



Abortion as a private choice

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Abstract

India has witnessed numerous gender equality movements in the last decade and has come a long way to grant equal opportunities, services and access to the women. Many laws have also been amended in order to promote gender equality but nobody has focussed on abortion laws currently prevailing in the country. This article will be analyzing the women's privacy from a historical perspective and will be examining the position of abortion and privacy in different parts of the world. In addition this article will be analyzing the abortion law in India and whether the privacy is guaranteed by the Indian abortion laws and if yes, to what extent and finally this article will be criticizing the Indian Abortion law and will suggest amendments in current laws to ensure right to privacy to women guaranteed by the Indian Constitution.

Keywords: private choice, Constitution, numerous, Abortion

Introduction

Abortion has been proved as the safest and most effective method of birth control. Abortion is defined by Webster as "the expulsion of the fetus prematurely, particularly at any time before it is viable, or capable of sustaining life"^[1]. Abortion all over the world concerns an important question, whether abortion comes under the right to privacy or the unborn child is covered under the fundamental right i.e. the right to life. The Roman church places fetus on equal status as normal human beings but all over the world the underdeveloped fetus is still not considered as a person, so does women have a right to privacy as to terminate her pregnancy at her will?

Abortion and right to privacy were first considered in *Roe v. Wade*^[2] and *Doe v. Bolton*^[3] and the state was prohibited from interfering in matters related to the termination of the pregnancy except when the state has compelling interests in the potential life of the fetus and the women's health. In another landmark judgment of *Planned Parenthood of Central Missouri v. Danforth*^[4], the court answered many questions regarding the spousal or the parental consent which were not dealt with *Roe* and *Doe's* case. Upholding the previous decisions the Supreme Court, in this case, held that a woman's privacy is not subordinated to any third party interests during the first trimester of pregnancy and for the first time, the court extended this right to privacy to minors also but again was restricted according to her level of maturity.

This article will be analyzing women's privacy from a historical perspective and will be examining the position of abortion and privacy in different parts of the world. In addition this article will be analyzing the abortion law in India and whether the privacy is guaranteed by the Indian abortion laws and if yes, to what extent and finally this article will be criticizing the Indian Abortion law and will

suggest amendments in current laws to ensure right to privacy to women guaranteed by the Indian Constitution.

History of abortion: A global view

In the nineteenth century, abortion was legally restricted in almost all the countries and the most important source of restrictive abortion laws were the imperial countries that imposed restrictive abortion laws on their colonies. Earlier restrictions on abortion were imposed for three main reasons^[5]:

1. Abortion was dangerous and lots of women were killed because of abortions. Hence, the laws were for the public good to protect women, who nevertheless sought abortions and risked their lives as they still do if they have no other choice.
2. Earlier abortion was considered as a form of transgression of morality and the laws were inflicted to punish and act as a deterrent.
3. Abortion was also restricted to protect fetal life in all circumstances.

The abortion opponents for a very long time have used reinterpretation by some scholars of the Hippocratic Oath (400 BC). They misinterpreted the passage "Neither will I give a Suppository to cause an abortion" as that the Father of medicine opposed abortion and interpreted it as "Neither will I give a woman a means to procure an abortion" but in fact according to this view, Hippocrates was not against the practice of abortion in general but were against one form of abortion that they considered dangerous to women.

In the USA and Europe, the period between the 17th and the 19th century was an interesting period according to abortion history. The USA witnessed many advancements in gynecology, such as the discovery of dilators and curettes which made abortions more effective and safer but the conservatism in the profession prevented widespread discussion and dissemination of abortion techniques. At the same time until the 19th century, the medical profession

¹ Manuel L. Ortega, *Abortion and the Right of Privacy*, 48 Phil. L.J. 652 (1973).

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁴ *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

⁵ Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, 19 HHR, 13-27 (2017).

responded to the abortion requests and the culture of abortion flourished. Abortionists freely advertised their willingness to treat female problems and pills that would terminate the pregnancy. In England, during Queen Victoria's reign abortion at any stage of pregnancy was criminalized under Person Act 1861 and by the 1870s, all states of the USA also criminalized abortion. In India, the penal code and code of criminal procedure with their origins from the British offenses made abortion a punishable crime till the 1960s^[6].

