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The Constitutionality of Abortion Laws

The concept of State came into being as people felt the need to safeguard themselves from external control while also keeping in check internal conflicts in order. Moreover, an organised government would rule the people with a certain uniformity and defined order. This would further lead to formulating laws that are suitable for present times, are equal and liberal in nature, and help maintain order in society.

Laws should change with Time

Laws should reflect the need for present times. They help maintain law and order within the society while also reforming society. We scrapped the archaic adultery law to meet the needs and demands of the people. This reformed law conformed with the society since punishing the wife and the lover for acts done out of love did not reflect the mindset of the current society. Moreover, it was against the principle of equality enshrined in the Constitution of India.

Indian Penal Code is the present Indian Law that defines criminal acts, determines the presence of exactly which elements will constitute a particular crime, and states the punishment for it. Yet this important law defining, regulating, and to a certain extent, even controlling our society, dates 300 years back and was formulated by the Britishers. Doesn't the 2020 Indian society need laws that are not reflecting the mind-sets and beliefs of Victorian society from the colonial era?

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Abortion is Personal not a Public Concern

Pregnancy, childbirth, and abortion are sensitive topics since they are not only concerned with families and in turn the society but also individually affect the mother and father. The physical, mental, and emotional well being of the mother is important for the healthy development of the child. However, when we are to consider the well being of the child, we should also take into consideration the well being of the women, the mother, who has to carry the child. Her body undergoes various changes to carry the baby full term along with the finances to support those medical bills. Moreover, the responsibility is not just until birth, it is a relation established for the lifetime that requires huge time, dedication, and responsibility.

Then why does this huge personal responsibility, relation, and bond, is decided and regulated by the Government? Isn't this a personal issue of life and liberty of the concerned women, which should be ideally on the will and voluntariness of the women? Moreover, the central question here is can the government ensure the well-being of every woman and every child born out of this obligation and forced pregnancy? If the mother does not want to carry the child will the government ensure that all emotional needs of the child are fulfilled by such an unwilling parent? Our government is hesitant to penalize marital rape since it concerns a personal intimate relationship which is difficult to be contested, proved, and evaluated in judicial courts. Then how is abortion and raising a child properly and safely, not a personal issue.

Abortion is a controversial topic in biomedical ethics and has conflicting opinions and arguments both morally as well as legally. In India, it is addressed by laws like the Indian Penal Code, 1860 and the Medical Termination of Pregnancy Act (MTP), 1971.

However, the conflict and contemplation are about whether this falls under the Fundamental Rights in the Indian Constitution. Sec 312 of IPC regards abortion as 'causing miscarriage', an offence against the public, and makes it a punishable offence. This disregards the right of a woman to her own body and her Right to get Pregnant.

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Abortion Rights and Constitution

Fundamental Rights have been widely interpreted to bring many other significant rights under its purview, which have not been expressly mentioned in the Constitution. The Right to Life and Liberty is one such right that incorporates many other rights. It is mentioned in Article 21 of the Constitution of India and is regarded as one of the most important rights guaranteed to us by the supreme law of the land- The Constitution.

This right aids us to make free choices regarding our quality of life- shelter, sleep, environment, health, and most importantly, dignity. The Right to Health is included under this fundamental right through the case *Bandhua Mukti Morcha v Union of India*.¹ The Right to Abortion should fall under this right. It is agreed that government has a duty that rights granted to citizens are not misused or abused but in cases of voluntary choices that concern and affect the individual majorly, should be left on the conscious of the said person unless they are harming the society. Hence the Right to Abortion should fall under the purview of the Right to Life and Liberty. It is a right to bodily freedom and liberty hence should not be denied by the State. Section 312 uses the word 'causing miscarriage' to penalise induced abortion. However, it probably uses the right words in the wrong context. Since it even implies to the women who are pregnant.

