REPRODUCTIVE AUTONOMY AND RELATED SEXUAL FREEDOM IN INDIA

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INTRODUCTION

Reproductive choices are at once the most private and intimate decisions we make in our lives and yet they undeniably have public dimensions.[1] Such decisions are not taken in vacuum and are influenced by various concerns – political, ideological, and socio-economic, health and healthcare. In this manner these decisions engage the public and involve strongly held opinions and attitudes. Decisions about reproducing, about whether and how to use one's reproductive capacity, whether to 'bear and beget' children is deeply meaningful to us as individual and of profound consequence to society.[2]

In the present, with the advancement in technology, there is a lot more choice regarding various aspects of reproduction. In essence having a child is no longer just a matter of mere chance, rather it is usually a deliberate choice. This aspect of improvement of medical science has led to greater state involvement in an individual's reproductive decision-making. With the advancement in technology related to prevention of conception, termination of pregnancy and initiation of pregnancy in vitro, there is need for regulations aimed at consumer protection and quality control, similar to regulations regarding medication and other medical procedures. However such state involvement needs to be balanced. Intervention by state in the context of reproductive decision-making is necessary but also dangerous- necessary in order to protect the rights and interests of the individuals, and dangerous because if it goes too far, regulations can have destructive effects on individuals and society as a whole.[3]

Meaning of Abortion

[1] Erin Nelson, *Law, Policy and Reproductive Autonomy* ,1 (Harte Publishing, Oxford, 2013)
[2] *Ibid.*
[3] *Id.* at 2

Reproductive autonomy is a concept that evolved in the west with the demand from the women's movement demanding right to make decisions regarding one's own body. Abortion, meaning premature termination of pregnancy, before the pregnancy is carried to term, became an important issue during this movement. It was believed, and still is, that right to safe abortions was important part of a woman's right to self-determination, along with access to contraception.

Abortion is generally divided into three categories, namely, spontaneous, therapeutic and criminal.[4] A spontaneous abortion is that which takes place unintentionally, or simply put, an abortion that is un-induced. It is also knows as natural abortion. Natural abortion generally takes place due to some illness or other medical problem. A therapeutic abortion entails that type of abortion wherein the discretion lies with the medical practitioner, if he/she believes that there is an apprehension or threat to the life or health of the mother, or there are chances that the child, if born, will be mentally or physically handicapped, if the pregnancy is continued, such pregnancy may be terminated. This type of abortion has been incorporated and legalized under the new abortion law in India. A criminal abortion is an abortion caused by a deliberate interference with the course of a pregnancy in circumstances which do not provide a legal justification for such interference.

Abortion as a Right

Stella Brown has regarded right to abortion as an absolute right" that "should be available, according to her, to any women without insolent inquisition or ruinous financial burden, for our bodies are our own".[5] The argument of most authors working on women's right to abortion is two-fold:

(a) The freedom to reproductive autonomy, if it has been granted generally, then it must be extended to freedom to voluntary abortion in order to achieve its full implementation;
(b) If there is any seriousness regarding women's emancipation, then complete reproductive autonomy must be accorded to them which must include a right to terminate an unwanted pregnancy.

Sexual freedom has become a major plank for feminist militant groups ranging from National Organization for Women (NOW) to Women's International Terrorist Conspiracy from Hell (WITCH) and for all these groups, key cause is the laws restricting right to abortion.

The argument that abortion is nothing short of murder holds no good when the question is put that what do we do when a women wants to assert her right to abortion? However repugnant this demand for abortion by a class of women may be, it cannot be denied except where it is violative of the medical practitioner's own conscience or when it would pose a threatto the peace, security and safety of the whole of society and such harm must be shown and not simply asserted.

In India, abortion- if certain conditions are met- was legalized by the Medical termination of pregnancy Act, 1971. The Act allows Indian women some semblance of reproductive autonomy.

[4] Asit K. Bose, "Abortion in India: A Legal Study, 16(4) *JILI* 535-548 (1974)
[5] Daniel Callahan, *Abortion: Law, Choice and Morality,* 460 (Macmillan Publishing, New York, 1979)

The question arises as to the extent of reproductive autonomy- who has the rights and who can exercise it?

Despite the existence of an abortion law in India the women of India still don't have full control over their bodies. The societal and familial pressures stops most women from taking the first step towards a clinic and even if she makes such a decision there is a huge scarcity of decent medical facilities that provide the necessary service. Furthermore, the Act leaves unwed pregnant women and victims of marital rape stranded unless it is a case of 'actual' rape.

