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Motherhood the Norm, Abortion an Exception: Let the Women Decide

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ABSTRACT

In the recent judgement of Dobbs v. Jackson Women's Health Organisation 2022 U.S. LEXIS 3057, the U.S. Supreme Court overturned Roe v. Wade 410 U.S. 113 (1973), stripping many women of their right to abortion. This brings forth to the mainstream the question as to whether Abortion can be considered a part of body autonomy. Does the State, Medical Professional, and as a matter of fact, the Spouse has any right to sue the woman for an abortion. The author will be critically analysing the Medical Termination of Pregnancy (Amendment) Act, 2021. Is it progressive enough to break the cultural chains binding Indian Women. This paper shall consider all the pros and cons in the event of making the right of abortion absolute under the Right to Privacy. What would be the repercussion if Abortion was given as a right at will. If we accept certain limitations on this right, then can we agree on a universal period at which abortion shall be forbidden? The paper also seeks to find out whether the Amendment Act of 2021 falls short of right-based legislation. The disability activists accuse the Amendment of advancing eugenicist perception and the Ableist approach- the author shall analyse the said accusation as well.

Keywords: Right to Privacy; Body Autonomy; Natural Law; Female foeticide; right to liberty; eugenics perception; Embryo.

I. INTRODUCTION

The practice of interrupting pregnancy is not a new one as Sarosh Framroze Jalnawala says in his report on the effect of the Medical termination of Pregnancy Act 1971 (hereinafter referred as MTP Act). What people tend to forget is that an unwanted pregnancy and childbirth can lead to catastrophic effects on both the mother and the child.² As is evident in the history, the provision regarding abortion in Indian Penal Code 1860 dates back about a century ago. It made every abortion punishable unless and until it was done to save the life of the mother. The problem as it seemed was not that it restricted women from aborting, rather it incited women to opt for illegal abortion while risking their lives in the process. As per World Health Organisation (hereinafter referred as WHO), unsafe abortion account for 13% of maternal death, 20% of

¹ Author is a student at National Law School of India University, India.

²John Baker, Philosophy and the Morality of Abortion, 2 JOURNAL OF APPLIED PHILOSOPHY 261 (1985), 261-62 (1985). <<https://about.jstor.org/terms>> accessed September 2, 2022 .

mortality and disability³ especially in those countries having severe restrictive laws for abortions.

(A) Literature review

The case of Ms. X V. The Principal Secretary, Health And Family Welfare Department, Government Of India, 2022 highlighted the gap between the Medical Termination of Pregnancy (Amendment) Act 2021 and the Medical Termination of Pregnancy Rules 2003, bringing the issue of abortion to the mainstream. Before analysing the Amendment of 2021, it was important to understand the ins and outs of the law on Abortion. *Sarosh Framosh Jalnawalla, Medical Termination of pregnancy Act Report of the First Twenty months of Implementation, 1974*, gave a background to the laws regulating abortion. It described how the growing concern of unsafe abortion and high mortality rate brought MTP Act 1971 making abortion legal in India. Reading *John A. Robertson, Autonomy's Dominion: Dworkin on Abortion and Euthanasia, Law & Social Inquiry, Spring, 1994, Vol. 19, No. 2 (Spring, 1994)*, was an enlightening experience as to how Robert Dworkin countered the 'Abortion conservative' while providing a wide meaning to right to privacy. He tried to answer the questions regarding fundamental right to procreative autonomy and so, is the state's interest in protecting the foetus. Right to Privacy and body autonomy is part and parcel of human dignity. The book of *Yechiel Michael Barilan, Human Dignity, Human Rights and Responsibility: the New Language of Global Bioethics and Biolaw* narrates the story of "human dignity" as a background moral ethos to human rights and its connection to the issue of abortion. It poses the question- does abortion violate the right to life of innocent humans? Or does the outlawing of abortion violate women's rights to privacy, equality, and autonomy? Another book *Christopher Kaczor, The Ethics of Abortion: Women's Rights, Human Life, and The Question of Justice (2nd edn, Routledge 2015)* is the most comprehensive case against the choice of abortion. It critically evaluates all the major grounds for denying foetal personhood. It also provides several (non-theological) justifications for the conclusion that all human beings, including those in utero, should be respected as persons. It also examines hard cases for those who are pro life, such as abortion in cases of rape or in order to save the mother's life as well as hard cases for defenders of abortions, such as sex selection abortion and the rationale for being "personally opposed" but publicly supportive of abortion. Research of *Antonella F. Lavelanet, Brooke Ronald Johnson and Bela Ganatra, Global Abortion Policies Database: A descriptive analysis of the regulatory and policy environment related to abortion, BMC Int Health Human Right 2018* provided insight what are the guidance

³Safe abortion: technical and policy guidance for health systems, 20 Reproductive Health Matters 205 (2012).

of World Health Organisation on Abortion. Through empirical study it demonstrated the most recent situation of abortion all over the world along with measures to fill the loopholes. Ultimately I came back to the Indian case of *K.S. Puttaswamy (Privacy 9J.) v Union of India*, (2017) 10 SCC 1 which held that right to reproductive choice is part and parcel to right to privacy under art 21 of the Indian Constitution.