The Road towards decriminalizing abortion

Many countries in the 19th Century legalized abortions by express statutory provisions and some countries legalized through judicial proceedings. Most populated countries like the People's Republic of China, India, the Soviet Union, and Japan at that time legalized abortion through statutory provisions. The People's Republic of China provided abortion but was very restrictive in the year 1954, owing to the growing concerns about women's health and privacy, the restrictions were extensively liberalized in 1957 and at present after huge discussions and deliberations on the topic, China provides abortion free of restrictions such as age, number of children and most importantly without any approval procedures ensuring right to privacy and upholding human rights to the full extent^[7].

In Russia, abortion laws have been fluctuating since the early 90s with the change in political heads of the state. Before 19th century abortion in Russia was not allowed even for medical reasons then in the 1920s, abortion was allowed if it is performed by doctors in hospitals. After some years when Stalin took over from Lenin, abortions were again prohibited with one exception that it will only be provided if continued pregnancy would pose a serious danger to the mother. Again in 1954 and 1955, a decree was passed allowing abortions if done under the guidance of qualified medical practitioners and it was done in order to give women a choice to make decisions of her personal life. But again under Vladimir Putin, abortion was restricted and the grounds on which the abortion can be done were drastically reduced and in January 2016, a bill to "rule out the uncontrolled use of pharmaceutical drugs destined for termination of pregnancy"^[8], as a direct result it could have banned retail sales and would have limited the organizations providing abortion pills. But this bill was summarily rejected because of the strong public protest.

India since the date of inception of the constitution has granted women special status and has always protected the dignity of women through constitutional provisions. India with respect to abortion pioneered in legalising induced abortion by passing a Medical Termination of Pregnancy (MTP) Act of 1971, legalising abortion if women carry a risk of injury, endangers her mental health, have resulted because of contraceptive failure or from rape and was permitted up to 20 weeks without any spousal consent in case of married woman. As per the records of the ministry of health and family welfare, in 1996-97 about 4.6 lakh MTPs were performed in the country. Against that, an

estimated "6.7 million abortions per year are performed in other than registered and government recognized institutions, often by untrained persons in unhygienic conditions"^[9]. In India though a very liberal abortion law was passed in 1971, it has been implemented in a very unorganized and poor manner.

Origin of privacy: Judicial interpretation

Unlike the other countries, the USA legalized abortion through judicial proceedings and right to privacy in abortion was first discussed in the USA and some major issues were raised in some cases discussed below:

- 1) **Griswold v. Connecticut**^[10]. In this case, a Connecticut statute that prohibited the dissemination of contraceptives and any information related to it, was challenged. The Supreme Court held this statute unconstitutional and announced that marital relationship lies within the zone of privacy which is guaranteed by First, Third, Fourth, Fifth and Ninth Amendments and Justice Douglas who wrote the judgment argued that these amendments establish "zones of privacy" that the government also has the duty to protect^[11].
- 2) **Eisenstadt v. Baird**^[12] - In this case the court extending the judgment of Griswold held that a state cannot restrict an unmarried woman from obtaining contraceptives. The rationale was that "the right to privacy means the right of an individual, married or single, to be free from unwanted state interference into matters to decide, whether to bear or beget a child"^[13]. Thus it was held that any individual, married or single has the right of privacy to obtain contraceptives without any governmental interference.
- 3) **Roe v. Wade**^[14]. this case is considered as the landmark judgment in the history of abortion which established that right to personal privacy of an individual is guaranteed under First Amendment as opined in Stanley v. Georgia^[15], in the Fourth and Fifth Amendments, in the Ninth Amendment and also in the Fourteenth Amendment as discussed in Meyer v. Nebraska^[16]. The appellant Roe instituted this action to declare Texas Abortion Statute unconstitutional which prohibits abortion except when the life of the women is in danger. The appellant was an unmarried and pregnant lady, who was denied abortion on the ground that it didn't possess a danger to her life. She claimed that this statute is unconstitutional because it infringes her right to personal privacy as guaranteed in First, Fourth, Ninth and Fourteenth amendment. And also she claimed that it is violating the judgment of Eisenstadt's case wherein it was held that the government is not allowed to interfere in the woman's decision whether to bear or beget a child. The Supreme Court, in this case, ruled that a woman's right to privacy encompassed her decision whether to terminate her pregnancy but did not

⁶ Siddhivinayak S Hirve, Abortion Law, Policy and Services in India: A Critical Review, *Reprod. Health Matters*, 114-121 (2004).