I. REPRODUCTIVE AUTONOMY

Autonomy means ability to make decisions regarding one's own self and life based on their values, morals, desires and beliefs. The idea of self-governance is core to this concept. However, one cannot be said to have autonomy unless they have the liberty to make and execute their own decisions. Two conditions are considered to be prerequisites for autonomy: authenticity conditions and competency conditions. Authenticity condition implies the presence of an authentic or primary values that are in a sense one's own, along with the ability to reflect on and act on such values. Competency conditions refer to one's capacity to be autonomous, this would include things like self-control, rational thought process etc. Also, it is significant that the person is able to act in line with one's primary values despite social resistance. As explained by Marylin Freidman the more [someone] can succeed in pursuing her concerns despite resistance, the more autonomous she is.[6] Autonomy is implied in various fundamental rights such as liberty, dignity, security, privacy and bodily integrity of a person.

From these, arises the right of a woman to make decisions regarding fertility and sexuality, free from all coercion. This is known as reproductive autonomy. Reproductive autonomy, i.e. the ability to be self-determining and to act on one's own values and desires in making decisions about reproduction, is an important concept in law and policy. Therefore, the developments that have come about in the legal regime related to reproductive autonomy have all risen from the women's demand for contraception and abortion services, which in turn stems from the assertion that women should be given complete autonomy to exercise control over their own bodies and reproductive processes.

The struggle for reproductive autonomy began in the nineteenth century in the West with women's movement turned its attention towards abortion and birth control.Abortion is a decision that deals only with a woman's private life. Others' opinions such as that of the father or relatives may be taken into consideration, however the ultimate right to choose belongs to the woman. A woman's body is hers and hers only. This right to terminate pregnancy emanates from the right of self-determination. Avoidance of coerced reproduction was the point – the battle of reproductiveautonomy was a battle for women's right to control their own reproductive capacities by preventing or terminating unwanted pregnancies.[7]

[6] *Ibid.*
[7] *Id.*at 32

The early conception of reproductive autonomy had a direct link with the liberal ideas of individual choice and individual rights. One of the most well-known and influential articulation of reproductive autonomy was given by John Robertson, though he termed it as procreative liberty. His earlier definition defined procreative liberty as not only freedom not to reproduce but also the freedom to reproduce whenever, with whomever and by whatever means one chooses. However, he later refined the definition to say that procreative liberty is the freedom to decide whether or not to have off spring and control the use of one's reproductive capacity. For him procreative liberty should be the primary concern unless it causes visible harm to someone else's interests, as for him reproduction is closely tied to a person's personal identity and dignity and the meaning of one's life.

While speaking of procreative liberty Robertson also speaks of reproductive responsibility. Using this concept, he has tried to categorize reproductive decisions as responsible or irresponsible, creating room for state intervention in cases of irresponsible reproduction. The primary objection to his conception of reproductive responsibility is that he seems to put the entire weight of the same completely, or at least for the most part, on women. Though it may not have been his intention, his articulation of reproductive responsibility seems to convey that if women wish for control over their reproduction then they should also carry the weight of all decisions that are made irresponsibly. Though he does speak of providing aid, counselling and support, he always envisions a woman as being alone. Such an approach assumes that both right to and responsibility for birth control is for women only. The fact that women have a greater say in reproduction should not absolve men (who are equally responsible) of all responsibility.

One of Robertson's critics, Dorothy Roberts, explains how a liberal articulation turns a blind eye to social considerations in reproductive decision making. To approach reproductive autonomy as requiring only that the state not restrict our ability to make reproductive decisions for ourselves in accordance with our own priorities, is to fail to recognize the steps that might be necessary to create conditions in which reproductive autonomy can be meaningfully exercised.[8]

Emily Jackson also takes an approach different from Robertson, by depending upon the feminist critique of the liberal approach. According to Jackson, the initial assumption is that individuals are social beings and that autonomy, also, has a social context. According to her the preferences, values of a person that make their true self are in large part a result of socialization.

The feminist opposition to reproductive autonomy, is not an opposition towards reproductive autonomy; it is the opposition to the liberal, individualistic, negative liberty conception of reproductive autonomy. This is understandable as the demand for reproductive autonomy is the consequence of the feminist movement and hence feminists are in favour of various reproductive rights.There are various kinds of feminist theories, like radical theory, post-modernist theory, postcolonial theory, socialist theory and so on. Most of these theories come from the critique of liberal theory as well as liberal feminist theory. Hence, it is inevitable that most feminists are opposed to the liberal conception of not only reproductive autonomy but also autonomy itself.

