

RIGHT TO ABORTION- HER BODY HER RIGHT HER CHOICE, WITH REFERENCE TO ROE V WADE AND IMPLICATIONS IN THE INDIAN CONTEXT

Aastha T Choudhry*

INTRODUCTION

Abortion

Unsafe abortion, by the World Health Organization (WHO), is “an abortion procedure performed by an untrained person or in an environment that does not meet minimum medical standards”. However, as abortion technology continues to become safer, it has been replaced by a three-tier classification (safe, less safe, and less safe) that allows for a more detailed description of the different situations that constitute an unsafe abortion, and the widespread replacement of unsafe and invasive methods.

Types

When a woman is voluntarily withdrawn from a supplier, it is called an artificial abortion procedure to end a pregnancy.

A miscarriage also known as spontaneous abortion, is the loss of a woman's pregnancy before the 20th week. This type can be physically and emotionally painful.

Abortion law in India

before 1999 (Indian Penal Code, 1860)

Prior to 1971, abortion was criminalized under Section 312¹ which described it as intentionally “causing an abortion.” Except where abortion was performed to save a woman's life, it was a criminal offense and criminalized women/providers, and anyone who intentionally caused a woman to miscarry was punished with a three-year prison sentence years, imprisonment, and/or a fine.² Using the service is punishable by imprisonment for a term of seven years and/or a fine. In the 1960s, when abortion was legal in 15 countries,

*BA LLB, THIRD YEAR, FACULTY OF LAW, UNIVERSITY OF ALLAHABAD.

¹ "Abortion law: In 24-week pregnancy case, Supreme Court failed to address women's right to their bodies", Retrieved 20 June 2023.

² "The Indian Penal Code 1860" (PDF). Retrieved 20 June 2023.

debate over the legal framework for induced abortion began in India. The alarming rise in the number of abortions has put the Department of Health and Family (MoHFW) on alert. To remedy this, the Indian government set up a committee chaired by Shantilal Shah in 1964 to draft an abortion law for India.³ The recommendations of this committee were adopted in 1970.

This was passed in August 1971 by Sripati Chandrasekhar as the Medical Termination of Pregnancy Act.

Highlights of the Shah Committee

- established by the Indian government in 1964.
- conducted a comprehensive review of the socio-cultural, legal and medical aspects of abortion.
- recommended in its report the legalization of abortion to avoid ruining women's health and lives for both humanitarian and medical reasons.

Abortion rate in India

A 2018 study estimated that In 2015, 15.6 million abortions were performed in India.⁴ Much of this could be dangerous. The last major study on induced abortion in India was conducted in 2002 as part of the Abortion Evaluation Project which estimated 6.4 million abortions per year under the India Medical Termination of Pregnancy Act 1971.

Unsafe abortions are the third leading cause of maternal death, killing tens of women every day along with thousands of other diseases. There is a need to improve women's access to CAC services⁵ and prevent death and disability.

The Medical Abortion of Pregnancy (MTP) Act 1971

provides the legal framework for the provision of CAC services in India.

Abortion is legal in a number of states up to the 20th week of pregnancy-

³ Gaur, K.D. (1991). "Abortion and the Law in India". dspace.cusat.ac.in. Archived from the original on 26 June 2018. Retrieved 20 June 2023.

⁴ Singh, Susheela; Shekhar, Chander; Acharya, Rajib; Moore, Ann M; Stillman, Melissa; Pradhan, Manas R; Frost, Jennifer J; Sahoo, Harihar; Alagarajan, Manoj "The incidence of abortion and unintended pregnancy in India, 2015". The Lancet Global Health. We estimate that 15.6 million abortions (14.1 million–17.3 million) occurred in India in 2015, retrieved 20 June 2023.

⁵ Comprehensive abortion care.

- the continuation of the pregnancy endangers the life of the pregnant woman or may seriously damage her physical or mental health;
- a significant risk that the child, whether born or dying, will be seriously affected by physical or mental abnormalities;
- If the pregnancy was caused by rape (suspected of seriously damaging the mental health of the woman);

The Act defines: (i) who can terminate a pregnancy - only be performed by a Registered Physician (RMP) who meets the following requirements: has a recognized medical qualification under the Indian Medical Council Act, name is on the State Medical Register, who has relevant experience or training in the field of OB/GYN as required by the MTP Regulation; (ii) when the pregnancy can be terminated; and (iii) where- All public hospitals are capable of providing CAC services by default. However, private-sector facilities require state approval. Approval must be obtained from a district-level committee, called the District Committee (DLC), consisting of three to five members.

