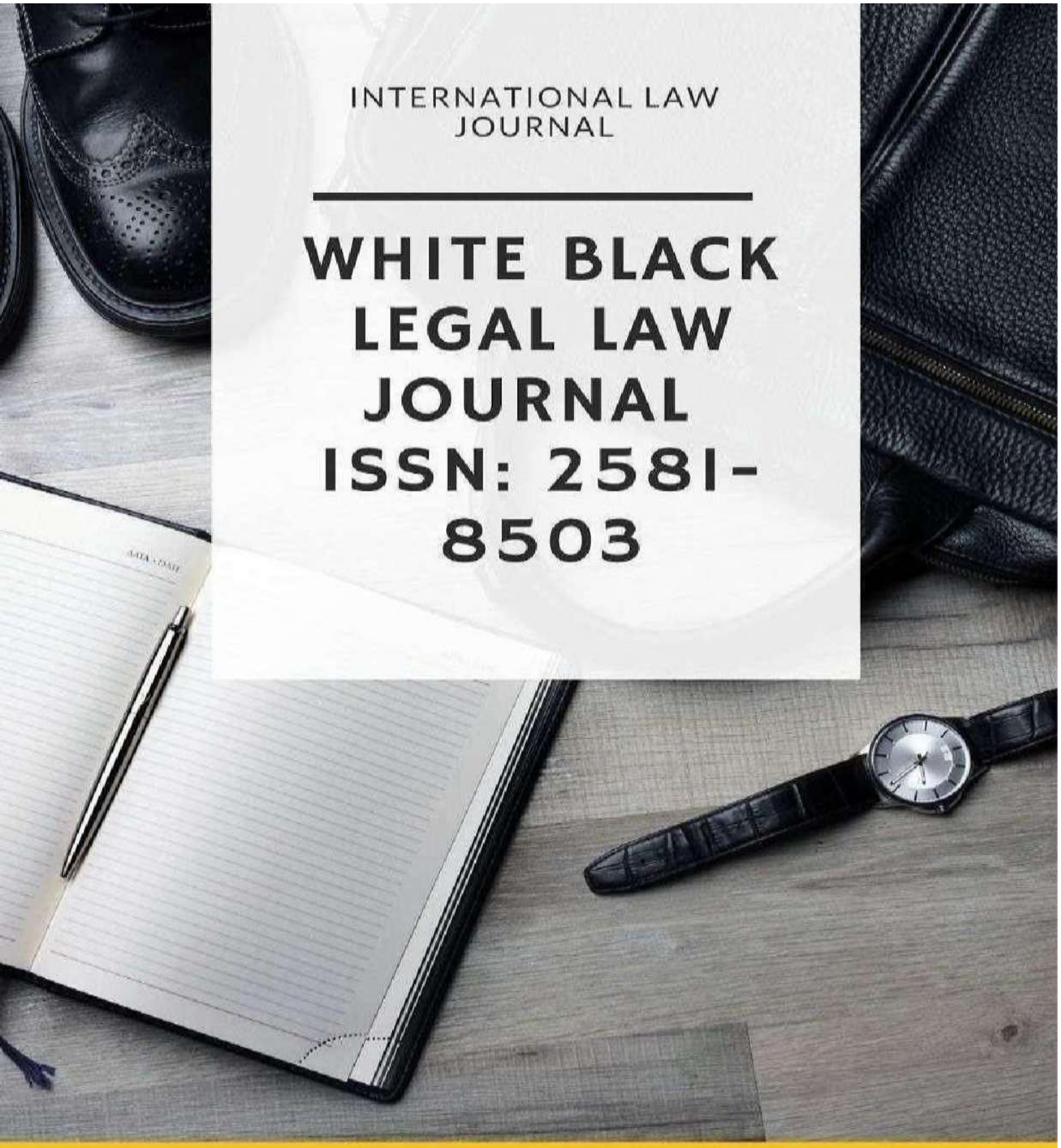

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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CHANGING DIMENSIONS OF ABORTION LAWS IN INDIA: A CRITICAL STUDY

AUTHORED BY - SHREYASHI SINHA[1]

