

CONCEPTION OF CONSENT UNDER ABORTION LAWS**BHASKAR KUMAR*****TABLE OF CONTENTS**

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ABSTRACT

In this essay, I have argued that the understanding of consent under the abortion laws is conceptually flawed and favours the patriarchal traditional norms. The feminist conception of consent stipulates that in order to give consent one should be in position to exercise one's choice among the given options. The right to abortion is the essence of every woman's right to own her body. As right to terminate pregnancy falls in the domain of equality, right to privacy and self-determination, the consideration of spousal consent in terminating pregnancy hinders the realization of constitutionally guaranteed rights to women. Further imposition of time limit for abortion also forces women to carry fetuses without their consent also signifies the disproportionate power dynamics between citizen and state. The laws restricting abortion force women to continue pregnancy beyond a certain time limit are a manifestation of patriarchal assumption of motherhood. Hence, it is argued that the time limit for abortion must be lifted in interests of women except for the cases where it will have adverse consequences on the mother.

I. INTRODUCTION

"There is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process... The real sexual revolution is the emergence of women from passivity, from nothingness, to full self-determination, to full dignity."

Recently, a petition was filed in the Supreme Court of India challenging the validity of the provisions of Medical termination of Pregnancy Act, 1971 [MTP Act] which criminalizes abortion.² It was alleged in the petition that Sections 3(2), 3(4) and 5 of the said Act are violative of personal liberty and body autonomy. The legal developments and critiques regarding abortion must be understood in the context of feminist revolutions and increasing dimensions of epistemology regarding female sexuality and agency. Evolving feminist theory has ferociously attacked patriarchal legal constructions and as a result of this political movement, constitutions across the globe have started taking their viewpoints into account. The advocacy of agency and choice for women gained momentum and made a place for itself in policy making and court rulings.

This essay outlines the conception of consent within the MTP Act. The essay argues that the conception of consent under MTP Act reflects patriarchal notions and endorses gender

¹ Betty Friedan, President, National Organization for Women, *Abortion: A Woman's Civil Right*, ADDRESS AT THE FIRST NATIONAL CONFERENCE ON ABORTION LAWS (Feb. 1969).

² Press Release, *SC Issues Notice on PIL Seeking Decriminalization of Abortion*, LIVELAW (Jul. 15, 2019), <https://www.livelaw.in/top-stories/sc-issues-notice-on-pil-seeking-decriminalization-of-abortion-146377>.

stereotypes which often find place in the judgments of the Supreme Court and of various High Courts.

II. AN OVERVIEW OF CONSENT PARADIGM IN INDIAN ABORTION LAWS

Section 3(4)³ of the MTP Act stipulates:

- (a) *No pregnancy of a woman, who has not attained the age of 18 years, or, who, having attained the age of 18 years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.*
- (b) *Save as otherwise provided in (a), no pregnancy shall be terminated except with the consent of the pregnant woman.*

Although the language employed in the section unambiguously dictates that the consent of a pregnant woman is required for terminating her pregnancy, and that her guardian's consent is required only in some circumstances, however, the interpretation of courts have had an adverse impact on women. In the case of *Samar Ghosh v. Jaya Ghosh*, the Supreme Court ruled that if a wife terminates pregnancy without the consent of her husband, it will be a ground for divorce.⁴ Although the judgment does not interfere with the statutory requirement of consent under section 3(4) but there have been a number of cases which followed the suit and entertained arguments of cruelty as a ground of divorce where the consent of spouse was not taken. The decision has potential to impact woman who wish to have abortion. Although the judgment does not abridge the requirement of consent directly, it is sufficient to invoke a fear of legal repercussions. In the celebrated case of *Suchitra Srivastava v. Chandigarh Administration*⁵ [**Suchitra Srivastava**], although the court unequivocally held that a woman has a right to privacy, dignity, and bodily integrity but at the same time, it ruled against termination. Further the time limit of 20 weeks which has been sought to extended by four weeks in selected circumstances⁶ force women to continue their pregnancy without their consent. The construction of law along with several judgments like *Suchitra Srivastava* has an anti-abortion intonation.