The Medical Termination of Pregnancy (MTP) Act 1971 was amended in 2002 to allow better implementation and access for women, particularly in the private healthcare sector.

Under the MTP Regulations 2003, the forms are required to authorize private premises for the provision of MTP services.

According to the provisions of the Act, only the consent of the woman whose pregnancy is to be terminated is required. However, in the case of a minor, or woman with mental illness, the consent of the guardian is required (the MTP Act defines a guardian as a person who cares for a minor. This does not mean that only the parents have to give their consent).

MTP Law Amendment of 2021

On January 29, 2020, the Government of India first introduced the MTP 2020 Amendment, which was adopted at Lok Sabha on March 17, 2020. A year later, the bill was introduced in

Rajya Sabha and passed on - March 16, 2021, as MTP Amendment Law 2021. The fixes are as follows:

- Abandoned Marriage Clause –law previously only allowed a married woman to have an abortion if the contraceptive method failed. Thanks to the change, unmarried women can now apply for safe abortion services due to a lack of contraceptives.
- Extension of the pregnancy period – Under the Act of 1971, the period for an abortion was up to 12 weeks on the advice of one doctor and up to 20 weeks on the advice of two doctors. In addition, termination of pregnancy after 20 weeks was not permitted. However, now all women can have an abortion for up to 20 weeks on the advice of a doctor, and certain categories of women (victims of sexual abuse, minors, victims of rape, incest, disabled women) can request an abortion for up to 24 weeks. In addition, women/couples can request termination of pregnancy at any time during pregnancy for fetal abnormalities diagnosed by medical commissions.
- Medical Boards – Changes require the establishment of medical boards in every state and federal territory to diagnose major fetal abnormalities. The council will decide whether the pregnancy can be terminated at 24 weeks and each council will consist of a gynecologist, a radiologist, a pediatrician and others advised by the government.
- Confidentiality – A licensed physician may only disclose the information of a woman whose pregnancy has been terminated to a person authorize

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Even after 50 years of the enactment of the Medical Abortion Act, abortion has not been decriminalized under Section 312 IPC. An exception to this is the MTP law. The law protects licensed physicians by specifying certain conditions under which they can terminate a pregnancy. Additionally, the MTP Act specifically defines “pregnant women,” making abortion services unavailable to transgender, gender-nonconforming, and other mixed-gender people who do not self-identify and dislike women. Violators are punishable by up to a year in prison, a fine, or both.⁶

Medical Abortion Methods - a method of terminating pregnancy using a combination of drugs approved for use in India by the Drug Controller General of India. MMA is recognized

⁶ Mansi Vijay, IndiaSpend com", Not just 'women': India's abortion law should cover members of queer community as well, say experts", Scroll.in. Retrieved 24 june 2023.

worldwide as the method of choice for women seeking CAC services. All over the world, women prefer this when seeking safe abortion services as it offers them privacy and security. However, the unavailability of medicines makes access to safe abortions difficult across India. The Foundation for Reproductive Health Services India (FRHS India) published a research report on the availability of medical abortion drugs in the markets of six Indian states in 2020. This report states that around 56% of chemists reported barrier regulations for the storage and sale of these drugs.⁷

Stats

“The Guttmacher Institute in New York, the International Institute of Population Sciences (IIPS) in Mumbai and the Population Council in New Delhi conducted the first Indian study estimating abortion rates. The results of this study were published in the Lancet Global Health journal in December 2017 as an article entitled “Incidence of Abortion and Unwanted Pregnancy in India, 2015. This study estimates that 15.6 million abortions were performed in India in 2015. Of these, 4 million (22%) were performed in healthcare settings, 11.5 million (73%) were performed using off-site medical methods, and 5% performed using other methods. The study also found an abortion rate of 47 per 1,000 women aged 15 to 49.”⁸

Safe abortion vis a vis the POCSO law

The Protection of Children from Sexual Offences Act (POCSO) defines a child as any person under the age of eighteen and defines various forms of sexual abuse, including penetrative and non-penetrative violence, as well as sexual harassment and pornography. This law provides for a severe penalty, up to a maximum of life imprisonment and a fine, depending on the seriousness of the offence. While the law protects the lives and rights of children, it does not distinguish between “consensual sex” and crime and does not address the gray area of “child marriage”. Any sexual activity with someone under a certain age, e.g.18 is considered statutory rape. Because the law does not distinguish between offenses and consent, it poses a major barrier to young people's access to sexual and reproductive health services. In addition, the law provides for a declaration obligation, failure to comply which is punishable by imprisonment or a fine. This requirement has implications for adolescents'

⁷ "Availability of Medical Abortion Drugs in the Markets of Six Indian States" (Pdf), retrieved June 25, 2023.