Abstract

The legal discourse around abortion in India has witnessed a large transformation because it has evolved from a rigid criminal law framework to a more liberal, yet conditional, regime. Though these legislative advancements exist, the Indian abortion framework continues to battle particularly about women's autonomy and reproductive rights, along with socio-cultural resistance, medical paternalism, and legal ambiguities. India's abortion laws are compared to those of the United States in this paper. This is done especially in light of both the Roe v. Wade[2] and Planned Parenthood v. Casey[3] decisions to evaluate the philosophical underpinnings of reproductive liberty, personhood, and also state interest. It also explores just how interpreters do interpret Article 21 of the Indian Constitution where it intersects with the right to privacy as well as bodily autonomy, also the exploration analyzes just how people recognize, restrict, or sideline these rights in practice. This paper questions whether India's laws truly balance a woman's rights against the unborn child's rights. Does it in fact, perpetuate a conflict that weakens them both? Further, the paper seeks to stress a rights-based, more subtle path to India's abortion law via socio-cultural, ethical, and medical factors inside a constitutional plus global human rights context.

Introduction

Abortion as a medical practice and legal reality exists amidst personal choice, morality, social ethics, and governmental interest. Yet in India, the narrative of legalized abortion goes beyond just the legality of such a practice to socio-cultural and religious considerations that further either supplant or impact the actualization of such a legal right. Therefore, the history of legalized abortion in India stems from its Indian Penal Code's Section 312–316 where miscarriage is a punishable act unless it is done to save the life of the mother, amended in part

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[2] Roe v. Wade, 410 U.S. 113 (1973).
[3] Planned Parenthood v. Casey, 505 US 833 (1992).

by the Medical Termination of Pregnancy Act, 1971,[4] which legally rendered the act of abortion for some purposes within a time frame, legal. Yet this Medical Termination of Pregnancy Act was inspired by nations supporting abortion in India, her case of Roe v. Wade (1973) rendering abortion a constitutional right under a woman's right to privacy.

Thus, the Indian amendments to legality of abortion spawn from an evolutionary thought of offering women extended protections up to 24 weeks for all termination purposes; however, relative to international standards, India still adopts a conservative stance to reproductive choice. In addition, Indian women's perception and true ability to exercise choice remain complicated by the medical profession as gatekeepers, government sanctioning abilities in specific rural areas, and social stigma surrounding all claims of what constitutes abortion on demand and legal. Where the law supports choice for rape victims and diagnosis up to 24 weeks, it does not differentiate between disabled fetuses or single mothers. Thus, until abortion is acknowledged as a specific right, this shows that women have limited recourse within a socially constructed reality.

Further complicating the legal landscape are "pro-life" versus "pro-choice" debates which challenge judicial interpretation and policy creation. Thus, while Article 21 of the Indian Constitution supports right to life and personal liberty inclusive of some reproductive rights, without an attributable right to abortion, Indian women still rely upon social constructs for their decision making regardless of legal realities.

Violation of Article 21 of Indian Constitution

The MTP Act, as a result, criminalizes even the consensual abortions-unless the conditions as set out in the law are exactly followed. Such strict standards would only disturb the right of a woman to have choices over her body. This type of interference is a form of erosion to her freedom of choice in terms of reproduction and a decision to make, which has already been identified as a critical component of the right to privacy, dignity and personal security as per Article 21 of the Constitution.

Paragraph 22 of the Supreme Court judgement in Suchita Srivastava v. Chandigarh Admn.,

[4] Medical Termination of Pregnancy Act, 1971, No. 34, acts of Parliament, 1971.

(2009)[5], the Hon Court held that:

"Women right to decide reproductive choice is a dimension of personal liberty guaranteed under article 21 of Constitution of India Reproductive choice can be exercised to procreate and abstain from procreation, The crucial consideration is that a woman right to privacy, dignity and bodily integrity should be respected."

The autonomy to take reproductive decisions received an additional impetus through the landmark judgment K.S. Puttaswamy v. The Union of India case (2017)[6]. The Supreme Court in paragraph 248 of the judgment, restated that this right also comes under the larger limitation of the right to privacy, which is the broad right that is covered under Article 21 of the Indian Constitution:

"248. Privacy has distinct connotations including (i) spatial control; (il) decisional autonomy; and (il) informational control. Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress."