⁷ Manuel L. Ortega, Abortion and the Right of Privacy, 48 *Phil. L.J.* 652 (1973).

⁸ Marge Berer, Abortion Law and Policy Around the World: In Search of Decriminalization, 19 *HHR*, 13-27 (2017).

⁹ Leela Visaria "et al." Abortion in India: Emerging Issues from Qualitative Studies, 39 *EPW*. 46, 5044-5052 (2004).

¹⁰ *Griswold v. Connecticut* 381 U.S. 479 (1965).

¹¹ ABORTION AND PRIVACY, Shmoop (Nov 16, 2019, 10:15), <https://www.shmoop.com/right-to-privacy/abortion-privacy.html>

¹² *Eisenstadt v. Baird* 405 U.S. 438 (1972).

¹³ *Id.* at 11

¹⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

made it an absolute right and announced that the state may have a compelling interest in the mother's health and the fetal life. Now the question was when this compelling interest would come into picture, addressing this issue the court adopted first trimester rule and laid down that during the first trimester of pregnancy it is an absolute right of woman to decide whether to terminate pregnancy or not, while in the second trimester government can interfere if maternal health is at risk and during the last trimester if the fetus reaches viability. After this case, many states altered abortion laws and made abortion easily accessible during the first trimester without any interference.

- 4) **Planned Parenthood of Central Missouri v. Danforth** ^[17]. Although Roe and Doe's case were landmark judgments in the abortion and privacy history there were some questions that were not answered in Roe and Doe of which the most important was, competing spousal and parental interests in the pregnancy. In this case, the court held that "if the state had no interest in the first trimester of the pregnancy then it cannot delegate to any other third party also" and hence it struck down the Missouri statute which required parental or spousal consent for abortion. While deciding the matter in this case, the court also held that in between the competing interest of women's right of privacy and husband's paternal interest, "the balance will always favor the women's right to privacy". In this case, for the first time, the right to privacy was extended to minors with one exception that her decision will be subjected to her level of maturity.
- 5) **Bellotti v. Baird** ^[18]. In this case, the Bellotti court upheld a Massachusetts statute that required parental consent because court was of the view that an unmarried pregnant minor may lack mature judgment but unlike the Danforth statute, the Massachusetts statute provided a provision that if a parent withheld consent to a daughter's abortion, the daughter can file a petition in the court to set aside parental refusal. In this case, that court laid down that though minors too have a qualified right to privacy but at the same time, the compelling state interest in the well-being of the minor citizens is also justified.

Abortion and Privacy: India's Scenario

India has always considered abortion as an important public health issue because more or less it is negatively associated with the social, economic and health of both women and family. Since the 19th century, India has been struggling to decide that whose side is stronger, the mother's right to choice or the unborn child's right to life. So as far as India is concerned, there are many statutes, which deal with abortion. Section 312 of the Indian Penal Code, 1860 makes miscarriage punishable.

312. "Any person who voluntarily cause any woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, shall be provided with the punishment of imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either

description for a term which may extend to seven years, and shall also be liable to fine" ^[19].

This section punishes any person who causes the miscarriage to women and an explanation to this section clarifies that even the women carrying the child are also deprived of this right under section 312. On one hand, this section tends to protect the right to motherhood in the best possible manner but on the other hand, it deprives women of the right to choose, whether to bear or beget a child. Although this law is very restrictive to the liberty of women but is not as cruel as it appears because Section 312 of Indian Penal Code, 1860 allows abortion if done in good faith for the sole purpose of saving the life of the women. Then in 1971 further extension was given to the right of abortion by the enactment of Medical Termination of Pregnancy Act, 1971. This act was introduced because the pregnancy law in the Indian Penal Code was enacted about a century ago and was a very restrictive law that resulted in the breach of this law in large numbers all over the country. Section 3 of the Medical Termination of Pregnancy Act, 1971 says that pregnancy can be terminated, if a woman seeking abortion is up to 12 weeks pregnant then she may abort with the approval of one "registered medical practitioner" and if a woman is between 12 to 20 weeks pregnant may abort only after the approval of two medical practitioners and medical practitioners will allow only if:

1. the pregnancy is continued it could have caused danger to the woman's life; or
 2. If the child were born, there was a substantial risk that the child would have suffer from such physical or mental abnormalities as to be seriously handicapped.
- "Explanation 1.-if the pregnancy caused was because of 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.-When the pregnancy so cause was because of the failure of any device or method used by any "married" woman or her husband for the purpose of controlling the number of children, the anguish caused by such unwanted pregnancy will be presumed as a grave injury to the mental health of the pregnant woman" ^[20].

