



Emerging jurisprudence on right of abortion VIS A VIS woman's sacrosanct right to reproduction

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Abstract

Abortion laws in India are designed to protect women's reproductive rights, ensure their health and well-being, and address social inequalities. The MTP Act, along with relevant sections of the IPC, provides a legal framework for safe and regulated access to abortion services. By recognizing women's autonomy and providing them with reproductive choices, India strives to create an environment where women can make informed decisions regarding their pregnancies while prioritizing their health and well-being. Abortion is a complex and sensitive subject, and its legal status varies across different countries.

In India, abortion laws have undergone significant changes over the years with a motive to ensure women's reproductive rights and safeguard their health. In September 2021, the Medical Termination of Pregnancy (Amendment) Act of 2021 came into force, extending the upper gestational limit for abortion from 20 to 24 weeks. The amendment was heralded as the next step in making Indian abortion laws more progressive. The amendment was a response to the Indian courts receiving requests to access safe medical support from many women with unwanted pregnancies beyond the permissible gestation period.

The scope of the MTPA was liberalized in 2022 in a judgment ('X v Delhi'). In this case, Justice Chandrachud, took up a "purposive" approach that emphasized and protected the reproductive autonomy of the pregnant person, to extend the ambit of the MTPA to both married and unmarried women. But, recently, the Supreme Court in *X v Union of India* (dated 16 October 2023) ('X v UOI'), denied a pregnant woman the opportunity to abort a 26-week old fetus, despite her mental health problems and clear intent to terminate the pregnancy.

In India, the field of progressive judgments has been muddled by a 'moral' contention entering the narrative, as if through a backdoor channel. The author argues that this judgment demonstrates the emergent discordant approaches that the Indian legal system is taking with reference to abortion. The right-based discourse has been conveniently by-passed by the idea that a woman's choices are everyone's business. This is the strain of a societal bias, which is being allowed to raise its censorious head even in the courtroom, undoing the progress made there in the face of public morality.

Keywords: Abortion laws, jurisprudence, medical termination of pregnancy (Amendment) Act of 2021

Introduction

One of the most important facets of reproductive freedom and justice is the right to abortion. For centuries, the debate on legalization and regulation of abortion has caused ethical dilemmas with proponents for both sides of the argument. There are two contrasting ideologies, with ardent supporters of pro-life and pro-choice often clashing in political, medical and legislative forums [2]. This has been a contentious issue that several developed nations have struggled to resolve till date [3]. There is a global trend toward the liberalization of abortion laws driven by women's rights, public health, and human rights advocates. This trend reflects the recognition of women's access to legal abortion services as a matter of women's rights and self-determination and an understanding of the dire public health implications of criminalizing abortion.

Nonetheless, legal strategies to introduce barriers that impede access to legal abortion services, such as mandatory waiting periods, biased counseling requirements, and the unregulated practice of conscientious objection, are emerging in response to this trend. These barriers stigmatize and demean women and compromise their health. India, a developing nation, with a wide spectrum of cultures, traditions, socio-economic statuses, and religious beliefs, would be expected to be grappling with this problem.

Reproductive rights in India as fundamental and human rights

In India Reproductive rights are essential to the realization of all human rights. They encompass a spectrum of civil, political, economic, and social rights, from the rights to health and life, to the rights to equality and non-discrimination, privacy, information, and to be free from torture or ill-treatment. States' obligations to guarantee these rights require that women and girls not only have access to comprehensive reproductive health information and services but also that they experience positive reproductive health outcomes such as lower rates of unsafe abortion and maternal mortality and the opportunity to make fully informed decisions free from violence, discrimination, and coercion about their sexuality and reproduction. Violations of reproductive rights disproportionately harm women due to their capacity to become pregnant and legal protection of these rights as human rights is critical to enable gender justice and the equality of women. The Constitution of India recognizes many of these same rights as fundamental rights that the government has an obligation to uphold, including the right to equality and non-discrimination (Articles 14 and 15) and the right to life (Article 21) which is understood through jurisprudence to include the rights to health, dignity, freedom from torture and ill treatment, and privacy.² India is also a signatory to numerous international conventions, such as the Convention on the Elimination of All Forms of Discrimination against

Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of the Child (CRC), all of which recognize reproductive rights^[4]. Article 51(c) of the Indian Constitution and the judiciary has established that the government has a constitutional obligation to respect international law and treaty obligations^[5].