Criminalization of abortion further violate the right to dignity as has been established by the Hon'ble Court in the landmark case of Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981)[7] in Para 7 & 8, wherein the Court held,

"The right to life under Article 21 of the Indian Constitution extends beyond mere physical survival, encompassing much more than just animal existence. This was emphasized in the case of Kharak Singh v. State of U.P.[8], where it was held that "life" includes all faculties through which life is enjoyed, such as thinking and feeling. Any act that damages or interferes with these faculties, whether permanently or temporarily, violates Article 21. Moreover, the right to life includes the right to live with human dignity, which involves access to basic necessities like adequate nutrition, clothing, shelter, and the ability to express oneself and interact with others. Any act that impairs human dignity, including torture or cruel, inhuman, or degrading treatment, is prohibited under Article 21. Such acts cannot be justified by any law or procedure, as they would be unconstitutional and violative of both Articles 14 and 21. The protection against such treatment is also in line with Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights."

[5] Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC, Para (India).
[6] K.S. Puttaswamy (Privacy-9J) v. Union of India, (2017) 10 SCC 1 para 248.
[7] Francis Coralie Mullin v. Administrator, Union Territory of Delhi,(1981) 1 SCC 608 in Para 7 & 8.
[8] Kharak Singh vs The State Of U. P. & Others (1962) SC 1295.

Abortion Rights in India: Bhartiya Nyaya Sanhita and Medical Termination of Pregnancy Act

In India, the Bharatiya Nyaya Sanhita, earlier Section 312 of the IPC[9], Section 88(1)[10] criminalizes causing miscarriage. What this implies is that even a female may be charged with the act of putting an end to her pregnancy according to the law. The Medical Termination of Pregnancy (MTP) Act 1971 came in as an exception to the rule. It was drafted in such a way that under certain circumstances, people could have abortions, namely in a situation where a pregnancy poses a threat to the physical or mental health of a woman. However, the extent of original MTP Act was limited. This is where the 2021 Amendment[11] came in. Introduced into law on September 24, 2021, the amendment was supposed to render the law more inclusive. It increased the maximum period during which abortion can be done to 24 weeks for some types of women upon the advice of 2 registered medical practitioners. Among the critical changes was the interpretation of mental health issues that arise as a result of contraceptive failure by the law. Initially, that claim was made only by married women, or rather, by their husbands. An amendment in 2021 killed this phrase and used instead the phrase: any woman or her partner in a specification of the first parent, and the amendment finally recognized that pregnancies are possible and do happen outside marriage. The change was able to explain that legal protection is not only applicable to married women. There is, however, a twist. Despite these changes, the last decision is with the doctor. Thus, even though the legislation in question may seem to increase the reproductive rights of a woman, her choice is still moderated by the medical permission. This has questioned whether the legislation succeeds in preserving the subjectivity of a woman in Article 21 of the Constitution, which bestows the liberty of a person.

Loopholes in Medical Termination of Pregnancy (Amendment) Act, 2021

Medical Termination of Pregnancy (Amendment) Act, 2021 - Although it is, by all means, a step towards positive changes in abandoning access to abortion in India, it has not gone without its share of criticisms. Its weaknesses have been singled out by several people; general wording, indistinct borders, and potential interference with constitutional rights. The great difficulty? It does not quite acknowledge the vast extent of circumstances that may prompt somebody to get an abortion during the latter stages of pregnancy. It also introduces contradictions in comparison with other laws and international requirements.

[9] Section 312 in The Indian Penal Code, 1860.
[10] Section 88(1) in The Bhartiya Nyaya Sanhita, 2024.
[11] Medical Termination of Pregnancy Act 2021, No. 8, Acts of Parliament, 2021.

Section 3(2B) of the Amendment increases the maximum limit of abortions to cover only those that are characterized by significant fetal defects. Well, that is at least something that relieves some people. Nevertheless, the Act remains blind to a variety of rather similar situations such as financial difficulties, loss of a loved one (a spouse died or divorced recently), mental or physical illnesses, or any type of personal crisis. These are practical, experienced, circumstances in which one may be desperate to have a late-term abortion. Unfortunately, in this laser focus on fetal abnormalities, the law misses the bigger- and of course, very human-picture: there are several reasons why carrying a pregnancy to term may be highly difficult-well beyond fetal abnormalities.

