

RIGHT TO ABORTION IS A BASIC HUMAN RIGHT: SPECIAL REFERENCE TO INDIA



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Delegation to the 2nd International Women's Rights Assembly
(Regd: 07IWRA2)

Abstract:

In a country like India, where everyday people fight for reservation rights and Right to equality under Article 14 and 21 of Indian Constitution, but there is one more right which needs fight or movement to bring this right for every women of India i.e. Abortion Right under Article 21. Indian women were silent regarding their abortion right protected under Article 21. Here in India only married woman were given abortion rights under Medical Termination of Pregnancy of Pregnancy Act, 1971 but that too also under certain conditions which is mentioned under Section 3 of the MTP Act. Explanation 2 of Section 3 of MTP Act says that "Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman". Now question is why only married woman were given this right and not to the other ladies. Recently when live together was declared legal in India after the decision of Payal Katara – Vs – Superintendent Nari Niketan Kandri Vihar Agra and others, but no amendment is done in MTP Act for including women who get conceived from this relation. In US abortion rights is considered to be as one of the basic rights of the women, after the feminist movement for abortion rights lead by Margaret Sanger and many more. And due to this now women in US were enjoying their rights without any distinction. Even many, International Organization recognized this right to be as one of the basic human rights. In India, abortion was introduced as a Family Planning method and not as a right because of which only married women were allowed to go for abortion and that too only when she conceived due to failure of any contraceptives. So here in India woman don't have any choice for abortion. In India, there is a strong need of feminist movement like in US, so that Indian women can enjoy this right i.e. Right to Abortion. Through this paper researcher will discuss about the violation of right of unmarried women, widow, and divorcee in terms of abortion right.

Keywords: *Abortion, Right to equality, Feminist, Pro-Choice, Reproductive Choice*

Every human is equal in the eye of god as well as in the eye of law. But when questions comes about the rights and position of women in society then one can find the clear discrimination between men and women. Even if we remember the Delhi gang rape case or Nirbhaya case where

defense lawyers put the entire blame on the victim and make a rubbish and ridiculous statement that "If you keep sweets on the street then dogs will come and eat them. Why did Nirbhaya's parents send her with anyone that late at night? He was not her boyfriend. Is it not the parents' responsibility



to keep an eye on where she goes and with whom?”¹ This example is to explain that how women were treated in our society and the discrimination made by the society. This kind of discrimination shows the low mentality of the person but this is not the actual problem of the women. Because there are only few peoples who holds or keep such kind of thinking. At least here women can fight against such people for the protection of their dignity. But, what if Government makes any law which is discriminating and bias in nature, a law which discriminate between married woman with unmarried, widow, divorcee etc like Section 3 of The Medical Termination of Pregnancy Act, 1971 i.e. abortion right.

Theoretically in many court cases and even the most important document i.e. Universal Declaration of Human Rights states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”² Even Constitution of India also says the same thing under Article 14 that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”³ But practically when it has to be applied in the situation, when question arise regarding it applicability then the problem is that this right is limited to book only. Especially, when it comes about the abortion right of the women, that whether all women have abortion right irrespective of their marital status? As we know that under MTP Act, 1971 only married, rape victim and minor girls were allowed to go for legal abortion. And for the rest there is no such right i.e. for unmarried, widow and for

divorcee, law is silent in India. And the question which comes in our mind is about the applicability of the Article 14 in this situation that why all women were not treated equally before Law? Why there is biasness regarding the applicability of MTP laws in India? Even though an MTP law was solely for the benefit of the women but then also women were not allowed to enjoy their basic right.

PRE- ABORTION LAW: INDIAN PENAL CODE

Before MTP Act any kind of abortion was illegal and punishable under Indian Penal Code, 1860 and Section 312 -316 deals with it. Abortion which was done in good faith for saving the life of the mother was only the ground for legal abortion. Also abortion was allowed in the cases of rape victim. But due to the strict abortion laws many women has to choose illegal ways because of which women has to undergo punishment if caught in the hand of law or sometime they lost their life due to the unhygienic methods which she used for abortion. Because of this only during second wave of feminism in US, women all together start the abortion right movement in USA. Margret Sanger was one of the known face of the Second wave feminism as she was the person who initiate this fight for all women irrespective of their caste, color, race etc and later after Roe versus wade 410 US 113 (1973), abortion was made legal for all women. Not only that many International Organization considered abortion as one of the essential human right for women, which I will discuss later. In India abortion law was introduced in 1971 but not as a right for women but as Family Planning method. It was introduced by a committee i.e. Shantilal Shah Committee and on the basis of the report of this committee, abortion law was introduced in India.

