Consequences of Legalized Abortion Law in India

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The Indian law on abortion, the Medical Termination of Pregnancy Act, 1971 (MTPA) came into force on April 1, 1972. The proposal for reforming the restrictive law on abortion was made in 1964 by the Central Family Planning Board of the Central Government and the various stages of legislative process ended in August 1971 with the enactment of a liberal MTPA.

The Act modified the provisions of the Indian Penal Code, 1860 relating to abortions by legalising abortions, previously considered illegal under the Code, under specified and limited conditions. It permits the termination of pregnancy by a registered medical practitioner where the length of pregnancy does not exceed twelve weeks, or by two registered medical practitioners forming opinion together, where the length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, provided that the medical practitioner or medical practitioners are of the opinion that (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or an injury to her 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. The medical opinion must, of course, be given in good faith.2

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1. SS. 312, 313, 314, 315 and 316, Indian Penal Code.
2. S. 3.
The MTPA also provides guidance for the doctors in the form of two explanations. These provide two instances where continued pregnancy is assumed to constitute a grave injury to the mental health of the pregnant woman, namely, (a) where a pregnancy is alleged by a pregnant woman to have been caused by rape and (b) where the pregnancy occurs as a result of failure of any device by a married woman or her husband for the purpose of limiting the number of children. This provision provides the doctors with a yardstick for a broad interpretation of the basic concept of the potential injury to the mental health of the pregnant woman.

Furthermore, in determining whether the continuation of a pregnancy would constitute a risk to the physical or mental health of the pregnant woman, the Indian Law permits the consideration of the woman's actual or reasonably foreseeable environment. This provision modelled on the British Abortion Act of 1967 has made the Indian law liberal.

The MTPA, however, is not so generous about the physical conditions under which an abortion may take place. It stipulates that operations must take place in either hospitals established or maintained by the government or in an approved place.

However, exceptions are made for emergencies. A single doctor may terminate a pregnancy if it is immediately necessary in order to save the life of the mother. In such situations, the requisites relating to the length of the pregnancy, the need for two medical opinions and the venue of operation do not apply. However, it needs to be pointed out that one aspect of this emergency clause tends to restrict rather liberalise the old law. Section 312 of the Indian Penal Code permitted abortion by anyone with the object of saving the life of the mother but under MTPA only a doctor can terminate pregnancies.

3. Explanations 1 and 2 to section 3.
4. S. 3 (iii).
5. S. 5.
Thus, the oft-argued following justifications in favour of permissive abortion are found in the Indian Law.

(i) Therapeutics: The old restrictive Indian abortion law had permitted abortion to save the life of the mother. In addition, the reformed law, as seen above, allows abortion when the mother's life is not threatened, but when continued pregnancy will cause damage to her mental and physical health.

(ii) Eugenics: The basic of eugenic abortion is that there is a justification for abortion when it is known before birth that the child will be born mentally or physically deformed. The unborn child should be relieved of a life of misery.

(iii) Pregnancy caused by rape: The problem of a pregnancy caused by rape may affect the mental health of the mother. It is assumed that the victim mother does not want the child and does not want to bear the continuing results of a crime for which she was not culpable.

(iv) Social and economic considerations: A popular argument in favour of abortion is based on the absolute right of the woman to control the use of her body. She has a right to an abortion on demand to terminate any pregnancy which she decides she does not want. Admittedly, the right to control the use of one's body is founded on ideas of liberty, and restrictions thereon may amount to an invasion of privacy.

The economic status of the family or the parent's inability to provide for a child is also given as a valid reason for abortion under this category falls the use of abortion as a means of population control. It is beneficial to society in helping to reduce the burdens of overpopulation. Though the Indian government's formal view is that liberalised abortion law is a health measure and will not normally be used for birth control, yet the demographic needs of the country loom large as one of the underlying objectives of the legislation.

The MTPA grants wide discretion to the doctor in implementing its provisions. The doctor is required to base his opinion on a variety of complex socio-medical, socio-economic and moral
considerations. With an increase of abortion on demand, the prospects of commercialisation of abortions by members of the medical profession cannot be ruled out. "Good faith" of doctors will come under severe strain and can assume a facade for illegal abortions by the doctors. This point of view is reinforced by the "ouster" clause found in MTPA which says that no suit or other legal proceeding shall lie against any doctor for any damage caused or likely to be caused by anything which is done or intended to be done in good faith under MTPA. However, this will not absolve the doctors from charges of professional negligence. The common law liability in tort will cover such cases and will safeguard the public against negligent doctors. However, in India, unlike other foreign countries, the volume of tort litigation is not large and cases involving medical negligence are few and far between.

Amniocentesis and Abortion.