III. EQUAL RIGHTS AND ABORTION ANALYSIS

Prohibiting abortion reduces women to potential mothers, thus perpetuating gender-based stereotypes.⁷ Nigel Rodley, when speaking about Irish abortion laws, says that our abortion law

³ Medical Termination of Pregnancy Act, No. 34 of 1971.

⁴ *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511 (India).

⁵ *Suchita Srivastava v Chandigarh Administration*, (2009) 9 SCC 1 (India).

⁶ *The Medical Termination of Pregnancy (Amendment) Bill, 2020*, PRS INDIA, <https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020>.

⁷ UN HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF IRELAND, CCPR/C/IRL/CO/4 (Aug. 19, 2014).

sends the message that a woman is ‘a vessel and nothing more’.⁸ The idea of a ban on abortion seems problematic when the State in the guise of protecting potential life enforces the traditional gender role stereotypes about sex, care-giving or decision-making around motherhood. In *Planned Parenthood v. Casey* (U.S.A.), the court reflected on the detrimental impact of abortion laws on women as a class.⁹ If it remains unchecked, given the myriad ways of unwanted pregnancy, the participation of women as equals in the society shall be burdened. In its rulings on abortion, the Court recognized that “*the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives,*”¹⁰ The burden on men and women is not commensurable in the context of child bearing and the choice of abortion.

In *Joseph Shine v. Union of India*,¹¹ Justice Chandrachud observed that the notion of substantive equality enshrined in our Constitution is directed at eliminating the systemic and institutional discrimination against disadvantaged groups so that they could achieve equal social, economic and political participation. There is a pressing need to move away from formalistic notion of equality which disregard social realities. The court emphasized that “*The primary enquiry to be undertaken by the Court towards the realization of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals.*”¹²

Article 15(1) of the Constitution of India prohibits any kind of discrimination on the ground of sex. Any provision discriminating women on the basis of class stereotypes or patriarchal conception of women’s agency will violate the right protected under Article 15(1).¹³ Justice Chandrachud further stressed that it is the duty of the court to break these gender stereotypes and promote a society where equality in all spheres of life is provided to women without any prejudice.¹⁴ The legal system still consists of certain norms and provisions which considers the historical subordination of women beyond any reproach and remedy. That aspect is laws related to family affairs.¹⁵ The laws on marriage, divorce, succession and abortion have long been contributed in subordination of women by depriving them of equal rights in personal affairs.

The equal-rights argument makes the case that women cannot be equal to men as long as the consequences of sexual activity and of childbearing are differentially distributed between women

⁸ Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 817–22 (2007).

⁹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰ *Id.* at 2809.

¹¹ *Joseph Shine v. Union of India*, (2018) SC 1676 (India).

¹² *Id.*, at ¶38.

¹³ INDIA CONST., art. 15 cl. 1.

¹⁴ *Supra* note 11.

¹⁵ *Id.*

and men. The right to choose, then, is an attempt to rebalance these differential consequences. In this argument the conflict of rights is shifted from the woman fetus conflict to a gender conflict. The bounds of liberal individualism are broken by formulating equality in terms of social groups, a claim established by demonstrating that one cornerstone of male domination, enacted through institutions such as church and state, has been in control of women's sexuality and reproductive capacity.¹⁶

IV. SOCIO-LEGAL ASPECT OF ABORTION

The sociological aspect of abortion is against the goal of transformative constitutionalism which seeks to rise above the stereotypes and biases inherent in our society and social institutions. As long as women are socially disadvantaged by their childbearing capacity and the gendered roles entrenched in Indian society, it remains impossible for most Indian women to make free and uncoerced decisions concerning reproduction. Male control of female sexuality is always expressed and legitimized in men's desire of having a large family (sometimes small too) which is prevalent in Indian societies. Reproductive justice cannot be guaranteed without looking into the unequal circumstance which pregnant women face in the present case. This reshaping of women's sexual and reproductive goals may be pursued in the name of furthering gender equality and women's rights, and freeing women from patriarchal control. Nonetheless, the entire project appears misogynist, as it seeks to make women's sexuality more like men's in effect, in the sense of being unburdened by the possibility of pregnancy, and being modeled after the more unattractive forms of male sexual practice.¹⁷

The woman's choice to have sex, become pregnant and then terminate pregnancy, is shaped by multiple inequalities existing in social institutions which enforce the traditional stereotypes of gender discrimination.¹⁸ The notion of substantive equality in this respect requires a complex and intersectional understanding of female subordination on the basis gender race and class. Rather than an assertion of women's moral agency the abortion legislation reflects on the manifestation of socio-economic inequalities in women's lives.¹⁹

India has an obligation to facilitate the progress of women's social position by modifying 'social and cultural patterns' of bias in order to eliminate gendered prejudices and stereotypes. Although

¹⁶ GERDA LERNER, *THE CREATION OF PATRIARCHY* 3-6 (New York: Oxford University Press, 1986).