[8] *Id.* at 35

It is important that reproductive autonomy be grounded on respect of autonomy of individuals, particularly individual women. With the advancement of technology, there is a lot more choice regarding various aspects of reproduction. Having a child is not merely a matter of chance, it has become a deliberate choice. In the present scenario, with advanced technology related to prevention of conception, termination of pregnancy and initiation of pregnancy in vitro, there is need for regulations aimed at consumer protection and quality control, similar to regulations regarding medication and other medical procedures. This aspect of improvement of medical science has led to greater state involvement in an individual's reproductive decision-making. However such state involvement needs to be balanced. Intervention by state in the context of reproductive decision-making is necessary but also dangerous.

As has been mentioned earlier, that reproductive autonomy means both, the power to make decisions to not reproduce or reproduce. In this paper the researcher has chosen to concentrate on the decision not to reproduce, particularly the right to safe and legal abortion along with thedubious nature of reproductive autonomy in cases of unmarried women and victims of marital rape.

II. ABORTION

A model of reproductive autonomy that places women's interest in autonomy and bodily integrity at its core demands that women have access to safe, legal abortion.[9] This implies that the State not only has to legalize abortion but also make provisions for regulation, generally done by making it mandatory for clinics to register themselves with the state if they provide abortion services. Furthermore, it must be noted, that criminalizing the act of abortion does nothing to prevent or bring down the rate of abortion, rather it increases the rate of illegal abortions. Such illegal abortion are less safe than legal abortion, very often resulting in fatalities, as the unregistered clinics don't have to undergo the scrutiny faced by registered clinics.

Religious View of Abortion

The Hindu Perspective

It is only in the last of all four Vedas i.e. the *Atharva-veda,* that abortion has been talked about that too as a sin. Abortion was considered detrimental to the elemental principle of creation.[10] Many Hindu lawgivers, such as Manu, treat abortion as a grave offence ranking it on par with murder, incest and adultery by a woman. The Smritis clearly condemn induced abortion as a sinful act calling it *bhrun-hathya* or *garbh-hathya.*

However, the ancient Indian medical jurisprudence is not so stern upon this position. It recognizes the need and existence of abortion in certain exceptional cases, for instance, effect of such

[9] *Id.*at 133

[10] S. Chandraserkhar, *Abortion in a crowded world: The problem of abortion with special reference to India,* 42 (Allen and Unwin, London, 1974)

pregnancy on health of the woman, problems relating to growth of fetus etc. Thus, the ancient Indian medicine cannot be said to be as unscientific and they were certainly not ignorant of the problems in relating to the need for abortion.[11]

The Muslim Inclination

Muslim Religion is said to be the most liberal one when it comes to the matters of birth control and family planning. There are no explicit condemnations against abortion. In fact, *coitus interruptus* was quite prevalent amongst the Arabs to prevent unwanted pregnancies and it was believed to be an allowed form of birth control by the Prophet, even though, in Jewish faith, this form of birth control is considered as infanticide.

In 1937, Grand Mufti (Hanafi School) issued a fatwa permitting husband and wife to take measures for birth control upon mutual consent, whenever necessary & this consent was later on construed to be irrelevant by various scholars, if necessity for abortion existed, thus, unitary right to abort was present with both parties.[12] An amendment to this position was made in 1964 by permitting procurement of abortion only till One Hundred and Twenty days after procreation, until the embryo had not taken a human form.

Therefore, nowhere does the Quran raise any objection against the practices of family planning and birth control seems to be a permissible act by the Prophet.

Constitutionalization of Right to Abortion in U.S.A

The discourse about the 'right' to abortion was initiated in the 1960s in the West, and is tied to the demand for equality in the workforce and society. Women's increased sexual activity and work force participation lead to increase in unwanted pregnancies. Along with a consciousness about women' rights, there was also a consciousness about population control, and activists of both advocated liberalized policies regarding abortion. Some unwanted pregnancies were believed to be unavoidable when one took into consideration various factors like fear, ignorance, lack of planning and pressure from male partners. The effect of an unwanted pregnancy had and still can have devastating effects for many women, ranging from lost employment or educational opportunities to ridicule and being ostracized for being an unwed mother. Hence, abortion became crucial for women to feel as if they had some control over their fates. "Men don't get pregnant, they just pass the laws," became the rallying cry within the women's movement.[13]

After 1961 almost half the states in the USA had introduced bills to legalized abortion in compelling situations like where the physical or mental health of the mother may be impaired, where the baby may be born with physical or mental defects or where pregnancy is a result of rape, incest or felonious intercourse. Abortions allowed in the last case are called therapeutic abortions. The Supreme Court finally legalized Abortion in the USA in 1973, when it gave its decision on *Roe* v. *Wade*[14]. The Supreme Court in this case declared abortion to be a constitutionally protected right as a