But the fundamental question of the right to privacy was still in question. In the case of *Gobind v. State of M.P.* ^[21], the court opined that privacy interest must be placed with respect to other rights and held that the right to privacy must include the personal choice of inter alia marriage, motherhood, procreation and child-rearing. In another Landmark judgment of Justice K.S. Puttaswamy v. Union of India, the nine-judge bench held that privacy is not only guaranteed under life and personal liberty in article 21 of the Indian Constitution but is also implicit in other facets of freedom and is guaranteed by the Fundamental rights mentioned in Part III of the Indian Constitution.

Finally in the year 2009, the Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration* ^[22] incorporated that the right of the woman to make reproductive choices falls within the ambit of personal liberty under article 21 and held that reproductive choices include right to exercise whether to procreate or to abstain from procreating thus making it amply clear that the choice

¹⁹ S. 312, Indian Penal Code, 1860

²⁰ S.3, Medical Termination of Pregnancy Act, 1971.

²¹ *Gobind v. State of M.P.*, (1975) 2 SCC 148 (India).

²² *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1(India).

¹⁷ *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

¹⁸ *Bellotti v. Baird*, 428 U.S. 132 (1976).

of procreation falls within the ambit of right to privacy. After these landmark judgments also, the MTP Act, 1971 has not been amended yet and in India, even today also if any woman wants to abort a child simply because she is not ready or because of career-related issues or financial or emotional reasons, she cannot abort a child. Also the section 3 of the MTP Act, 1971 doesn't permit abortion to an unmarried woman, who becomes pregnant because of the contraceptive failure because it specifically mentions the term married woman in the explanation clause. The cruelest point is you are not allowed to abort under any condition if the pregnancy exceeds 20 weeks. In most of the rape cases, the pregnancy is detected after the expiration of 20 weeks then according to the MTP Act, 1971 the rape victims have to carry a child. If we consider bodily integrity as a matter of privacy then the MTP act is expressly violating the right to privacy. Though the MTP Act provides some reasons under which abortion can be done but that decision is also not a private decision because the approval of the medical practitioner is mandatory.

Conclusion and Suggestions to Amend the MTP Act, 1970

India has witnessed numerous gender equality movements in the last decade and has come a long way to grant equal opportunities, services and access to the women. Many laws have also been amended in order to promote gender equality but nobody has focussed on abortion laws currently prevailing in the country. International human rights law has clearly mentioned that a person is vested with human rights only at birth and has laid down that pregnancy takes place inside the woman's body and hence, the right to control their own body and choice whether to procreate or to abstain from procreating must be left to the women alone^[23]. These provisions clearly end the debate of "Pro-Choice v Pro-life" but still, Indian society under the shield of fetal rights discourage abortion practices and does not pay any heed to the woman's right to privacy as guaranteed by the Indian Constitution and even today also pre-marital sex is considered as unethical.

In other parts of the world, the right to abortion has been made co-extensive with the right to privacy as we have seen in the case of the U.S.A There have been many landmark judgments that ensured that the personal privacy of its citizens doesn't get violated and even extended these rights to minors also with the only exception of state's interest in the well-being of its citizens. And after these judgments, many statutes were amended in the US but in India, despite the landmark judgments discussed above, no amendment has been made to the existing laws. So a step needs to be taken urgently to amend MTP Act, 1971 and to start with, the word "married" mentioned in the explanation clause Section 3 of the said Act needs to be removed and abortion should be provided to all the woman irrespective of the marital status if the pregnancy results from contraceptive failure. Also, the provision that during the first 12 weeks also the abortion can be done only if approved by a registered medical practitioner, who can approve only on certain grounds, needs to be revised as this provision is

against the privacy of the woman. The First-trimester rule as adopted by the U.S. in *Roe v. Wade* can be adopted in India also so as to ensure right to personal privacy and well-being of the citizens. Also, the first-trimester rule should be applied with the exception of rape cases where sometimes the pregnancy is not detected in the first trimester. Therefore it is argued that the MTP Act, 1971 needs to be amended because it violates the right of privacy as guaranteed by the Indian Constitution.

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