Abortion laws in India

Until the 1960s, abortion was illegal in India and unless the procedure was done in good faith to save the life of the mother, a woman could face three years of imprisonment and/or fine under Section 312 of the Indian Penal Code, 1860 if she tried to abort her fetus. It was in the mid-1960 that the government set up the Shantilal Shah Committee to enquire whether India needed a law to regulate abortions. Based on the report of this Committee, a medical termination bill was passed by Parliament in August 1971. The title of the law, the Medical Termination of Pregnancy (MTP) Act, 1971 was strategically chosen to avoid any religious or ethical objections and impart a medical reasoning behind permitting such procedures. It can be said that abortion in India is governed under the MTP Act which provides the legal framework for abortion in India outlining the conditions, gestational limits, and procedures for lawful abortions;

The Medical Termination of Pregnancy Act was introduced in 1971, which legalized MTP under certain conditions^[6]. The MTP Act, 1971, clearly laid down the criteria for a registered medical practitioner (RMP) and medical centre to be deemed qualified to conduct MTPs. The MTP Act however did not permit MTP as a method of family planning or on the mere grounds that the woman did not desire to continue the pregnancy. The grounds permitted for MTP were:

- If the continuation of pregnancy posed a risk to the life of the pregnant woman
- The pregnancy, if continued, would result in grave injury to the physical and mental health of the pregnant woman. The explanation mentioned for this clause in the Act itself describes pregnancy caused due to rape or due to failure a device/method of contraception between a married couple to fall within the ambit of causing grave mental injury to the pregnant woman.
- The existence of substantial risk is that if the child is born, it would suffer serious physical/mental abnormality.

Amendments to the MTP ACT^[7]

The Medical Termination of Pregnancy (Amendment) Act, 2021 is a recent amendment to the MTP Act. It introduces several changes to the existing MTP Act, aiming to expand access to safe abortion services, enhance women's reproductive rights, and address certain limitations and concerns in the previous legislation. Some key changes are mentioned as follows:

- One significant change introduced by the Amendment Act is the extension of the gestational limit for abortion. It allows women to seek abortion up to 20 weeks with the opinion of one registered medical practitioner and beyond 20 weeks with the opinion of two registered medical practitioners, in certain specific circumstances.

- In the failure of any pregnancy termination or contraceptive method or device, a married woman as well as an unmarried woman is allowed to terminate a pregnancy up to 20 weeks.
- The termination of pregnancy up to 20 weeks of gestation is allowed on the opinion of one registered medical practitioner.
- In the case of 20-24 weeks of gestation, the opinion of two registered medical practitioners is needed to terminate the pregnancy.
- Termination of pregnancy after 24 weeks requires an opinion of the State-level medical board.
- Increase in upper gestation limit, for special categories of women such as victims of incest, survivors of rape, and other vulnerable women, to 24 weeks.
- It emphasizes the need to maintain the privacy and confidentiality of women seeking abortion, all records related to abortion including the identity of the woman should be kept confidential and not be disclosed without her consent, except as required by law.

Judicial recognition of reproductive rights as fundamental and human rights

Recent jurisprudence concerning abortion in India also reflects progressive evolution in the judiciary's articulation of reproductive rights. Although a 2004 Supreme Court ruling undermined women's reproductive autonomy by holding that a woman's decision to undergo abortion or sterilization without her husband's consent could constitute mental cruelty^[8], subsequent judicial decisions have moved toward greater constitutional protection of this right. In 2009, the Supreme Court recognized women's reproductive autonomy as a fundamental right, stating that "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21."^[9] In 2011, the High Court of Punjab and Haryana reiterated women's rights to reproductive autonomy by dismissing a suit filed by a husband against a doctor who had performed an abortion without the husband's consent saying that "it is a personal right of a woman to give birth to a child. Nobody can interfere in the personal decision of the wife to carry on or abort her pregnancy unwanted pregnancy would naturally affect the mental health of the pregnant women."^[10] Further, in the case of *Hallo Bi v. State of Madhya Pradesh and Others*, the High Court of Madhya Pradesh in 2013 affirmed the importance of providing victims of rape access to abortion without requiring judicial authorization, stating "we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily will certainly cause a grave injury to her mental health."^[11]