[11] *Id.*at 44
[12] *Id.*at 47
[13] Deborah Rhode, *Justice and Gender*, 208 (Harvard University press, Cambridge, 2009)
[14] 410 U.S. 113 (1973)

part of right to privacy stating that right to privacy is broad enough to cover a woman's right to choose whether to abort or not, and it shall not be subject to government regulation except when there is a compelling interest of the state (both life of the mother as well as fetal life are recognized as interests of the state here).[15] The Court, however, restricted the right in certain cases. In the first trimester, the question of abortion was supposed to be between the woman and her physician. In the second trimester, this right is available only if it would not cause the woman harm. In the third trimester, the right is available only if the woman's life is in danger. Reason for this was that after the first trimester the morbidity from abortion is higher than from childbirth and also the belief that a fetus has the capability of life outside the womb in the third trimester, it is considered as a viable life.

The reasoning regarding viability makes Roe a very controversial decision. The question arises as to what is viable life. After all, with the advancement in technology a safe birth is possible earlier in a pregnancy. The concern regarding a woman's health is also allayed because now abortions can be safely conducted in later stages of a pregnancy. So the trimester framework provided by the Court in Roe is no more relevant. Not only that, but why at all should viability made a difference? Why should fetal survival be given the importance that had been accorded to it by the court? What makes the possibility of a life more important than the right of a person over their body? These questions arose from this decision and the court was and is unable to answer them. The result has been a bitter debate between the 'pro-life" group and the "pro-choice" group that continues even today.

Another criticism of the decision is that the court justified abortions as a private matter between the doctor and patient or a family matter. Critics claim that privacy is too narrow a concept in this context. The harm from abortion restrictions is not merely to the privacy of a woman. Rather, as Sylvia Law and Robin West have suggested, the primary harm involves "invading the physical boundaries of a body and the physical boundaries of a life", and thus, the issue is not simply intimacy but identity- women's capacity to define their own existence.[16] The harm caused by denial of this right would be a combination of physical intrusiveness, psychological trauma and career impairment. From this perspective, the question of viability of life decreases in importance. For why should a woman be forced to sacrifice her aspirations for the sake of embryonic life when a Good Samaritan is not forced to take risk to save an existing life?

While upholding the main ruling in *Roe,* the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,*[17]denounced the prescriptive medical trimester system and placed an "undue burden" test under which the state could still regulate the procurement of abortion in furtherance of its interest in potential life of fetus if such regulation does not put the woman's right to abortion under an undue burden if she chooses to do so.

[15] Debdyuti Banerjee & Ujwala Uppaluri, "From Roe v. Wade to Fetal Pain Legislation: A reflection of American Jurisprudence on the Indian milieu of liberalized abortion policies" 2 NUJSLR 637-667 (2009).
[16]*Supra* note 8 at 212
[17] 505 U.S 833 (1992)

Criticism of this decision does not decrease its importance in the feminist movement. For the first time in America's history, the Court recognized a right specifically enabling women to gain a degree of control over their bodies and lives, to have a right of autonomy similar to men.

"When we talk about women's rights, we can get all the rights in the world-the right to vote, the right to go to school-and none of them means a doggone thing if we don't own the flesh we stand in, if we can't control what happens to us, if the whole course of our lives can be changed by somebody else that can get us pregnant by accident, or by deceit, or by force. So I consider the right to elective abortion, whether you dream of doing it or not, is the cornerstone of the women's movement..."[18]

III. LAW AND ABORTION IN INDIA

Pre-1971 Position

In India, the Indian Penal Code prohibits "miscarriage". Keeping in line with the Victorian mores, Macaulay's code prohibits all kinds harm to an unborn child, unless the mother's life is in critical danger. Section 312 of the Indian Penal Code reads as follows:

> "Whoever voluntarily causes, a 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, be punished with imprisonment of either description or term which may extend to three years, or with fine, or with bot; 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.
>
> *Explanation* – A woman who causes herself to miscarry, is within the meaning of this section."[19]

However the western values of the law were not really a deterrent for the poor Indians who wanted to avoid unwanted births and to also limit births. By the 1960s there was a phenomenon which is often called the 'baby boom'. The population explosion lead to the state involvement in "family planning", the reduction of the family size a crucial aspect of the same. Even today the phrase "*hum do, humare do*" is well known. However, the methods adopted were often contraception and sterilization. India also felt the influence of the west in the 1960's and efforts to liberalize the law regarding abortion commenced. In 1964 the Central Family planning Board recommended that that the Ministry of health constitute a committee to deliberate the question of legalization of abortion. Hence the Committee to Study the Question of Legalization of Abortion or the Shah Committee was formed and it gave its report in 1966.