(B) Research question

In this paper the author shall analyse the Medical Termination of Pregnancy (Amendment) Act 2021 vis-a-vis Right To Privacy. The main question which the author shall try to answer is whether the Amendment of 2021 is a right based legislation providing procreative autonomy under the ambit of Fundamental Right to Privacy?

(C) Hypothesis

Whether by retaining the provision for medical practitioner's opinion, specifying the categories of women who can abort and omitting the word 'request', the Medical Termination of Pregnancy (Amendment) Act 2021, retains its overall regressive legal position on the issue of right to privacy along with reproductive autonomy of women hence making "motherhood the norm and abortion the exception."

II. ABORTION AND RIGHT TO PRIVACY

Liberals have always been of the view that the right to personal autonomy requires an Individual to have the right to choose abortion whereas conservative argue that such autonomy is rightfully limited when an individual attempts to take a human life.⁴ In the view of legal philosopher Ronald Dworkin, controversies over abortion should be seen in the light of personal choice and not the right or interest of fetuses.⁵ Dworkin furthers his argument by saying that a principled interpretation of the constitution must assign the question of abortion to the individual involved rather than the society. State's deontological interest does not justify the infringement of a person's fundamental right to liberty in abortion.⁶ Preventing women from aborting can also produce resentment in the women, creating a mindset of being a slave of another person's whims and fancies.⁷

⁴John A. Robertson, *Autonomy's Dominion: Dworkin on Abortion and Euthanasia*, 19 LAW & AMP; SOCIAL INQUIRY 457 (1994).. <<https://about.jstor.org/terms>> accessed September 2, 2022.

⁵ The rationale he gives behind this view is that such views are so clearly religious or spiritual in content, they should be left to individual moral choice. Ronald. M Dworkin, 'Life's dominion: An argument about abortion, euthanasia, and individual freedom' (Knopf 1993). as cited in John A. Robertson, *Ibid* at 458 <<https://about.jstor.org/terms>> accessed September 2, 2022.

⁶ Robertson, *supra* note 3, at 460.

⁷ YECHIEL MICHAEL BARILAN, HUMAN DIGNITY, HUMAN RIGHTS, AND RESPONSIBILITY: THE

Right to Privacy must not be limited to just freedom from unjust arrest and searches and seizures but must also include within its ambit right to abort a foetus.⁸ Indian Courts holding the view of Dworkin have held- “*The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.*”⁹ In the case of *Suchita Srivastava v. Chandigarh Administration*,¹⁰ the Supreme Court held that- “*..a woman's right to make reproductive choices is also a dimension of personal liberty as under Article 21 of the Constitution.*” In a recent case the Apex Court went on to say and I quote “*A woman's right to reproductive choice is an inseparable part of her personal liberty under Article 21 of Constitution. She has a sacrosanct right to bodily integrity*”¹¹

III. LIBERALISATION OF THE ABORTION LAW

WHO requires from the nations not restricting safe abortion but to develop an enabling provision. To argue this it is often said that barriers to accessing care only leads to the burden of unsafe abortion. A study shows that approximately 25 million unsafe abortion were done between 2010 and 2014 alone.¹²

Abortion laws began to be liberalised, through legislation or broader interpretation of those legislation in the first half of the 20th century when finally the issue of unsafe abortion was recognised.¹³ Thereafter, a trend could be seen of liberalising the legal grounds for abortion.¹⁴ By the end of 1985, approximately 36 countries had liberalised their abortion laws.¹⁵ As a consequence, many countries witnessed a surge in legal abortions¹⁶.

Interestingly, 84.3% of women coming for abortion were married. Also, a very low mortality rate was recorded where abortion was performed before the 12th week of pregnancy.¹⁷ In Japan 7 per 100,000, in Sweden where abortion is permitted upto 20 weeks, 84 per 100,000 and in Britain 30 per 100,000 abortions resulted in death.

IV. ISSUES REGARDING LEGALISING ABORTION

NEW LANGUAGE OF GLOBAL BIOETHICS AND BIOLAW 253, ch5 (2012) (MIT Press 1966).