⁸ Singh, Susheela; Shekhar, Chander; Acharya, Rajib; Moore, Ann M; Stillman, Melissa; Pradhan, Manas R; Frost, Jennifer J; Sahoo, Harihar; Alagarajan, Manoj (January 2018). "The incidence of abortion and unintended pregnancy in India, 2015". The Lancet Global Health, retrieved June 25, 2023.

sexual and reproductive health as it leads to the denial of various health services such as contraception, medical care for sexually transmitted infections, etc. Reporting requirements also impede adolescent girls' access to safe abortion services. Conflict between POCSO and MTP laws leads to denial of service in consensual child sexual assault cases. Previously, the MTP Act required guardian consent for minors, and it still does today, but the POCSO Act complicates matters with reporting requirements and providers are reluctant to offer safe abortion services to minors, even if they are self-imposed attack, leading many people to attempt unsafe abortions to avoid legal problems and make the situation even more difficult for parents who use it to abuse children or their partners, with an additional prison sentence of 7 to 10 years.

Pratigya Campaign for Gender Equality and Safe Abortion 2013.

provides a platform to address the issue of gender selection while protecting women's right to safe and legal abortion in India. A media information pack was also produced as part of the campaign.⁹

Covid 19 reign

The nationwide lockdown imposed since March 25 to fight the COVID-19 pandemic has negatively impacted access to contraception and safe abortion. India's Department of Health and Family Welfare suspended basic contraceptive services a week before the lockdown and issued guidelines saying sterilization and intrauterine device (IUCD) services should not resume until further notice. As a result of the COVID-19 lockdown, more than 20 million of the country's couples have been denied the ability to use contraception and terminate unwanted pregnancies. According to an IDF report about 1.85 million abortions were performed, i.e. 50% of the abortions that would normally take place during this period could be at risk due to lockdown travel restrictions from March to June 2020. This would require reviewing a large number of unwanted pregnancies and unsafe abortions that can result in maternal deaths.¹⁰

⁹ "Resources for the Media | Pratigya – Campaign for Gender Equality and Safe Abortion". Pratigya Campaign for Gender Equality and Safe Abortion. Retrieved June 25, 2023 .

¹⁰ "Compromised Abortion Access due to COVID-19 : A model to determine impact of COVID-19 on women's access to abortion". www.ipasdevelopmentfoundation.org. Retrieved 25 June 2023.

SUGGESTION

Telemedicine delivery of abortions can offer clients a legal, safe, and supported experience: for those who self-medicate without a prescription and without having to meet with an RMP in person. Given the need for medical abortion in India and the already existing mass self-consumption and the openness of clients and healthcare professionals to the use of technology for health and safety abortions established by global models via telemedicine.

The provision of abortions in the public sector presents several **challenges**:

lack of trained personnel, equipment and supplies, and unbiased care to the extent permitted by law.

RECENT LATE TERMINATION CLAIMS CASES FILED FOR COURT APPROVAL

Another report from Pratigya's campaign assesses the role of the judiciary in providing access to safe abortion.¹¹ The report found that more cases are being referred to the courts for approval. While many abortion orders are based on the opinion of the medical board and the case law that has already been handed down in previous cases, some fundamental decisions have also come to light in recent years. This underscores the need for the law to keep pace with changing times. It is important that pregnant women have the right to an abortion, at least during the first trimester. It is imperative that the opinion of the doctor consulted by the woman is the first and only opinion requested. The establishment of medical commissions, which are determined by the courts to handle cases of this type, has only made it more difficult for women to access safe and legal abortion. The media actively reported on many of these cases.

In December 2017, the father of a 13-year-old rape victim appealed to the Mumbai High Court for permission to remove the 26-week-old fetus. The girl was repeatedly raped by her cousin. After examining the report of the medical commission, which stated that continuing the pregnancy would endanger the life of the girl, the court concluded that the girl was physically unfit to bear a child and approved abortion.¹²

¹¹ "Assessing the Role of Judiciary in access to Safe Abortion II" (PDF), Retrieved 25 June 2023.