[18]Stephanie Ridder and Lisa Woll, "Transforming the Grounds: Autonomy and Reproductive Freedom", 2*YJLF*, 75-98 (1989).

[19] The Indian Penal Code, 1860 (45 of 1860), s.312

The report showed that the major concern of the policy makers was the hazards of illegal abortion and various figures from 1960-1961 are cited that lend credence to the belief that illegal abortions account for a significant number of deaths and injuries each year.[20] The report also categorically denied that the law was motivated by the need of population control citing the lack of qualified doctors and infrastructure as proof. The fact was that in the absence of doctors and hospitals, abortion was not really a viable way to control population. However, in the report itself, there is a portion that confuses the issue: "the words "family planning" connote the control of conception which does not include abortion which takes place after conception. However, abortion can also be used to control family size, as is being done currently in several countries, in which case family planning or contraception and abortion, are two parallel two parallel categories which can lead to population control."[21]

One of the features that made the proposed law truly permissive was that in the first trimester only the approval of the physician was required and there was no need for the consent of the husband or partner. This provision of the proposal makes it seem that despite the lack of the demand from the women's movement, the law makers were attempting to give a little bit of freedom to women reproductively. While analyzing the development of abortion law in India one needs to keep in mind that the legal sanction for abortion does not arise from an understanding of women's choices and women's rights over our bodies. It is, rather, a socially mandated consequence of the economic imperatives of the state.[22]

Present Indian Law on Abortion

In 1971 the Indian parliament passed the Medical Termination of Pregnancy Act, hereinafter referred to as the Act. The Act is based on the Abortion Act passed by the United Kingdom parliament in 1967. Section 3 of the Act lays down the basic rules and conditions regarding abortion. Section 3 reads as follows:

> "When Pregnancies may be terminated by registered medical practitioners.-
>
> (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
>
> (a) where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

[20] *Supra* note 4 at 151
[21] *Id.* at 152
[22] Nivedita Menon, "Abortion and the Law: Questions for Feminism", 6, *CJWL,* 103-118 (1993).

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

Of opinion, formed in good faith, that,-

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health ; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

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

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

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

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

(b) Save as otherwise provided in Cl.(a), no pregnancy shall be terminated except with the consent of the pregnant woman."[23]

The Act has an overriding effect on Section 312 of the Indian penal Code. Hence as long as the conditions of section 3 of the Act are met, no liability shall arise under Section 312 of the Indian Penal Code(now referred to as the code). Furthermore if an abortion is done in contravention of the Act then criminal liability arises under the Act as well as the code, both being separate offences.

However, the conditions under which abortion is legal are very restricted. Abortion is legal up to the second trimester, but it is at the absolute discretion of medical opinion[24]. A woman can't simply abort an unwanted pregnancy, she has to make sure that she falls in the categories mentioned in the section 3 and also that it can be medically proven that the pregnancy would cause great harm to her. The two explanatory notes indicate that that pregnancy resulting from rape or contraceptive failure may be taken to cause injury to mental health, however, the terms "heath", "substantial risk", even the terms, "termination of pregnancy" and "abortion" are not clearly defined in the Act. This legal ambiguity makes the medical opinion about these matters the highest authority. Thus, the currently

[23] The Medical Termination Of Pregnancy Act, 1971 (Act 34 of 1971), s.3

[24] Nivedita Menon, *Seeing Like a Feminist*, 204 (Zubaan-Penguin Books, United Kingdom, 2012)

liberal-seeming provisions of the MTP Act could become restrictive without, a single word of the text being altered.[25]

Curtailment of Sexual Freedom

In the present framework, one needs to see who is allowed to procure abortions. A single female in a relationship has no such right. She either has to get married or live with the stigma of being an unmarried mother. This is a problem for not only those who feel that women's sexuality is highly suppressed in India, but also because an accidental pregnancy can destroy a woman's career and her place in society. The Act implies that there is a denial in our society, rather a stigma associated with it, that unmarried women do not participate in sexual activities. It is not just the modern woman who is overlooked but also women who are victims of marital rape. Marital rape is not equivalent to rape in India, so a woman who faces abuse at home cannot opt for abortion under the Act. In these cases the pregnancy would cause mental distress but the Act, which seems to assume that only married women are sexually active and the Code that assumes there is no rape in marriage, force women in such situations to either carry the pregnancy to full term or go for illegal and unsafe or self- abortions which are often fatal to the health and life of a woman and may even risk the fetus to have a stunted growth if the abortion fails completion.