⁸ K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1 [479].

⁹ *Id.* at 298.

¹⁰ AIR 2010 SC 235 [11].

¹¹ X vs The Principal Secretary, Health & Family Welfare Department, [2022] LiveLaw (SC) 621, [19].

¹² Antonella F. Lavelanet et al., *Global Abortion Policies Database: a descriptive analysis of the legal categories of lawful abortion*, 18 BMC INTERNATIONAL HEALTH AND HUMAN RIGHTS, 25-35 (2018). <<https://doi.org/10.1186/s12914-018-0183-1>> accessed September 2, 2022

¹³ WHO, *supra* note 2, at 90.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ SAROSH FRAMOSH JALNAWALLA, PROGRESS REPORT FOR THE FIRST TWENTY-ONE MONTHS OF THE CONTRACT PERIOD, (1980), <http://dx.doi.org/10.2172/6946629> (last visited Feb 24, 2023).

¹⁷ *Id.* at 590.

1. Sex Selective Abortion

One problem which is inherent in the history of Indian society is the preference for male children, giving rise to the issue of sex determination and sex selective abortion. To counter this issue, where all over the world sex determination is legal, Pre-Conception and Pre-Natal Diagnostic Techniques Act makes it illegal in India. Thus to avoid the larger evil of sex selection abortion, one has to restrict the technological advancement which is normal in other international jurisdictions.

2. Viability of the Foetus

Viability means the capability of the foetus to live outside the womb. Medical science claims it to be placed about 28 weeks but may occur earlier around 24 weeks. Viability becomes an important line of distinction between human and foetus- one which needs protection and one which does not.¹⁸ to put it simply- is a foetus a person? Well unfortunately there has never been a clear answer to it.

The abortion conservatives advocate for the life of foetus calling for compelling state interest. They argue, removing a foetus from its life source i.e. mother, is actually nothing but killing a human being.¹⁹ In biological terms they say, embryonic life could be considered to commence with the fertilisation.²⁰ In his contention, Ronald Dworkin asks that if abortion conservatives considers foetus to be a person with all rights from the moment of conception, then how are they creating a “*exception out of it in cases of health of mother, rape and incest. Even in such a case would not hold any meaning to compare between two lives - the mother and the child. For those who consider a foetus to be a person and reject any kind of exception, they will have to deny the biological fact of post fertilisation development.*”²¹ Additionally, they should consider the postcoital means of birth control as a means to destroy human life thus promoting homicide.

3. Bioethics

The field of medicine respects the choice of the pregnant woman but such choice must be made based on her duration of pregnancy and past medical record. Besides, consultation regarding the risks present in the abortion must precede her choice.²² Abortion within 12 weeks is

¹⁸CHRISTOPHER KACZOR, THE ETHICS OF ABORTION: WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE, 70 (2013).

¹⁹BAKER, *supra* note 1.

²⁰Kaczor (n 17) 112, ch 6.

²¹ In post fertilisation, an individual embryo does not develop until after implantation in the uterus, and a sentient nervous system does not exist until very late in pregnancy.

²² Clinical Practice Handbook for Safe Abortion, World Health Organization. 10, s1

equivalent to abortion and can be controlled by the woman.²³ The guidelines provided by WHO states that in case a woman asks for abortion of an unwanted pregnancy led by the failure of contraceptive, she must be guided for the correct use of contraceptive. But at the same time, the acceptance of the contraceptive must not become a pr-condition for the abortion.²⁴

Abortion is not just a social issue but involves intervention of the medical field. In advanced cases of pregnancy the procedure often involves contact with blood and other body fluids, it makes the opinion and intervention of the medical professional absolutely necessary.²⁵ In the case of medical abortion beyond 12 weeks, administration of misoprostol shall be done in the health care facility. The idea of abortion without the counselling of the doctor becomes impossible considering that in case of pregnancy beyond 12 weeks demand surgical abortion.²⁶

Although bioethics considers abortion a bitterly controversial topic, there is growing concern for abortion care to be constitutionalised.²⁷

V. ABORTION LAWS IN INDIA: FROM RESTRICTIVE TO PROGRESSIVE

Sec 312-316 of Indian Penal Code, 1860 comprehensively covers the area of abortion. Sec 312 criminalises voluntary abortion²⁸ including within its ambit the woman who “causes herself to miscarry.”²⁹ The effect of the Code was the high mortality rate of pregnant women due to illegal and unsafe abortion.