¹ Abhinav Garg, The Times of India, Mar 4, 2015, 09.25 AM, <http://timesofindia.indiatimes.com/india/Defence-lawyers-blame-Nirbhaya-for-rape/articleshow/46451407.cms>

² Article 1, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

³ <https://indiankanoon.org/doc/367586/>



POST ABORTION LAWS: MEDICAL TERMINATION OF PREGNANCY ACT

As the law relating to abortion was very strict in India to make the law liberal and to protect the women life from illegal abortion MTP Act was enacted. But this law was enacted not to provide this law as a right to women but it was introduced as a Family Planning method to control the population which any one can interpret from the language of the Section-3 of the Act.

“3. When Pregnancies may be terminated by registered medical practitioners.-

(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in

force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) Where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are.

Of opinion, formed in good faith, that,- (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health ; or

(ii) 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.

Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in Cl. (a), no pregnancy shall be terminated except with the consent of the pregnant woman.”⁴

Section 3 of the MTP Act explains about the conditions when abortion can be performed by the doctors. The section clearly says that doctor opinion is must for performing abortion in women. Women wish for abortion has not been given any importance under MTP Act as well as in Pre- Abortion laws. Also Explanation 2 of the same says that only married women were allowed for abortion and that too also only when she can proof that the pregnancy was caused due to the failure of any contraceptive. And now question comes that why in 21st century still women has to proof that pregnancy was

⁴ The Medical Termination Of Pregnancy Act, 1971, <http://tcw.nic.in/Acts/MTP-Act-1971.pdf>



caused due to failure of any contraceptive methods. When two finger tests on rape victim is considered to be violative under Article 21 i.e. Right to privacy, then why Explanation 2 of section 3 of MTP Act is not considered to be as violative to Article 21. Why in India Abortion law is biased in terms of its applicability? If a women wants abortion it means that the pregnancy is unwanted and then for an unwanted pregnancy why she has to give answer to the question of the doctors. Don't we think that this question can really hurt one feelings, privacy etc. Also one more important point to discuss here is that this law was introduced to protect the mother life from the hand of dai's or untrained professional who performed abortion. But when the law is restricted up to married women, rape victim and minor then in such case where the other lady will go for abortion, for them there is only one way that is illegal abortion.

Even during one of my research related to Abortion topic⁵, I have taken interview of Dr. Nehha V Motghare, MBBS, DGO, (CGMC 96/2003), during the conversation she said that many Doctors in private hospitals performed abortion in unmarried woman/girl while charging huge amounts. And no data or record is maintained for that. Now in one hand MTP Laws was enacted to protect the mother life and to control the illegal abortion but in the next hand because of it bias applicability it promotes the illegal business of the doctors by forcing the unmarried lady, widow, divorcee and also some time the woman who are in a relation of adultery for opting illegal abortion. Then what is the importance of this law. As before this MTP law, abortion was allowed to protect the mother life, rape victim and now also it is allowed. The only new thing which was added is that now the Act clearly says that only married women and minor will be allowed for abortion. So, new law is not that

⁵ Pyali Chatterjee, Medical Termination Of Pregnancy Act: A Boon Or A Bane For A Woman In India- A Critical Analysis, IJSR, ISSN: 2319-7064(Online), <https://www.ijsr.net/archive/v5i9/ART20161470.pdf>

effective to control the maternal death due to illegal abortion. Not only that even in many cases police also don't registered any cases if the abortion was done for the better future of the widow/divorcee. As in such cases pregnancy might cause hurdle in the future of the women. Here in India, Government speaks about women empowerment but how it is possible if the women were not able to enjoy their basic right. Also abortion right should not be limited to married women to get rid from unwanted pregnancy. But it should be allowed to every woman. As each single child will be part of the India Population. And also for the bright future of India, it's better to bring wanted child and not unwanted child. Because many unwanted child lost their life in the jaw of the street dog or in the garbage and if they are lucky then they might get shelter in any orphanage home. In every way Section 3 of the MTP Act is violative to Article 14 and 21. Not only it is violative to woman rights for abortion but also against each and every unwanted child.

There are many international organizations which strictly criticize the use of abortion as Family Planning methods like World Population Conference of 1984 "The World Population Plan of Action recognizes, as one of its principles, the basic human right of all couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children. For this right to be realized, couples and individuals must have access to the necessary education, information and means to regulate their fertility, regardless of the overall demographic goals of the Government"⁶

Then, the Principle 8 of the International Conference on Population and Development ICPD states that "Everyone has the right to the enjoyment of the highest attainable

⁶ Siddhivinayak Hirve, Abortion Policy in India: Lacunae and Future Challenges, CEHAT Mumbai, 2004, <http://www.cehat.org/go/uploads/AapIndia/hirve.pdf>



standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmer should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.