Thus, if a woman has to get her pregnancy terminated, she may feel pressured to make false claims of rape. This is, however, a futile deception. Even when a women has been actually raped, the language of the Act does not allow abortion unless rape has been proven at least in trial court. If she undergoes abortion before rape is proven she would be liable under Section 312 of the code, along with the doctor who aided in the abortion. Given the fact that criminal cases are time consuming and the rape victim has to await the decision of the court or the conviction of the accused because the law presumes him to be innocent unless proved otherwise, the rape victim may not be able to avail the benefits made available under the explanation appended to section 3(2) to the victim of rape.[26] Furthermore, there is also a time limitation as abortions are not allowed after twenty weeks, which can be gathered from section 3(2)(a) and 3(2)(b) of the Act. Section 5(1) allows abortion after twenty weeks only if there is immediate danger to the life of the woman. Therefore, in cases where the trial is long drawn, even if rape is proved and the pregnancy has crossed the twenty weeks mark, a rape victim has to, in most cases give birth.

There is also the question of access. The majority of the country's doctors and hospitals are concentrated in the cities, whereas the majority of women live in villages. Most women are unaware that abortion is legal and need not be a shameful secret, so they try to deal with the pregnancy in the villages instead of travelling to the city. This is the main reason that the rate of illegal abortions and the morbidity rate from illegal abortions is still high in the present day. Incapacitation and killing of women by the "back-street" doctors and dirty finger-nailed *dais* (midwives) is causing a huge loss of thousands of women to the nation, most of whom are married and thus, countless children are

[25] *Id.* at 205

[26] Lalita Dhar Parihar, *Women and Law- From Impoverishment to Empowerment- A Critique,* 371 (Eastern Book Company, Lucknow, 2011)

rendered motherless every year due to this shameful situation.[27]Clearly, the law meant to liberalize the law regarding abortion in India leaves a lot to be desired. As we have seen, the "progressive" attitude of the Indian state to abortion is dictated by compulsions other than a commitment to women's liberation.[28]

IV. EFFECTS OF REGULATING REPRODUCTIVE AUTONOMY

It has been estimated that every year, four to five million abortions take place out of which about three million abortions are of criminal nature.[29] It is quite obvious from the above statement that many women procure illegal abortions at the hands of unqualified persons with morbidity and mortality being main consequences. It is believed that the restrictive law of abortion has been a reason for a huge amount of suicides, infanticides, abandonment and cruelty towards children.[30]

Since there is no victim in the traditional sense under section 312 of Indian Penal code, it is only when the abortion is rendered unsuccessful resulting into serious concerns, the matter is raised in public and legal proceedings begin. The operations are so secretive that tracing the evidence becomes an unreasonably difficult task which further suspend the judicial proceedings right there. Then what is the justification for such an ineffective law to be kept in books? Apart from the social and medical reasons, there is no other valid ground for retaining this law. It is required from a social perspective, because in India, population growth, poverty, girl child being considered a burden on the family, are some of the major reasons that drive termination of pregnancy, even if not by the mother herself, then by the relatives (which is often the case). As far as the medical reasons are concerned, it is quite clear that whenever there is a danger to the fetus or the health of the woman, a person can very well be permitted to terminate pregnancy.

Even though it has been criminalized, abortion takes place in large numbers even today without any fear of penal consequences. Most people regard it as a very minor sin and believe that abortion should be a private decision and societal interference should not be there.

Despite abortion being legalized in India (to some extent) via Medical Termination of Pregnancy Act, practice of unsafe abortions is widespread. The probable reason behind this less awareness about its legalization.

MTP Act gives discretion for abortion only to the medical practitioner in all practicality and not the woman who undergoes a massive change during the gestation period. The opinion of the gynecologist is generally paramount but their negligence gets easily condoned due to the blanket protection provided against any legal action in lieu of the Act.

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[27]*Supra* note 5 at 65

[28]*Supra* note 17

[29] N.R. Madhav Menon, "Population Policy, Law Enforcement And The Liberalization Of Abortion : A Socio-Legal Inquiry Into The Implementation Of The Abortion Law In India", 16(4), *JILI,* 626-648 (1974)

[30]*Ibid.*

One of the most shameful realities and biggest critique is that MTP Act is being misused for sex-selective abortion which is quite apparent from the sex ratio in our country. It is appalling that even the most educated and urban sections of our society have shown such bias against the girl child when it comes to abortion.