With the accelerated pace of modernisation of medical technology, the chances of abuse of the liberal abortion law by members of the medical profession are increasing. One instance in point is the test of amniocentesis. This is a chromosome test done on the amniotic fluid in the womb of a pregnant woman to predict whether an unborn foetus was of a male or female. Further, this test is also invaluable in detecting genetic disorders of the foetus and in finding out whether a child born would be deformed or abnormal. It has come to light that doctors in government hospitals and other private medical practitioners have been doing this test in India to determine the sex of the foetus and have been aborting it if it happens to be female.


7. The Amniocentesis test which was carried out in the All India Institute of Medical Sciences in the '70s was discontinued after it was discovered that women were having this test only to know whether a foetus was male or female. This test was carried out in Meerut in a government hospital and has been discontinued only because the doctor qualified to do the test had gone abroad. Lucknow, Kanpur, and Bombay had been (f. n. contd.)
following are extracts from a letter circulated by two doctors of New Bhandari Hospital in Amritsar, Punjab.  

Dear Doctors

Most prospective couples in quest of a male child, as the social set up in India demands, keep on giving birth to a number of female children, which in a way not only enhances the increasing population but also leads to a chain reaction of many social, economical and mental stresses on these families.

Amniocentesis and antenatal sex determination have come to our rescue and can help in keeping some check over the accelerating population as well as give relief to the couples requiring a male child.

Assessment of the foetus sex has been made possible by amniocentesis after completion of 16th week and up till 20th week of pregnancy, when therapeutic abortion is medically feasible and legally permissible.

In spite of all precautions, the procedures can be fraught with dangers of abortion in 0.1% of cases only.

carrying out the test for quite some time. In Delhi the lack of proper facilities has resulted in some doctors extracting the fluid and sending it by air to Bombay and getting the results from there. The reporter investigating the details had termed the test a “money spinner.” See Facets, Vol. 1 No. 3 (August, 1982) edited by Chanchal Sarkar, p. 32.

8. See Facets Vol. 1 No. 1 (June, 1982), p. 24. “A young reporter went to Amritsar and gave a vivid description of what goes on in the New Bhandari Hospital. Women line up waiting their turn, the majority of them accompanied by their mothers-in-law. Perhaps the most revolting act of the doctors was to keep the foetus of twins (both girls) preserved, to show to any women who were hesitant about going through with the test. The doctors also brought a woman on whom they had performed the test so that she could tell other women herself how happy she was that she had been able to get rid of the foetus, Vol. 1, No. 3 (August, 1982); See also Maityree Saha, “The Heinous Practice Must stop”, Vol. XXIV No. 44. Mainstream 29 (1986).
A charge of Rs. 500/- will be levied by the clinic for doing amniocentesis sexchromatin studies and theatre charges. Sex determination is done on those patients having one or more than two female children.

The unethical message of the two doctors that the availability of amniocentesis test leading to abortion of female foetus would fulfil the twin objectives of checking population growth and avoid having an unwanted daughter.

In the tradition-bound India society where the parents feel a certain ambivalence towards girls, the availability of abortion of foetuses of a certain sex selectively might alter this ambivalence to dislike. It is well known that a male infant is more welcome on birth than a female one. A female baby is considered a 'burden' to the family. More resources in health and education are invested by parents on male children.

Female foeticide if permitted under the aegis of MTPA would further drastically change the sex ratio the proportion of females to males to the total population. The number of women will become smaller than what it is already. Shrinkage of female population will result in a shortfall of marriageable women and female labour which India needs most.

Frequent abortion in quest for a son will adversely affect the health of the mother for whose benefit primarily MTPA was enacted. Far from being a health measure, it will undermine the status, dignity and health of Indian women.

 Abortions carried out with a view to getting rid of female foetuses consequent on amniocentesis are outside the purview of MTPA and are patently illegal and the doctors, who do it must be criminally prosecuted. In addition a great onus lies on the Medical Council of India to take disciplinary action against those members of the medical profession who conduct such abortions. Amniocentesis per se need not be totally banned because according to the doctors, it is a highly beneficial test to trace genetic disorders. The test has positive advantages in pregnancies in advanced maternal age, in pregnancies where a partner is known to have any chromosomal abnormality, in case of frequent
spontaneous abortions and in previous children (usually deceased) with disorders on whom chromosomal analyses were not performed.

The incidence of female foeticide by this test has reached such alarming propositions that it has led three members of the Maharashtra Legislative Assembly in tabling before the house, “The Maharashtra Prohibition of Amniocentesis and other sex Determination Medical Tests Act, 1986.” Their cause has received support from doctors in Bombay who have formed the “Doctors Against Sex Determination and Sex Pre-Selection Techniques” and have demanded a ban on sex determination tests. The doctors point out that the amniocentesis test must only be done in government hospitals and the sex of the child must never be revealed to the parents.9

While the initiative of the Maharashtra MLAs is highly commendable what is urgently needed is an amendment to MTPA to ban all selective abortions of female foetus. The ban should be only on sex determination and it should be laid down by law.