¹⁷ Sidney Callahan, *Abortion & the Sexual Agenda*, *Commonweal* 232 (1986).

¹⁸ Joanna Birenbaum, *Contextualising Choice: Abortion, Equality and Decisions concerning Reproduction*, 12 S. AFR. J. HUM. RTS. 485 (1996).

¹⁹ June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, 7 S. AFR. J. CRIM. JUST. 382 (1994).

in the Indian society, the disadvantage to females as a class is not as visible as the disadvantage to the lower castes; however, the disadvantage runs deep into the structure which is more acute in case women of lower class. The eradication of this discrimination and disadvantage is the key message of the constitution and the goal of transformation. The goal of transformation cannot be attained where pregnant women have to face disproportionate consequences in order to maintain the stereotypical status quo. The aim of social and sexual equality will only be achieved when they will exercise reproductive autonomy under equal conditions which doesn't preclude choice.²⁰

The formal equality doctrine also fails to capture the essence of subordination perpetuated by abortion laws. Under formal equality framework the abortion rights will lose its case as there are no pregnant men hence equal protection theory cannot be applied.²¹ Law is unable to detect the discrimination in practices which doesn't involve men because gender equality can only be assessed if there are similarly situated men who are treated differently.²²

The ability to equally participate in social and economic affairs of the nation can only be facilitated by their ability to control their reproductive lives.²³ The burdens of motherhood and fatherhood in the society are horribly disparate, so the law needs to focus on changing structures. The right to abortion provides the women a way out of the oppressive patriarchal structure of gendered roles and obligation by not choosing the motherhood.²⁴ The restrictions of reproductive choices turn the reproductive capacities of women for use and in control of others which is a disability not parallelly imposed on men.²⁵ Basically the restrictive abortion laws stem from constitutionally unacceptable stereotypes.

The policing of women's body and behavior is essential to preserve the patriarchal structure. Every act of a woman is under social scrutiny which operates through peer policing and consequentially resulting into conformity on the part of women and violence, excluding ridicule on the instance of non-conformity.²⁶ The constant fear of surveillance and consequences of non-conformity results in self-censorship.²⁷ In this context right to privacy judgment recognizes heterogeneity as

²⁰ Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

²¹ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

²² *Supra* note 11.

²³ *Supra* note 8.

²⁴ *Id.*

²⁵ Cass Sunstein, *Neutrality in Constitutional Law (With Special reference to Pornography, Abortion and Surrogacy)*, 1 COLUM. L. REV. 92 (1992).

²⁶ Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013).

²⁷ Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001).

intrinsic value and respects an individual's choice to stand alone and against the tide of conformity. These values are essential to preserve the plurality and diversity of our culture.²⁸

The founding fathers of the constitution had profound respect towards toward the liberty of an individual and hence they placed the right of personal liberty on the highest pedestal. The right to personal liberty ensures autonomy of an individual in his private life unless the state has a compelling interest in intruding that. The debate which sacralizes pregnancy to motherhood transition always suppresses the possibility for women making choices regarding their reproductive capabilities.²⁹ The biblical influence on the conception of abortion has been apparent as the ecclesiastical debate regarding 'personhood' or 'ensoulment' of fetus has been pervasively manifest in abortion.³⁰ It is a widely held belief in Roman Catholics that soul is gift of god given at conception. Hence abortion at any stage would simply imply the taking of human life and that too against the will of god. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the womb. In balancing the evils, the notion held by latter is that the evils lying in destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.³¹ Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "*moral predilections must not be allowed to influence our minds in settling legal distinctions.*"³² The view on moral status of fetus depends largely upon one's own religious beliefs and the religious conception of sins profanity.³³ As there is no precedent which confers the right to life on the unborn child, the fundamental right of mothers should not yield to the societal notions of morality.