In the 2016 the Bombay High Court ruled to improve women prisoners' access to abortion and strongly affirmed women's rights to abortion as an aspect of the fundamental right to live with dignity under Article 21. The judgment recognizes that unwanted pregnancies disproportionately burden women and states that forcing a woman 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." The decision boldly recognizes that an unborn foetus is not an entity with human rights. 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. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant^[12].

Changing facets of abortion jurisprudence in India

One of the purposes of enacting the MTPA in 1971 was to grant the benefit of termination of pregnancy to women who are impregnated “*under circumstantial pressure*”, with these circumstances being limited to humanitarian, health and eugenic grounds^[13]. The scope of the MTPA was contradictorily liberalized in 2022 by a three-judge bench of the Supreme Court in *X v Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi (‘X v Delhi’)*. In this case, Chandrachud, J took up a “*purposive*” approach that emphasized and protected the reproductive autonomy of the pregnant person, to extend the ambit of the MTPA to both non-cisgender women and unmarried women. Amongst other liberal guidelines, Chandrachud, J noted that the tenor of the MTPA was to provide access to safe and legal abortion, and that it was to be given the widest construction]. The Court recognized earlier expansive interpretations of S. 5 in allowing abortions beyond the outer gestational limit. The term “*mental health*” was given a wide connotation which could not be “*confined to medical terms or medical language, but should be understood in common parlance*”

Furthermore, Rule 3B was given a wide interpretation, with the Court holding that it was not possible for the legislature to enumerate each and every single material change in circumstance that would give rise to a right to abortion under S. 3(2). Therefore, the Rule was to be “*understood as extending to all women who undergo a change of material circumstances*” as opposed to a change in material circumstances in the limited situations listed out in Rule 3B. Most importantly, the Court upheld and emphasized on the autonomy to make reproductive decisions free of coercion, violence or undue state influence, by linking reproductive autonomy to the constitutionally protected right to privacy and the right to dignity.

It must be noted that *X v Delhi* and the other liberal judgments mentioned above claim to take a “*purposive*” approach in holding that reproductive autonomy is the true intent of the MTPA, and in giving the widest interpretation to its phrases and connected Rules. However, this clearly contradicts the restrictive, narrow and provider-centric approach that the black letter of the MTPA provides, and the legislators had intended to create. *X v Delhi* acknowledges the fact that the abortion regime in the MTPA is provider-centric and yet somehow claims that a purposive interpretation of it would emphasize on the reproductive autonomy of the pregnant person.

But in 2023, the positive developments of 2021 and 2022 appear to have been overshadowed by anti-reproductive rights sentiments. A year after the judgment in *X v Principal Secretary*, this pro-rights agenda received a major setback and revealed how much more there is to be done for India to transition into a truly liberal and right-based jurisdiction for medical termination of pregnancies.

In *X v Union of India*, a 27-year-old married woman, a mother of two, approached the Supreme Court to seek permission for abortion as per the Medical Termination of Pregnancy Act, 1971. The petitioner discovered her pregnancy at around 24 weeks due to a condition known as lactational amenorrhea, which leads to breastfeeding women not menstruating.

Division Bench of the Supreme Court (Hima Kohli and BV Nagarathna, JJ.) passed an order which constituted a Medical Bench and sought for their opinion. The Medical Bench found that the 26 week old foetus was viable and had a reasonable chance of survival. There was a chance of post-partum psychosis, which was something that the couple had worried about, and the petitioner faced chances of complication owing to a hysterectomy and her previous two C-section deliveries. As a result of this, the Medical Board opined that the petitioner should be allowed to terminate her pregnancy.