1. Shanti Lal Shah Committee Report

Concerned by the mortality rate, Central Family Planning Board³⁰ in 1964 formed the Shanti Lal Shah Committee under the chairmanship of Shri Shanti Lal Shah. Based on the recommendation of this committee, in the year Medical termination of Pregnancy Act 1971, was enforced on 1st April 1972. This Act was followed by the report of Sarosh Framroze Jalnawalla,³¹ analysing the effect of the 1971 Act during the span of the first 20 months of enforcement. The statistics furthered by the Shantilal Shah committee stated that among 6.5 Million abortion, 3.9 million were self-induced. Among the abortees, a large number of women

<https://apps.who.int/iris/bitstream/handle/10665/97415/9789241548717_eng.pdf;jsessionid=9EEF7A0ED161D9FFB6E8BE95ECDA871D?sequence=1> accessed on september 5, 2022.

²³ *Id.* at 12, s 1.

²⁴ *Id.* at 19, s 1.5.

²⁵ *Id.* at 37, s 2.7.

²⁶ *Id.*

²⁷ BARILIN, *supra* note 6, at 254, ch 5.

²⁸ “...imprisonment of either description for a term which may extend to three years, or with fine, or with both”.

²⁹ Indian Penal Code 1860, sec 312.

³⁰ The Central Family Planning Board at their 16th meeting held on 25th August, 1964 expressed anxiety on the reported increase in the number of illegal abortions.

³¹ Jalnawalla (n 15).

were married with no particular reason to hide their pregnancy.

2. Medical Termination Of Pregnancy Act 1971

MTP Act 1971 thus came as an exception to sec 312 of IPC providing for the safe abortion. Sec 3 of the Act provided that a pregnancy under 12 weeks could be legally terminated with the opinion of a single medical professional.³² In case of pregnancy, in advanced stage i.e. between 12 to 20 weeks, it can be terminated with the opinion of at least 2 medical professionals in certain specific circumstances provided under the Act itself- risk to the life of women, grave injury (physical or mental). The legislature clarified that it would consider rape as mental injury³³. It also considered pregnancy caused by the failure of the birth control method used by the married woman and her husband as grave injury to the mental health of the pregnant woman.³⁴

3. Need For The Amendment: Medical Professional Centric Legislation

As a matter of fact, policy makers have been inclined to frame the provisions in terms of *“doctors’ right, foetal rights, law enforcement, morality, religion, progressivism, family planning, eugenics rather than focussing on women’s privacy, choice, health and autonomy.”*³⁵ The major criticism of the MTP Act 1971 has been that it was mainly concerned with the medical professionals and their exemption from liability rather than the women and their right to abortion. Abortion beyond the gestation period for which abortion is allowed leaving her with no other option but to take legal recourse which turns out to be very cumbersome.

4. Medical Termination Of Pregnancy (Amendment) Act Of 2021

The two laudable changes introduced by the Amendment of 2021- the Limit of 12 weeks has been raised to 20 weeks³⁶ and the gestation period of 12-20 weeks has been substituted with 20-24 weeks³⁷ for certain categories of women.³⁸ The requirement for the opinion of medical professionals stands unchanged in the new provision. The Amendment goes beyond the conventional provision of marriage and adds the word “partner” instead of “husband”³⁹ allowing the women getting pregnant outside the marriage to have a legal and safe abortion.

³² Medical Termination of Pregnancy, Sec 3(2)(a) (MTP Act 1971)

³³ MTP Act 1971, Explanation I to s. 3(2)

³⁴ MTP Act 1971, Explanation II to s. 3(2)

³⁵ DOROTHY MCBRIDE STETSON, ABORTION POLITICS, WOMEN’S MOVEMENTS, AND THE DEMOCRATIC STATE: A COMPARATIVE STUDY OF STATE FEMINISM, 3 chap 1 (2001).

³⁶ “where the length of the pregnancy does not exceed twenty weeks...” Medical Termination of Pregnancy (Amendment) Act 2021 s 3(2)(a) (MTP Amendment 2021).

³⁷ where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in the case of such a category of woman as may be prescribed by rules made under this Acts...” MTP Amendment 2021 s 3(2)(b).

³⁸ Medical Termination of Pregnancy Rules 2003, Rule 3B.

³⁹ “..device or method used by any woman or her partner..” MTP Act 1971, Explanation 1 to sec 3

Is the new amendment a right based legislation providing abortion as a right under the ambit of right to privacy and body autonomy?