Experimentation on foetus.

Another off-shoot of liberal abortion provisions is the choice given to the mother to have her pregnancy terminated for the sale of foetus for medical research. Advances in medical technology have helped in keeping the foetus alive outside the mother’s body. Experimentation on abortion and “keep alive” foetus could be agonizing for the foetus as well as the mother. How far is it morally justified to conduct such medical research?

Prostaglandin abortions.

Medical research has now made possible “abortion sans tears” i.e. abortion without involving a knife.10 This is known as

medical induction method. This has been succinctly described by Lord Denning M. R. in *Royal College of Nursing v. D.H.S.S.*:

Since 1972, a new method has been used. It is called medical induction. It does not involve a knife. It started quite simply in ordinary full-time birth so as to induce labour a few hours early to save the mother the stress of waiting—or for the convenience of doctors and staff. But it is now becoming much used to effect abortions—when the mother is pregnant for three months or more. It is done by pumping a chemical fluid into the mother’s womb. It is called prostaglandin. The fluid so affects the muscles and shapes the mother’s inside that it forces her into labour prematurely—so that the unborn child expelled from the body usually dead, but sometimes at the point of death.

In U.K. the whole process of medical induction was being conducted in two stages. The first stage was done by a doctor—a registered medical practitioner in the operating theatre by inserting a fine catheter into the mother’s body under general anaesthetic. The second stage, which involves the pumping of prostaglandin fluid into the womb, was being done by the nurses. The process of induction of labour and the expulsion of foetus from the mother’s body may take 18 hours or sometimes up to 30 hours.

The practice of making the nurses responsible for the second stage in the medical induction method under the circular issued by the Department of Health was challenged by the Royal College of Nursing. The Royal College of Nursing had sought a declaration in the High Court that the department circular involving nurses in termination of pregnancy by medical induction contravened the provisions of the U.K. Abortion Act, 1967. The High Court refused the declaration saying that the departmental instructions did not involve the performance of unlawful acts by nurses. On appeal the Court of Appeal interpreting the provisions of Act, 1967 declared illegal the part played by the nurses in the prostaglandin abortions. Lord Denning observed:

12. *Id.* at 284 (*Emphasis added*).
When the medical induction method is used, this means the continuous act of administering prostaglandin from the moment it is started until the unborn child is expelled from the mother's body. The continuance act must be done by the doctor personally. It is not sufficient that it is done by a nurse when he is not present.

In construing the abortion statute Lord Denning also said that the statute was direct to the members of the medical profession who have to implement it. They would interpret it not as lawyers but as laymen. Consequently it should be interpreted in a manner as they would. The Parliament had deliberately confined "termination of pregnancy by a registered medical practitioner" omitting any such words as "or by his direction." In the face of such omission, nurses could not be allowed to terminate pregnancies. If the Health Department want nurses to terminate pregnancies, the law should be amended by adding the words "or by a suitably qualified person in accordance with the written instructions of a registered medical Practitioner." The statute could not be amended by departmental directions.

However, the House of Lords (Lord Wilberforce and Edmund-Davies dissenting) held that Parliament envisaged that the termination of a pregnancy under the statute should be a team effort and that statutory requirements would be satisfied when the process of medical induction was initiated by a doctor who remained in charge of it throughout and the process was completed in accordance with directions by a qualified nursing staff.

An analogous situation could arise under MTPA in India with the onset of prostaglandin abortions in due course of time. The Indian Act authorises only doctors to terminate pregnancies. Under the Indian conditions prostaglandin abortions should be resorted to only when the doctors themselves have sufficient time on hand to initiate and complete the process of expulsion of the foetus from the mother's body. The nursing staff should not be entrusted with the independent responsibility of terminating pregnancies.
Abortion is a controversial and emotive subject involving moral and social judgements on which opinions strongly differ. The legislation of abortion, at any rate in circumstances in which it is not essential in order to save the mother’s life, is a subject on which strong moral and religious convictions are held. Hence MTPA needs to be interpreted with caution.

Amniocentesis followed by abortion for selective sex-preference and abortion for purposes of foetal experimentation should be banned. Having regard to MTPA’s antecedents and the state of affairs existing in 1972 which involved abortion by surgical process and doctors alone, the words in the Act “pregnancy .... terminated by a registered medical practitioner” should not be interpreted to cover cases where medical staff other than the doctors play a significant part in the process of prostaglandin abortions.

With the progress of medical research facilitating such abortions in India, questions will arise whether a doctor alone has to conduct these time consuming abortions or could he leave to the nurses some independent role in it. It is suggested that if such a change is required, the Act has to be amended by Parliament after proper consideration of the implications and necessary safeguards.