In their Order the Bench took cognisance of several factors that favoured permitting abortion of the foetus. Based on these factors, the Court allowed for the termination of pregnancy. The Court also acknowledged the importance of reproductive autonomy and cited *X v Delhi*, holding that the MTPA was to be interpreted in an “*overarching and all-encompassing sense*”.

The next day, UOI filed for a recall application, based on an e-mail sent by one of the members of the Medical Board, which requested a directive from the Supreme Court on whether the viable foetus’ heart was to be stopped before conducting the termination. As per the e-mail, not doing so would result in a preterm delivery, as opposed to a termination, and the preterm baby would be subject to a long stay in the intensive care unit and a high possibility of immediate and long term disabilities.

The question before the court was whether the foetus could be terminated. In response to this, the same Bench delivered a split verdict. Kohli, J refused to sanction the termination on the ground that her *judicial conscience* did not permit it, with no further explanation on why the abortion could not be granted. Nagarathna, J took note of a new affidavit filed by the Petitioner, in which she took cognisance of the factors mentioned in the e-mail and categorically stated, out of her free will and without external pressure, that she “*made a wilful and conscious decision to medically terminate her pregnancy and doesn’t want to keep the baby even if it survives.*” Nagarathna, J opined that the SC was to respect the decision of the Petitioner, keeping in mind her delicate mental and socioeconomic conditions.

In light of the split verdict, the case was referred to a 3 judge Bench, which refused to permit the termination in its final judgement dated 16 October, 2023 In *Final Judgement*, Chandrachud, CJ held that an abortion could not be granted, keeping in mind that the upper gestational statutory limit of 24 weeks had been crossed. Since the Medical Board’s reports did not indicate any immediate necessity to save the Petitioner’s life by way of a termination, S. 5 could not be invoked. Furthermore, the Court, using its ‘complete justice’ powers was “*averse*” to issuing a direction to stop the foetus’ heartbeat, and it was observed that the Petitioner was also opposed to such a direction.

This raises many questions about the MTPA and the abortion laws in India. Is the purpose of these laws to protect reproductive autonomy or the foetus? Prior to *X v UOI*, the Courts have interpreted it in favour of the former,

the legislators behind its 2021 Amendment, which increased the gestational limits, have argued (pg 286) ^[14] that the MTPA acknowledges reproductive autonomy, and “ensures dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy” while also continuing to maintain both gestational and circumstantial limits.

Is it even possible to claim that the Indian legal system is promoting reproductive autonomy, while it places gestational and circumstantial limits on the exercise of abortion and criminalises those that abort outside of the ambit of legal termination that it creates? The Petitioner in *X v UOI* had clearly demonstrated a need to terminate her pregnancy, due to various material circumstances that were recognised. Yet, she was denied the permission to do so due to the gestational and circumstantial limits propounded by a textual reading of the MTPA, when similar circumstances have justified termination in other cases.

More importantly, can there even be limits on reproductive autonomy in the name of an unexplained and supposedly “compelling state interest” to protect the foetus, if it is an aspect of the same dignity and personal liberty that the Constitution so vociferously protects?

Conclusion

The amended law and the Supreme Court's judgment in 2022 liberalised abortion laws to a great extent. The practices remain State-sanctioned and service provider-centric instead of providing complete bodily agency to a pregnant person. The system pits the pregnant person against the pregnancy itself, and we have seen what the outcome of that is in the October 2023 judgement. Here, the Court limited the woman's right to reproductive autonomy by strictly measuring her rights against the eligibility criteria in Sections 3(2B) and 5 of the MTP Act.

The view of Justice Nagarathna clearly indicates that the demands at hand could have been addressed within a rights-based legal interpretation. It is important for reproductive rights experts to carefully analyse this judgment and its implications, considering the subjectivities at play. In India, the field of progressive judgments has been muddied by a ‘moral’ contention entering the narrative, as if through a backdoor channel. The right-based discourse has been conveniently by-passed by the idea that a woman's choices are everyone's business. This is the strain of a societal bias, which is being allowed to raise its censorious head even in the courtroom, undoing the progress made there in the face of public morality.

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