furthered the gendered stereotype that only married women indulged in sexual activities.”

But this was an ad interim order. The petitioner terminated her pregnancy successfully, according to the Supreme Court. In its final judgment, the Supreme Court heralded a series of systemic changes and expanded the scope of the MTP Act, which I had written about in an earlier piece. The purpose of this piece is limited to understanding the expansion of the ambit of the MTP Act, and looking at how the court has placed the autonomy of the pregnant person at the forefront in balancing the rights of the pregnant person and the foetus.

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The case of Nikita Mehta in India has sparked a discussion about raising the legal cutoff for abortion from 20 to 24 weeks. In India, abortion is not permitted after 20 weeks or on demand, which leads to women getting abortions illegally. The work of caring for a kid that is born malformed is challenging for the mother, and the youngster experiences health challenges at every stage of life. Both the mother and the child are having problems at that time. Since India is not a developed nation, it is challenging for the poor to travel abroad for proper medical care. If deformity can justify abortion within the first 20 weeks of pregnancy, then there won't be a difficulty if abortion is permitted beyond 24 weeks. Both times, a malformed child will be born.

The Debate over whether the mother has the right to an abortion or the child has the right to life continues to rage..

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In India, in various statutes also, an unborn has been defined as a legal person by fiction. An unborn acquires right only after being born alive. So the state is required to interfere in abortion matters only after the stage of viability. Every right has two elements. One is material element of interest like reputation, property, money, etc. Second, is the formal elements like capacity, power to realize the interest. Therefore Rights are concerned with interest. Interests are the things which are to a man an advantage. When we say that we are having interest in reputation, it means we are having the advantage to enjoy a good name and the state is under an obligation to protect my interest. If we are having an interest in our physical body, then a Right is created in favor of us and we go to doctor who is under a duty to give us a medical treatment under safe condition. To protect the Right of a human being, Right to Health has emerged under Right to Life. In case of rape, a woman loses her dignity in the society.

She has an interest to survive in the society at par with other human beings. If abortion is not in demand then she may commit suicide or go for illegal abortion which will affect her health. But unborn has no interest of his own because his Right cannot be recognized. Property Right is a contingent interest upon unborn. First prior interest is created in favor of a living person and then Right is vested to unborn when he/she is born alive. An unborn cannot take decision, so unborn lacks the capacity to choose. When an unborn is in mother's womb means it is one of the parts of a woman body. If mother does not want to give birth then it's her decision. If she considers herself that she cannot take care of child then it's better to have an abortion.

Summary and Recommendations

No statute has ever acknowledged the beginning of life. A woman has the right to choose whether to have an abortion, and her Right takes precedence over the Right of an unborn child, according to our analysis of this paper and comparison of India's legal laws. India should liberalise its abortion laws, and any legislation that outlaws abortion is blatantly against women's rights. Women's rights to privacy, liberty, dignity, and health are all violated by this. To safeguard the most fundamental rights of women, abortion must be legal. The government should take action to safeguard both pregnant women's health and the unborn child's health after viability. ■