¹² "High Court Allows 13-Year-Old Rape Victim To Abort 26-Week Old Foetus". NDTV.com. Retrieved June 25, 2023.

A 15-year-old runaway applied to the Delhi High Court for permission to terminate her 25-week pregnancy. However, the medical commission examining her case concluded that abortion would pose a serious threat to the life of the fetus and mother. The Supreme Court then refused the girl's permission to have an abortion.¹³

In December 2017, a Thane woman appealed to the Mumbai High Court for permission to remove her 22-week-old fetus, which had been diagnosed with various disabilities. The Medical Committee's opinion concluded that the baby could have intellectual disabilities at birth, but acknowledged that terminating the pregnancy at this stage would be risky. After the applicant expressed her willingness to take the risk, the court authorized her to have an abortion.¹⁴

In May 2017, a penniless HIV-infected rape victim applied to the Patna High Court for an abortion. After the Supreme Court dismissed the charges on the grounds that "it is an irresistible duty of the State to keep the child alive," the Supreme Court went to court. The Supreme Court then authorized the abortion of the 26-week-old fetus and asked the AIIMS Medical Commission to investigate. She said: "A woman who has been left destitute, a victim of sexual abuse and suffering from a serious illness should not suffer anymore. The essence of life is the dignity of life, and every effort should be made to preserve it."¹⁵

A panel of three judges of the Supreme Court of India in Civil Appeal Complaint Case No. 5802 of 2022 released the conclusions on September 29, 2022.¹⁶ The ruling emphasized women's rights, bodily autonomy, sexual and reproductive choices, and equality for women and breaks down barriers such as third-party consent for adult women. The judgment defined "woman" as all people who need access to safe abortion, including cisgender women, transgender people and other gender-differentiated people.

¹³"Delhi HC refuses abortion nod to 15-yr-old rape victim". The Asian Age. 22 December 2017. Retrieved 25 June 2023.

¹⁴"Bombay High Court allows Thane woman to abort 22-week foetus". The Asian Age. 20 December 2017. Retrieved 25 June 2023.

¹⁵"SC considers abortion plea of HIV victim". The Hindu. 4 May 2017. ISSN 0971-751X. Retrieved 25 June 2023.

¹⁶KM, Ashok (29 September 2022). "Consent Of Woman's Family Not Needed For Abortion, Doctors Cannot Impose Extra Legal Conditions : Supreme Court". *LiveLaw*. Retrieved 25 June 2023.

Roe v Wade Overturned: What It Means

Roe v. Wade¹⁷ was a landmark decision by the United States Supreme Court, which ruled that the United States Constitution generally protects a pregnant woman's freedom to have an abortion. The decision repealed many abortion laws and sparked an ongoing debate in the United States about whether and to what extent abortion should be legal, who should decide whether abortion should be legal, and what role women should play.¹⁸ The decision also influenced the debate about what methods the Supreme Court should use in making constitutional decisions. The case was filed by Norma McCorvey - officially known as "Jane Roe" - who had a third child in 1969. McCorvey wanted to have an abortion but lived in Texas, where abortions were illegal except when necessary to save the life of a child the woman. Her attorneys, Sarah Weddington and Linda Coffee filed a lawsuit on her behalf in US federal court against her local district attorney, Henry Wade, arguing that Texas abortion laws are unconstitutional. A three-judge special court in the United States District Court for the Northern District of Texas heard the case and ruled in her favour. The parties appealed this judgment to the Supreme Court. In January 1973, the Supreme Court ruled 7-2 in McCorvey's favour, finding that the due process clause of the Fourteenth Amendment to the United States Constitution provides for a fundamental "right to privacy," which includes a pregnant woman's right to an abortion. He also recognized that abortion rights are not absolute and must be balanced against government interests in protecting women's health and prenatal life. In June 2022, the Supreme Court threw out Roe in *Dobbs v. Jackson Women's Health Organization*, arguing that the substantive right to abortion was not "deeply rooted in the history or tradition of this nation," nor was it considered a right when due process was ratified in 1868, and that it was in American law Rogen was unknown up to this point. Thereafter, in its historical research, the court introduced the concept of a constitutional "right to privacy" which it believed had been used in previous decisions such as *Meyer v. Nebraska* and *Pierce v. Nebraska Society of Sisters*, which provided for parental control over the upbringing of children, and *Griswold v. Connecticut*, where contraception came about. The ruling abolished 50 years of legal protection and paved the way for individual states to limit or ban abortion rights altogether. In a majority opinion by Judge Harry A. Blackmun, the court ruled that Texas laws criminalizing abortion in most cases violated a woman's constitutional right to privacy, which it believed was implicit in guaranteeing the liberty of a

¹⁷ 410 US 113 (1973).