However, ideally and personally causing miscarriage intentionally and by any person, other than one who is pregnant, should only be punishable. Maliciously causing a woman to miscarry her baby is a traumatic experience and should be illegal. However, when a woman on her own will chooses to abort the baby it should not be evaluated legally or even morally. Since all the changes in the physical and emotional well being of the pregnant women have to be dealt with by her in individual capacity hence law or the state should have no say in the matter. Moreover, it is highly unlikely that after the birth of the child the law or the state will tend to the needs of the new baby instead the whole responsibility falls on the mother. Therefore, it is unjustified and arbitrary control by the state. Limiting the permission to abort the baby only for therapeutic purposes alone, is also an unjustified and unbalanced provision. Since the common reasoning behind allowing this abortion, is to allow only in cases where the life of the mother is in danger. However, if the women are unwilling then such forced continuation of pregnancy not only affects the mental health of the

¹ *Bandhua Mukti Morcha v. Union of India & Ors*, (1997) 10 S.C.C. 549.

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women adversely but also affects the well being of the future baby. It is often observed that in such cases the mother becomes withdrawn from the baby and often leaves the baby unattended which is unsafe for the child.

Therefore women should be given the Right to abortion since she has the liberty to alter their body in any way she can.

Beyond the Health Factor

Pregnancy is a condition that affects the body of the women both physically and mentally. Additionally, we are now witnessing a change of attitude among the educated and working women. Women are now becoming career-oriented and want to plan their pregnancies accordingly. It should not be generally perceived that being pregnant halts the growth of your career. However, since every woman has a different medical history, pregnancies are also different for every woman. Some can work throughout the term of their pregnancy however some are advised to be on bed rest since the first trimester. Moreover, the financial aspects are also an important factor to be considered when discussing this issue. There is no doubt that the world today is expensive and raising a child certainly involves a considerable amount of money and certain times is the most important factor, why women want to abort that particular pregnancy.

Providing Women Free choice regarding Abortion rights would be Constitutional

The right to safe and legal abortion is a fundamental human right addressed in various treaties and also forms a significant part of good health for women thereby should be included in Article 2 Right to Health. The major goal of the government should be providing proper facilities so that the women can have a safe abortion and do not succumb to death due to the paucity of medical care.

The Supreme Court has been vague in its approach to abortion rights. They recognised that this right is a part of the Fundamental Right in a 2009 case², reiterated the same in the recent

² Suchita Srivastava v. Chandigarh Administration, (2009) 14 S.C.R. 989.

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Puttaswamy³ privacy judgment. They specifically mentioned that abortion is a private issue and women have to be granted autonomy over their bodies.

However, judgments in 2017 where they refused abortion since the woman was already 26 weeks pregnant. However, it was specifically mentioned that the women had been raped and as a result not only was pregnant but also became HIV positive. Moreover, she lived in a shelter in Bihar and the foetus was diagnosed with Down syndrome yet the court refused abortion only on the ground, that the life of the unborn child mattered. Basing judgments on matters of immediate importance are not in favour of the jurisprudence. We have to look beyond the immediate concern as well. Would the child get sufficient care in the shelter home after its born? Would his FR to Health be granted to him by the government hospitals?

We are a developing country with limited money and a huge population. A third of our population is so poor that they cannot even afford proper meals and the government has limited resources to provide aid to them. Then would the government be able to help such abandoned children, both physically and emotionally, and ensure that their Fundamental Rights as well as Human Rights are effectively granted and exercised by them.

Conclusion

The legal status of Abortion laws needs to be evaluated since the existing laws still conform to the ways of a patriarchal society. The limited rights granted to women through the Medical Termination of Pregnancy Act (MTP), 1971 are not enough.

It is a constitutionally granted Fundamental Right of women to ensure that she can make her own choices, concerning her body, health, privacy, and liberty, without the intervention of government. Moreover, the current status of abortion laws of India is a legal method to control the lives of women. These restrictive laws and the pedantic interpretation of existing laws, direct and control the lives of women in a democratic society which is against the basic principle of liberty and

³ KS Puttaswamy (Retd.) v. Union of India, 2017 SCC Online S.C. 1462.

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freedom. Tracking the legal status of a free choice is a direct conflict with the constitutionally guaranteed right to equality since women have the right to direct their life in any way they want.

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