Article 2 of the Universal Declaration of Human Rights states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”⁷

In the above three laws one thing which is common that law should be equal for all and abortion should not be used as family planning methods. But under MTP Act, abortion is used as a family planning method. And Article 14 of Indian constitution fails to protect the abortion right of every woman. Also, when we speak about the choice of the women in India regarding the abortion rights it is to be mentioned here that, actually there is no choice given to the women. The law was enacted to protect the women life from the illegal abortion but for abortion the sole decision is depend on the medical practioner to decide whether to perform abortion or not.

⁷ Universal Declaration of Human Rights, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

Women willingness has given no importance here.

Even one of the Supreme Court judge AK Sikri, while speaking at the symposium “Reproductive Rights In Indian Courts: Celebrating Progress, Identifying Challenges And Discussing The Way Forward”organised by the Jindal Global University (JGU) said that “When we talk of reproductive rights in this country, then there is hardly any choice so far as the woman is concerned ...I can't help but wonder how we as humans have failed humanity. I am perplexed as to how in the 21st century, with all the technological advances, becoming frequent guests in the outer space and creating artificial intelligence, we are still not able to bring our women to enjoy the fruits of humanity. That is the harsh reality,”⁸ Actually there is no right given to the women in terms of Reproductive Rights or Abortion Right. In both this situation woman has to depend on others decision. In present scenario woman individual decision has given no importance. As for MTP husband consent is not required. But under family law if a woman did abortion without taking husband permission or consent then it become a ground for divorce. It was in the case of Satya (Smt.) – Vs – Shri Ram AIR 1983 P & H 252: 1983 Hindu LR 117 : 1983 Marri LJ 153 :1983 Pun LJ 192,⁹ where court held that abortion done by wife without taking husband consent will amount to cruelty. This case also speaks about the harsh reality of woman position in Indian Society. The position of woman is just like the situation which we faced last year during demonetization of old currency, where we had money in our account but unavailable to use it due to shortage of new currency. But

⁸ Mohak Gupta, Her body, her right: Women have the right to decide on pregnancy, SC judge says, [Indiatoday.in](http://indiatoday.intoday.in/story/women-right-decide-pregnancy-sc-judge-ak-sikri/1/880596.html), February 11, 2017, <http://indiatoday.intoday.in/story/women-right-decide-pregnancy-sc-judge-ak-sikri/1/880596.html>

⁹Justice Palock Basu, Law Relating to protection of human rights,249(Modern law Publication, 2nd edn, 2007)



still there was a hope that this problem will be solved shortly after the available of the new currency. But in the life of the woman there is no such hope that when they will be able to enjoy the Reproductive Right and abortion Right. As, here the choice is on the Government whether to give this right or not? Honestly saying women in India should also start movement for their abortion right like in USA. May be after this only women will get the basic right i.e. Right to abortion.

SUGGESTION AND CONCLUSION

If we consider Kelson Grundnorm theory, then Constitution of India is the grundnorm because from its other law derive it norms. Any law ultra-vires to Constitution is not a good law.

Part III: Article-14 of the Constitution deals with Fundamental Rights. So any law violative to any article of fundamental rights will not be considered as good law. Then, how Section-3 of the MTP Act is still operative as it's clearly violates the rights of every woman to enjoy the Abortion Right. It's the women who conceive, its she who carry the baby for 9 months, if she is not ready to give birth to a child then nobody has this right to forced her to give birth to a unwanted child or forced to choose the illegal way for abortion which is not at all good for our country reputation as well as for the woman health also. In 21st century when we talked about modernization and giving equal status to men and women then why such law still exists which itself discriminate a women from another woman. There are many job where married women were not allowed to join then in such situation if any of this woman conceived during live-in-relationship or from love affair then what will be her future, her career will be in stake or finished. A country like India, which is unable to protect or provide one of the important basic right to a woman, then how it will become a developed country like USA. A country will developed only when its citizen will grow and developed. And for

this law should be equal for all. All women deserve good health, medical facility and off course the motherhood which is one of biggest happy moment of a woman. But the same moment can bring sorrow on the wife life it is unwanted. It's high time for Indian women to start a feminist movement for abortion rights for all without any discrimination. Section -3 of the MTP Act should be amended as it's clearly violets Article 14 and 21 of the Constitution of India. All women deserve the right to enjoy the motherhood and they must have abortion right for this. As this is the exclusive right of woman over her body so no one should interfere in it. And no Law should discriminate one woman from another because of their marital status. So the only solution for making the MTP Act effective is to allow Abortion on demand irrespective of marital status. That is only solution and an important part of the Act which is missing in present MTP Act, 1971.

"The entire Society is depend on an woman as she is the one who will bring a younger one in this world, then why she is not allowed to enjoy her motherhood, her right for abortion"

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