It must be noted that legalization has not really done anything in favour of giving rise to the exercise of free choice by women in India and neither has it improved an all over health of women. Thus, the present legality only provides a thin cover which is practically insufficient to bring about much change in the material conditions of women in India, as the argument of right to reproductive autonomy or right to unitary abortion being an inherent civil right will immediately give an opportunity to the anti-abortionists to juxtapose the rights of the unborn child with the right to freedom of choice of a woman.[31]

MTP Act, 1971 and the Judiciary

A social activist had challenged the vires of the Act in *Nanda Kishore Sharma* v. *Union of India*.[32] The Court clearly stated that medical termination of pregnancy or abortion is necessary where the continuance of pregnancy is likely to involve a risk to the life of the pregnant woman or cause grave injury to her physical or mental health.[33] As the objective of the Act is to protect the life of the pregnant woman, it is not contradictory to the right to life enshrined in Article 21.

In *Suchita Srivastava* v. *Chandigarh Administration*[34] the court held as follows:

> "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 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

[31] *Supra* note 10
[32] AIR 2006 Raj 166
[33] Mamta Rao, *Law relating to women and children,* 234 (Eastern Book Company, Lucknow, 2012)
[34] AIR 2010 SC 235

In this case, the issue was that the High court had ordered the termination of the pregnancy of a mentally retarded person, acting as guardian. The Supreme Court said that consent of guardians is material only in cases of mental illness or minority. Here the girl was not mentally ill but was mentally retarded and hence had the right to make decisions regarding her pregnancy.

Now the law proposed in the 1960s and the current Act both speak of consent of the woman. Nowhere is it mentioned that consent f the spouse is needed. This seems to give women some control over their reproductively. Decisions about when to have children and how many children, according to the written word of the law, should be in the hands of the wife. This however, is proved false when one studies the decisions in some divorcee cases.

In *Deepak Kumar Arora* v. *Sampuran Arora*[35] it was held that, if a wife undergoes abortion with a view to spite her husband then it may in certain circumstances be contended that the abortion resulted in cruelty to the husband. Later in *Kalpana Srivastava* v. *Surendra Nath Srivastava,*[36] the Court held that refusal to prepare tea coupled with lodging of false F.I.R. and termination of pregnancy without consent of the husband were acts constituting mental cruelty by wife to the husband. Again in*Sushil Kumar Verma* v. *Usha*,[37] a single Judge of the Delhi High Court held that the wife's aborting fetus in her first pregnancy without the consent of the husband would amount to cruelty within the meaning of Section 13(1)(ia) of the Hindu Marriage Act, 1955. In the face of such decisions it is hard to assert that an Indian woman is the master of her own body.

As mentioned above, the situation is even worse for rape victims, as often due to a long trial, the pregnancy goes over the twenty weeks mark. In *Ashaben* v. *State of Gujrat,*[38] the court held:

> "Assuming that the pregnancy for whatever reason had been against the wish and desire of the applicant, the intriguing aspect in the present case is that by the time the applicant chose to file this writ petition, the pregnancy had been of about 27 weeks as is borne out from the medical reports. Although it is the case of the applicant that since she was in unlawful confinement of the accused persons she had no opportunity to get the pregnancy terminated within the statutory time period as provided in the Act, yet I am unable to accept such submission as the law does not permit the termination of pregnancy beyond twenty weeks except in cases where the life of the mother is in danger to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she becomes an object of scorn and ostracization. This is very unfortunate... howsoever harsh one may find the law, yet it remains the law and one has to respect it."

[35] (1983) 1 DMC 182
[36] AIR 1985 All 253
[37] AIR 1987 Del 86
[38] MANU/GJ/0179/2015

Upholding the decision in *Ashaben*, the Gujarat high court held in *Chandrakanta JayantilalSuthar* v. *State of Gujarat*,[39] that "there are times when a poignant situation arises in a case where the application of the law gives rise to a situation that would have physical, mental and social connotations upon the life of an innocent girl. Nevertheless, the law is the law, and has to be obeyed… If the provision of the statute is unambiguous and the legislative intent is clear from it, no other rules of interpretation are required to be resorted to and the statutory provision is to be followed as it is."
In this case the petitioner was a rape victim who was only 14 years and her pregnancy had progressed to 24 weeks. An appeal was filed in the Supreme Court which consulted a team of medical experts. Finally the decision of the High court was reversed and the girl was allowed to procure abortion.

From the above decisions it appears as if the Supreme Court supports reproductive autonomy but when it comes to abortions, women are not given any real control. Though the most recent Supreme Court decision may be an indication of progress.

Therefore, there is no freedom, equality or full human dignity in the real sense possible to women until there is a realization for the need and demand is made for control over their own bodies and reproductive autonomy is asserted by not only a few exceptional ones but all womankind by moving forward and understanding that no doubt they give birth children but it is not their primary responsibility to rear and bear them[40]. A shift is required from the overrated idea prevalent in the society that primary end of every marriage is procreation of children. Abortion should be available for all women equally without much inquisition or financial burden because their body ultimately belongs to themselves.