Based on the 2022 World Health Organization report entitled "Abortion Care Guidelines[12]", criminalizing abortion fails to decrease the number of abortions performed. Rather, it drives women into unsafe practices of abortion, thus making it incompatible.

Disjointed Legal Protections: Why Pregnant Adolescents Fall Through the Cracks

The protections in the Juvenile Justice Act, 2015[13], and the protections in Article 3.1 of the UN Convention on the Rights of the Child (CRC)[14] are not really considered in the MTP Act. In both, the paramountcy of best interests of a child is expressly mentioned. The Juvenile Justice Act, that is supposed to shelter and look after the children, therefore ought to consider providing services that are specific to adolescent girls, including their access to safe abortion services.

Although the Act does not directly address the issue of terminating pregnancy, its main objective is to place the welfare of a child as the primary concern. Concern of the health and well-being of pregnant adolescents must be part of the package of such responsibility. Article 3.1 of the CRC does this as well, it emphasizes not only the protection of rights but also the involvement of the child in the decision-making affecting them. The Convention calls upon states to revise their legislations to ensure that there are no delays and no fear of seeking confidential reproductive health services among teenage pregnancies.

[12] https://www.who.int/publications/i/item/9789240039483.
[13] Juvenile Justice (Care and Protection of Children) Act, 2015, Act No. 2 of 2016.
[14] Convention on the Rights of the Child, UN General Assembly, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

Indian law must now align better with these international standards to be able to protect fully the rights of young girls.

Abortion Through the Lens of International Law

Frankly, the tone established in the Preamble of the Universal Declaration of Human Rights[15] is quite high. It refers to the declaration as a universal benchmark of success for all peoples and nations. More bluntly put, what this is saying is that this is the moral standard to which we are all supposed to aspire. It also says that people of the United Nations have once more shown their belief in the basic human rights and the importance of each human and gender equality between men and women.

That is when Article 2 clarifies that all the positions and these rights are for everyone. No, maybes, no buts. It explains that all people should be entitled to all rights and freedoms in the declaration without any form of distinction. It creates an image of unambiguity and all-inclusiveness.

This is followed by Article 3, which presents perhaps the most fundamental right, the right to life. It says that all people are entitled to life. That it is not only a formality; it is the basis of all the rest of the rights. Simply because, after all, without your life being secured, everything becomes a bit of an illusion, if not a joke.

But this is where the thing changes a little bit- the declaration, even though it is global and has relevance, does not constitute legal obligations. It is rather a common sense or a code of ethics and not something which can be enforced in a court of law.

The International Covenant on Civil and Political Rights (ICCPR)[16] makes assertions particularly on the right to life. It simply explains that each human being is born with a right to live, and this right should be secured by law. It also states that no one can be deprived of life at random. Well, now we are speaking about the legal obligations, not merely ideas.

Another significant aspect of this is the terminology, i.e., the use of the word everyone, or better

[15] General Assembly resolution 217 A (III) of 10 December 1948.
[16] International Convenant on Civil and Political Rights, opened for signature Dec. 16,1966,999 U.N.T.S. 171, entered into force Mar. 23,1976.

said, every human being. That is a major issue. A biological term like human being, unlike a term like person, where in some nations such as US it has been construed in the law that it does not include unborn children. It is any human being who is alive in the human species. That alters the situation. Therefore, following one train of thought, these documents of basic human rights do not promote abortion; they perhaps indicate the other way. At least, they fail to recognize any right to abortion. They are about life, protection, and dignity, but they rather say very little about the point at which life begins or the place of abortion.

The right to life at the international human rights law is understood to be commencing at birth by some jurists as it has been generally interpreted historically. The records of negotiations of the treaties supported this opinion. During the formulation of a several human rights around the globe and other contentious regions, some governments actually proposed to incorporate the wording that would mandate the right to life to be extended to the point of conception. However, the suggestions were taken away in the majority of cases. According to Article 1 of ICCPR, the right to life is an innate right of every human being. Interestingly, when it comes to other rights in the same document, it reads either, everyone or every person. The wording difference has brought about questions, is every human being something broader? Does it refer to unborn children? The authority writing in support of this has not been documented much. More apparent though is that criminalizing abortion will have an impact on the right to life in a different manner. An example is when some young women, in an inability to access abortion owing to legal barriers, have killed themselves. That, also is a violation of the right to life. When such deaths could have been prevented and they are not being prevented by a particular state, this creates very grave issues of concern regarding whether the state is indeed safeguarding this right in all persons. We also have Article 12 of the CEDAW[17] Convention according to which states should take all the efforts to stop discrimination of women in medical care. That involves ensuring that women enjoy equal access to services that touch on family planning.