A number of right activists accuse the Amendment of 2021 to fall short of rights-based legislation.

a. Third Party Authorisation:

The mandate of opinion of the doctor makes it unclear as to whether the woman has been given full autonomy to abort an unwanted pregnancy. In Africa, 30 of the 105 countries require authorisation by the health care provider or other types of Professional.⁴⁰ 30 Asian Countries and 32 of the 105 European countries require similar authorisation.⁴¹ It thus goes against human right treaty which recognised the importance of autonomous decision-making, “*calling on states to remove third party authorisation requirements*”⁴² The problem of third party intervention becomes more complicated when the woman exercising her autonomy requests for abortion and the doctor exercising his discretion in the form of opinion denies abortion.⁴³ It thus demonstrates a situation where policy actors debate whether or not doctors be given freedom to decide on abortion issues while disregarding the women’s role in that decision.⁴⁴

b. Request By The Woman

The Medical Termination of Pregnancy (Amendment) Bill of 2014 put forward a more right oriented provision of sec 3 stating that abortion could be terminated before 12 weeks on the “request” of the pregnant women.⁴⁵ To showcase a reflection of right based legislation, the Amendment should have “*followed the recognition of the right to make reproductive choices included in the right to privacy, dignity and bodily autonomy.*”⁴⁶ On the matter of request for abortion by the women WHO claims that nearly a third of the UN member States have allowed their citizens abortion based on request giving them the right to privacy along with body autonomy.⁴⁷ Considering, there are also certain jurisdiction where Abortion is lawful on the woman’s request, with no requirement of justification of any legal ground,⁴⁸ The Amendment of 2021 lags behind.

⁴⁰ Lavelanet, Schlitt, Johnson, Ganatra, *supra* note 11, at 27.

⁴¹ *Id.*

⁴² *Id.* at 32.

⁴³ KACZOR, *supra* note 17, at 242, ch 11.

⁴⁴ Stetson, *supra* note 34.

⁴⁵ Medical Termination of Pregnancy (Amendment) Bill, 2014. Available at <<https://main.mohfw.gov.in/sites/default/files/74582186651414643779.pdf>>

⁴⁶ K.S. Puttaswamy, *supra* note 7.

⁴⁷ UN Department for Economic and Social Affairs. 47. World abortion policies 2011. New York, Population Division, United Nations, 2011.

⁴⁸ Lavelanet, Schlitt, Johnson, Ganatra *supra* note 11, at 25.

c. Specified Categories for Abortion

It is indeed laudable that the Act has included more categories of women who can have abortion in advance stages. This includes unmarried women as well. The celebration was short lived when the Delhi High Court refused interim relief to a 25 year old unmarried woman seeking abortion of her pregnancy of 23 weeks and 5 days saying that unmarried Woman Pregnant Out Of Consensual Relationship Cannot Seek Termination Of Pregnancy After 20 Weeks except on the grounds mentioned in rule 3B.⁴⁹ Though the Decision was rectified by the apex court stating “Denying an unmarried woman the right to a safe abortion violates her personal autonomy and freedom”⁵⁰ It showed a visible gap between the MTP Act 1971 and the Rules 2003.

VI. CONCLUSION AND SUGGESTION

Appreciative of the laudable change brought by the said amendment, I highlighted some of the major issues present in it. In the area of Right to privacy the 2021 Amendment has shown progressive approach but the loopholes present would give it slight tint of regressive approach as well. To clarify, the aim of the paper is not to advocate the right to privacy by having abortion at home without doctor’s consultation. What right to privacy and body autonomy actually demands is ‘*consultation and guidance*’ by the doctor and not his discretionary opinion.

Any legislation demands advertisement for its successful implementation. So does MTP Amendment Act 2021. It requires circulation of information especially in those rural areas where women are deprived of such knowledge. It also requires legislative interference for the addition of the term ‘request’ which could clarify the nature of the Act to be not just doctor centric but also providing for the right to privacy to women. The 2021 Amendment Act acknowledges changes like marital status and health condition, it ignores the factors like - economic factors, broken families, drug abuse, abusive relationships, incomplete education, fear of public humiliation, antagonistic partners and failed love, to a large extent. One way for the woman to get abortion in such cases is to fit her ground under mental pain. For this, again a third party intervention (the doctor and the court in advance cases of pregnancy) would be required stripping the woman of her right to privacy and body autonomy. The act should be made more enabling and less restrictive. The gap between the Act and Rules makes the position of right to body autonomy of unmarried women questionable. If these loopholes are successfully filled, the Amendment Act of 2021 would become a right based legislation not

⁴⁹ Ms. X V. The Principal Secretary Health And Family Welfare Department, Government Of India, 2022 LiveLaw (Del) 660, [8].

⁵⁰ X vs The Principal Secretary, Health & Family Welfare Department, 2022 LiveLaw (SC) 621, [20].

forcing on women the concept of “*motherhood the norm, abortion an exception*”