In addition to individual rights framework which protects the privacy, dignity and bodily integrity of an individual the issue of abortion must be looked at from the perspective of transformation of women's lives form the social conservatism. The abortion rights will emancipate the women from the traditionally ascribed role of motherhood imposed on them and thus will bring the transformation of society. The laws prohibiting abortion beyond 24 weeks are compelling examples of women alienated from their body, sexuality and agency and perpetuating the gendered power imbalances.³⁴ The laws on abortions must uphold the desire of pregnant women and should

²⁸ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCALE 1 (India).

²⁹ Janet R. Jakobsen, *Struggles for Women's Bodily Integrity in the United States and the Limits of Liberal Legal Theory*, Vol. 11, No. 2 JOURNAL OF FEMINIST STUDIES IN RELIGION 5-26 (1995).

³⁰ *Id.*

³¹ *Meeting of the Ass'n for the Study of Abortion, Hot Springs, Va. On Nov. 18, 1968*, N.Y. Times, 77, col. 1 (Nov. 24, 1968).

³² O. W. HOLMES, *THE COMMON LAW* (1881).

³³ Glanville Williams, *The Law of Abortion*, Vol. 5 (1) CURRENT LEGAL PROBLEMS 128-147 (Jan. 1, 1952).

³⁴ CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 35-36 (Harvard University Press, 1988).

not succumb to social stereotypes and notions. Moreover, the abortions in India are doctor centric with doctors having the ultimate discretion over the women's body and choice. The only condition of medical risks to terminate pregnancy beyond 20 week doesn't take into account various socio-economic and psychological and personal considerations. Hence, the women are forced to carry the child in their womb against their will. Recognition of women's ability to choose implies that they have moral agency with regard to their course of life which threatens the naturalization of traditional gendered division of labor that are based on assumptions regarding motherhood etc.³⁵ Hence, when women will choose to abort then it will attack the patriarchal family set-up by altering the roles played by males and females in social affairs. To move towards a sexually egalitarian society it is important to recognize women's right over their respective bodies in matters of pregnancy and child bearing. Control over women's sexuality is the key patriarchal assumption that underlies family and marriage. In remedying injustices, the Court cannot shy away from delving into the 'personal', and as a consequence, the 'public'. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the court is not taking on a paternalistic role and "granting" rights.³⁶ Therefore in light of advances in medical technology which has rendered process of abortion safer and more secure, the time limit of abortion must be lifted barring the cases where women could face health risks.

V. THE IDEA OF CONSENT

In this essay, two prongs of consent in the context of abortion have been discussed. The first aspect covered cases where court ruled in favor of spousal interest in matter of abortion indirectly.³⁷ The second aspect covered the time limit beyond which abortion is not possible which forces women to continue pregnancy against their wish. In considering unilateral termination of pregnancy as a ground for divorce as a lot of cases have, women have been robbed of their ability to consent freely.³⁸ Moreover a number of studies show that doctors ask for a husband's signature before carrying out pregnancies even in case of unmarried woman.³⁹ In a study on the process of informed consent in sterilization services in Chennai done by this author, 73 per cent of the clients

³⁵ BEVERLY W. HARRISON, *OUR RIGHT TO CHOOSE: TOWARDS A NEW ETHIC IN ABORTION* 119 (Beacon Press, 1983).

³⁶ Planned Parenthood, *supra* note 11, at ¶¶51-2.

³⁷ Samar Ghosh, *supra* note 4.

³⁸ *Id.*

³⁹ UNDERSTANDING INDUCED ABORTION: FINDINGS FROM A PROGRAMME OF RESEARCH IN RAJASTHAN, INDIA, POPULATION COUNCIL (New Delhi, 2004).

reported that third party signatures were procured, of which 53 per cent were from husbands.⁴⁰ The judicial pronouncements validating spousal consent as a prerequisite for abortion assumes the stake of husband in women's reproductive choice. On the other hand the time limit imposed on termination of pregnancy is reflective of patriarchal notions embedded in law prohibiting termination of pregnancy beyond 20 weeks. These both instances are sufficient to show how the element of consent on which individual autonomy rests is skewed in favour of perpetuation of a patriarchal structure.