Socio-Ethical Dimensions of Abortion

Abortion is not only a question of medicine or law, it goes deeper into the social, religious, economic, and political background of society. One can see its ramifications as both ends of

[17] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

the coin; it can be considered an empowerment to some and still remains a taboo to others. Going back to the early generation of policy-making, particularly in the west, abortion was majorly frowned upon. Many countries had outlawed it by the 19th century. It was only later on, in the second half of the 20th century, that the rights of women began gaining genuine legitimacy. Through people have come to the realization that few countries have, such as the United States, for instance, legislation with the necessary and needed awareness.

In India, it is more complicated. You cannot isolate the Medical Termination of Pregnancy (MTP) Act when you have a society weighed down by deep rooted societal problems such as poverty and illiteracy. It must be taken in a context of changing standards, changing social constrictions and strict conventional expectations. A good way to de-bunk its social effects is the comparison of the position of abortion when carried out among wives as opposed to girls who have not gotten married. The difference is immense. The trend is observed as not having found scandal when a married woman wants to have an abortion. However, when an unmarried girl does this, the society is not afraid to criticize. This verdict tends to run families to extremes of leaving girls at a distant just to have an abortion in a way that will not make them be known, all in the name of their future and the honor of their family. It is ironic that secrecy can be detrimental to the individual it is intended to protect.

Nevertheless, in spite of these problems, the legalization of the MTP Act has most certainly left some positive effects. The needy women could now acquire safer procedures of abortion. It has resulted in the reduction of suicides due to unwanted pregnancies and had been positively affecting the health of women. The acceptance of the family planning methods has also witnessed wider acceptance.[18]

With that said however, not all of the MTP Act has gone as it ought to have. The disconnect between what is noted on paper and what occurs on ground-particularly in the rural setting is one of the most alarming issues. Patients are sadly uninformed and in a lot of cases, the checking up that the government provides is rather pathetic. Due to this, the effectiveness and safety of the procedures are questionably often. Lots of clinics do not keep up good hygiene standards, lack trained personnel, or even have rudimentary medical facilities. This is not merely about the feeling uncomfortable, but this lack of care may even cause severe

[18] Government of India, Report of Ministry of Health and Family Welfare on Rural Health Care System in India (MHFW, 2005).

consequences such as infertility, irregular periods, pelvic infections, and, ultimately, death in a worst-case scenario.[19]

It is a problem of implementation. According to the law, only qualified personnel in officially registered clinics or hospitals should perform abortions. However, that does not always occur. One of the main queries that the authorities are confronted with is to establish whether the considerations which led to abortion are even legitimate. In some cases, abortions of frivolous reasons have been practiced- such as missing exams, weddings and some are even taken abroad to get abortions. They also happen a lot because a lot of such cases are supported by forged medical reports and thus, are easily ignored. The devil of it all? There are still some physicians who conduct these at the cost of money even though they are aware of the dangers.

Worse still, abortion is currently gradually evolving as an alternative to family planning.[20] It was not to be that way. These are not mere personal health problems, they are very much social problems. This is why government needs to intervene with proper initiatives and campaigns of awareness. And doctors? They also play a large role. They owe it to educate each patient on safer options-, since regular birth control is much safer than getting an abortion. The key is to truly strike the right balance between the good and bad sides of this legislation.

The moral debate on legislation governing the prevention of unwanted pregnancies has been raging since ages all over the world. That is what ultimately led to the thought of having legislation that makes some attempt to set out a balance of what is legal and what is argued in light of morality. In India also, despite having appropriate legislations in the country and the court having intervened on the subject more than once, the moral grey zone surrounding medical termination of pregnancy has not become any clearer. A majority of individuals have a lingering condition of the belief that abortion is wrong or immoral. Now the fact is, and it may happen that people agree or not quite-but it is a right.