¹⁸ Mears, William; Franken, Bob (January 22, 2003). "[30 years after ruling, ambiguity, anxiety surround abortion debate](#)". CNN. In all, the *Roe* and *Doe* rulings impacted laws in 46 states, retrieved 25 June 2023.

proper procedure of the Fourteenth Amendment ...and no state shall deprive any person of life, liberty or property without due process. The Supreme Court disagreed with Roe's assertion of an absolute right to terminate a pregnancy by any means and at any time, seeking to balance a woman's right to privacy against the state's interest in regulating pregnancy. In Opinion, Blackmun noted that only "essential state interests" justify a regulation that restricts "fundamental rights" such as privacy and that legislators must therefore enact restrictive legislation "not merely to reflect the legitimate interests of the state bring". The Court thus attempted to reconcile the State's individual vital interests in the health of pregnant women with the life potential of the fetus. He set the point at which the overriding interest of the state in the health of the pregnant woman would allow regulation of abortion "at the end of the first trimester" of pregnancy. In relation to the fetus, the court defined this point as "the ability to live meaningfully outside the womb" or viability, which occurs at about 24 weeks gestation. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court ruled that abortion restrictions were unconstitutional if they placed an "undue burden" on a woman seeking an abortion before the fetus was viable. As expected, Roe and Casey were reversed in Dobbs' official June 2022 court ruling, in which Alito said he had no constitutional right to an abortion.

Who will be most affected by this decision? What if people don't have access to abortion?

The only alternative to abortion is the birth of a child, in which the risk of death is 14 times higher than with this abortion. By denying a person access to a desired abortion, states are forcing them to take significant medical risks against their will.

Research from the Turn-Away Study has shown that withholding a desired abortion has other harmful effects. This study followed about 1,000 self-identified women for five years after receiving or refusing a desired abortion. They found that for these women, being denied an abortion resulted in years of economic hardship and insecurity. Compared to women who wanted an abortion, women who were denied an abortion had lower credit ratings and higher levels of debt, bankruptcy, and evictions, sex with an aggressive partner. It also had a negative impact on the financial situation and the development of earlier and later children.

After all, having a baby is associated with more serious long-term health problems than having an abortion.¹⁹

CONCLUSION

Therefore, in 1973 SCOTUS²⁰ created the constitutionally protected right of “choice”. The ruling had far-reaching implications, as it established that women's health and autonomy should be a prerequisite for passing abortion laws. *Roe v. Wade* has also sparked a looming debate about government interference with the rights of its citizens. Beyond the political debates surrounding abortion, the ruling serves as a cornerstone for defining the right to privacy and its primacy over government action and surveillance.

The judgment had a significant impact on the development of case law on judicial activism and the right to privacy. The “right to privacy” discourse in India was also likely to have been stimulated by the SCOTUS decision in *Roe v. Wade*, which was based on the recognition that while the right to privacy is not absolute, other rights (such as the right to choose) do apply under the concept of “right to privacy”: *Govind vs. Madhya Pradesh and Ors*²¹; *R Rajgopal & Ors. against the State of Tamil Nadu*²²; *Binoy Viswam v. Indian Union*²³.

The dissenting opinion also notes that the right to abortion flows from the right to contraception. Thus in the case of *Dobbs v. Jackson*, the extent of government interference in birth control laws has also yet to be determined. It has become clear that by setting aside the judgment in *Roe v. Wade*, it's a woman's innate right to choose who is affected. Probably *Dobbs v. Jackson* suggested that legislation should not be guided by autonomy, health and quality of life, but should be guided by historical considerations and the importance given to the above by previous legislation.

¹⁹ <https://www.american.edu/cas/news/roe-v-wade-overturned-what-it-means-whats-next.cfm>, retrieved 25 june 2023.

²⁰ Supreme Court of the United States.

²¹ (1975) 2 SCC 148.

²² (1994) 6 SCC 632.

²³ (2017) 7 SCC 59.