As per feminist theories, consent can be said to exist when a choice is made without being influenced by any kind of express or implicit extraneous force.⁴¹ Consent has been associated with the autonomy of an individual. When discussed specifically in the context of sexual activities, it usually determines the 'rightness' or 'wrongness' of other's sexual advances to oneself. Therefore, consent can be understood as a line that an individual draws while exercising the right to sexual autonomy. According to feminist legal theory, the legal subject is not an abstract, gender neutral creature of the traditional legal imagination but an ideological construct, endowed with attributes that vary according to context. She thinks the crime of rape focuses more centrally on what men define as sexuality than on women's experience of their sexual being, hence violation. The tool of subordination, or the means by which inequality between men and women is perpetuated, is sexuality. Heterosexuality as the prevailing sexual practice in society involves the sexual dominance of one, the man, and submission of the other, the woman. It is this sexual paradigm that gives meaning to gender. In every law, socially constructed relations between the interacting parties are always a secondary focus.⁴² In the life of inequality, much routine sad resignation or worse passes for "voluntariness" in the sexual setting.

Consent covers multitudinous forms of A's hegemony that are typically so elided as not to be seen to infect or inflect, far less vitiate, B's freedom.⁴³ Steven Lukes broaches this aspect of the inequality analysis when he observes that, "*A may exercise power over B by getting him to do what he does not want to do, but he also exercises power over him by influencing, shaping or determining his very wants.*"⁴⁴ One effective method of exerting this kind of power over the will, apart from socialization to gendered identity, is to be in the position to determine the alternatives and their consequences. In a similar hierarchy,

⁴⁰ Rajalakshmi. *Informed consent in sterilisation services: evidence from public and private health care institutions in Chennai*, Working Paper No. 4 POPULATION COUNCIL (New Delhi, 2007).

⁴¹ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8(4) FEMINIST THEORY 635 (1983).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ STEVEN LUKES, *POWER: A RADICAL VIEW* 27 (Palgrave Macmillan, 2nd ed. 2005).

the consenting parties to government in eighteenth century English liberalism were not the state's equal, although they (generally not including women) were considered equals among themselves, and the power of the state they created by their consent was not unrestrained or unlimited.⁴⁵ The consent paradigm under abortion law is manifestation of power of dominant groups over subordinated women by instrumentality of law. His word is her law as the saying goes. The purpose of consent is to attribute and justify the obedience of the powerless to the rule of the powerful, her obeisance to him, specifically in the present context, to what he does to her sexually. It is about compliance, compliance of the compliant presumptively legitimizing otherwise illegitimate acts of power.⁴⁶ The traditional notion of womanhood is perpetuated by enactment of laws which are enacted by men to govern women.

VI. CONCLUSION

In this essay the right to abortion has been discussed in the light numerous judicial pronouncements withholding right to equality and privacy of an individual. It has been argued that women have fundamental right to reproductive choice and her choice to carry or terminate pregnancy is an element of decisional autonomy. However certain judgments have ruled in favor of granting divorce in cases where women terminated the pregnancy. As the judgment *Samar Ghosh v. Jaya Ghosh* shows, men have also accused women of terminating non-existent pregnancies to substantiate fake cruelty charges in divorce matters. Since the courts have consistently recognized the women's right to terminate pregnancy within the framework of right to bodily integrity, privacy, equality and self-determination, the hindrance due to spousal consent must be weeded out of the abortion paradigm. The decision regarding termination of continuation of pregnancy must solely be taken by women themselves. Any kind of legal hindrance like outlined in this essay will rob the women of autonomy. Hence doing away with the element of spousal consent in termination of pregnancy will go a long way in ensuring the realization of women's right to decisional autonomy. Further the time limit is reflection of patriarchal notion manifested in law. The forced continuation of pregnancy where there are not health risks in termination is state's attempt to rob the consent of its subject and the same should be done away with.

⁴⁵ HACKETT, ON THE SOCIAL CONTRACT (Donald A. Cress ed. & trans., 1987).

⁴⁶ KATE MILLETT, SEXUAL POLITICS 25 (1970).