V. CONCLUSION

Reproductive autonomy is a basic right. Women see this as necessary because pregnancy and child-rearing are for all practical purposes, the sole responsibility of women. Women should therefore, have the right to choose when and under what circumstances they will bring a child into the world, for women should be able to control what happens to our bodies and to our lives. The right to safe and legal abortion is an essential right of self-determination.[41]

Society should put least obstacles in the way of women who want to procure abortion, since theirs' is the ultimate choice. A change from restrictive to permissive law will pave the way for a means to indicate to women that the moral bias against abortion has been unfastened and those who want abortion for whatever reasons, have approval and support of the society at large. This will help in reducing the social pressure and stigma attached to procurement of abortion.It needs to be understood that not every woman wants to abort the fetus. However, the choice must be freely

[39] MANU/GJ/0375/2015
[40] John Adwet Raghav & Arya Tripathy, "Women's Right to Abortion", 10 *SCC* J23-33 (2011)
[41] *Supra* note 24 at 203

given to them as the direction of their future depends upon the end result of a pregnancy.

The question of viability raised by *Roe v. Wade* plays an important part in the present day Indian law. The act allows abortions only unto twenty weeks, the rationale behind it being the same as why Roe prohibited abortion in the third trimester, as the fetus is considered 'Life" at that stage.

The right to abortion in India is clearly not available to all women, be it because the law does not even consider them like, unmarried women who are sexually active or married women who are victims of marital rape. Now the Protection of Women from Domestic Violence Act, 2005 does qualify marital rape as sexual domestic abuse. Therefore, marital rape can no longer be ignored and nor can the pregnancies that result from it. In the light of the new law, the Act also needs to be amended accordingly.

The second category to whom the benefits of the act are not readily available are the women in the rural areas. Not only are the doctors and hospitals concentrated in the cities, majority of women in villages do not know that abortion is legal. Just passing a law is not enough, it is the duty of the government to educate the people of that law, particularly if the law is for social development.

There is an Amendment which was proposed to the Act in 2014. The amendment Bill, 2014 would have brought changes to two important provisions of the Act. Firstly, qualified persons, aside from doctors like Auxiliary Nurse Midwives and midwives would have been able to perform abortions. Secondly, it would have extended the twenty-week cut off for abortion to twenty-four weeks. The latter may be a relief to any rape victims, if the amendment were to pass.

The Judiciary's attitude regarding abortion is more worrisome than the law itself. The decisions in divorce cases regarding husband's consent to abortion makes it clear that if women in India choose to exercise control over their reproduction, then they can expect a suit for divorce on the grounds of cruelty. This is the situation when in 1966 itself it was stated that spousal consent would not be needed for abortion. The second problem is apparent in *Ashaben case.* A reading of the decision reveals that the judge in the case considered it the duty of the woman to give birth, even though the pregnancy was a result of rape. He gave a lot more importance to the potential life of the fetus than to the life and aspirations of the pregnant mother.

The reason behind the drawbacks of the Act and the decisions given by the Indian judiciary is the same. The Act is not the result of any women's movement, but rather its purpose was population control. Most women in India have no control over the conditions in which they have sex, and often abortion becomes the only form of birth-control. Women also have abortions because of the stigma of illegitimacy, or because they cannot afford another child, or because they are at a stage in their careers or their lives where they cannot take on the responsibility for yet another human life.[42] Unless the lawmakers understand this and respect this, the law regarding abortion in India cannot be complete. A law to promote reproductive freedom cannot have the same mind-set behind it as a gender-neutral, liberal law. From a traditional liberal point of view, as long as neither men nor

[42] *Id.* at 209

women are coerced into reproducing, or sterilised without their consent, all is well.[43] This is very narrow and simple view. Only women can get pregnant, so women should have the say when they get pregnant.

The law and the mind-set of the people, particularly judges, needs to be redefined when it comes to abortion and reproductive autonomy. The disgust that is associated with abortion and in the process of its law-making needs elimination.

Both, in terms of human rights as well as women's health, reproductive autonomy is an essentiality of the society today. The most enlightened form of advocacy and education is necessary to persuade the opinion of the law makers. India is a secular country and thus, religious ideals should now be kept aside and women must be given the right to explore their multifaceted role in society. The taboo attached to the discussion of abortion needs to be done away with and a balanced approach must be adopted which allows women to live a dignified life in all respects, in the truest sense.

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