Conclusion

The moral war involving the legislature that concerns the prevention of unwanted fetuses is an excuse that has been playing out in different parts of the world over the decades. That was what

[19] Government of India, Annual Report, 2000-2001, Government of India Press (Ministry of Health and Family Welfare, 2001).
[20] Ministry of Statistics and Programme Implementation, MSSO 60th Round, Report No. 507 on Morbidity, Health Care and the Condition of the Aged (National Sample Survey Organization 2004).

eventually drove the thought of a legislation that attempts to find a compromise- between what is legally right and what can be morally argued about. Even in India, despite the existence of laws and that of the judiciary which has intervened at least more than once, the ethical grey area that encloses the practice of medical termination of pregnancy is yet to clear up significantly. Majority of the population still believes abortion is wrong or immoral. However, the truth of the matter today, whether you like it or not, it is a right. And that is privileged to the woman only.

As far as social stigma is concerned, The Suman Kapur case[21]. A Supreme Court bench comprising Justices Thakker and D.K. Jain went on further to hold that in case a woman performed abortion against the wishes of her husband, it may amount to mental cruelty and give her grounds to divorce.

Legal provisions, however well they might appear on paper, might fail to endure meaning when their application is faulty, or when they overlook the socio-cultural tenets that dance around the daily lives of women.

The problem of the MTP Act being conditional, that it allows abortion under certain conditions, and in many cases the decision is technically left upon the doctors rather than the woman is one of the most alarming issues of the act. This not only restricts her autonomy, but is also against Article 21 of the Indian Constitution which ensures her right to life and personal liberty. In such a case as in the Suchita Srivastava v. Chandigarh Administration[22] and K.S. Puttaswamy v. Union of India[23], it has already been acknowledged that reproductive choices are mainstream to a woman right to privacy and dignity. Nevertheless, even today this does not imply that abortion is treated as a right by the law but as an exception, which has to be justified.

At the social level, there is an even greater gap between law and lived reality. Abortion still comes with a strong stain, particularly to unmarried girls. Although the law might not explicitly distinguish between a married and an unmarried woman, society does. It is common to find families far and wide to conceal an abortion, in the countryside in particular, and not only out of caution but in fear- fear of judgment, gossip, dishonor. In most of these, women do not

[21] Suman Kapur vs Sudhir Kapur, (2008) SCC 422.
[22] Suchita Srivastava vs. Chandigarh Administration (2009) 9 SCC 1.
[23] Supra 5.

receive proper medical attention and are made to indulge in unsafe abortion activities and thus the whole purpose of legalising abortion will go waste.

The issue includes unified standards in healthcare, especially beyond urban centres. Most abortions are undertaken under unsanitary unregulated channels mostly by unskilled individuals. This, as tabulated in the reviewed documents, may cause long-term health effects such as infertility or infections or in extreme cases, may cause death. Though laws are present, the lack of essence in maintaining adequate infrastructure, qualified medical staff, and enhancing awareness among people has enabled loopholes to widen.

The abortion law in India is also not in complete harmony with world standards. Even though we are parties to global treaties such as CEDAW[24] and UN Convention on the Rights of the Child[25], both our domestic laws and policies are not inclusive of adolescent girls providing them the access and choice to confidential, safe reproductive care. Juvenile Justice Act does mention child welfare providing no clear jurisdiction on how it applies in dealing with pregnant teens. The CRC has been insistent that the best interest of the child should be paramount consideration, but Indian law has not been placed on the same course by practice. Not only does the presence of these gaps of intersection between laws make the law confusing, but it also exposes helpless people to a lack of protection.

A new direction is not only about rewriting laws, as legal reform is also necessary. It is all about changing the way we view abortion, to eliminate the shame behind it, and recognizing that reproductive health is a right and not a privilege.

Abortion is not a legal provision stretched in a statute. It is an experience in the sense of being lived--usually not a smooth, comfortable, easy life, but a life that is sometimes may be characterized by pain, pressure, urgency, and emotion. That experience cannot be alone and should not fall on women who have to go through that experience with fear or even quietly.

This is not an argument of morals, as it is core. It is a matter of trust, freedom and dignity. And we ought long ago to have put in its proper place that trust--and that is with the woman.

[24] Supra 16.
[25] Supra 13.