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Medical-Legal Quandary Arising from a Legislative Gap

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Abstract

Women and girls constitute one of the most vulnerable sections of the society. Their care and protection have emerged as a precedence for the Government of India. Within this realm of protection, the Medical Termination of Pregnancy Act, 1971 was enacted to liberalise access to abortion, and to provide access to safe abortion services. Abortion is not merely a medico-technical issue, but a fulcrum (focal point) of a broader ideological struggle in which the very meaning of family, motherhood and women's sexuality are challenged. In 2021, the Parliament enacted the Medical Termination of Pregnancy (Amendment) Act, 2021 through which it amended various parts of the MTP Act. However, the insertion of Section5A in the amended Act penalises medical practitioners who fail to protect the privacy and confidentiality of women and adolescents who wish to terminate their pregnancy. Contrary to this Section 19 of the POCSO Act, 2012 mandates that if a minor conceives, even through consensual sex, and wants to abort, the matter has to be reported to the local police. Therequirement to mandatorily report not only poses a dilemma for service providers who must choose between their statutory obligation to report to thepolice and their ethical duty of confidentiality as medical professionals, but also creates a lot of confusion which adversely impacts the access to safe abortion. Thus, there is a lot of grey area and a conflict between the MTP and the POCSO Act. This research paper aims to understand and analyse whether and how these conflicting laws operate as barriers to accessing safeabortion. Legalising abortion is consistent with the Utilitarian Philosophy. Jeremy Bentham propounded the idea of utility based moral theory. According to Jeremy Bentham's theory of utilitarianism – greatest good forgreatest number, what matters is the outcome and consequences of one's actions, and not the actions itself. Thus, this theory is applicable in cases of adolescent pregnancies and abortion.

Keywords – Abortion, Adolescents, Conflict, Legal barriers, Medical practitioners, Medical Termination of Pregnancy Act, Protection of Childrenfrom Sexual Offences Act (POCSO Act).

INTRODUCTION

Until 1971, abortion in India was considered as a criminal offense under the Indian Penal Code,1860 unless if it was conducted to save the life of the pregnant mother. However, because of the large-scale channel of unsafe abortions in the country, increasing the maternal morbidity and mortality rate, the Government of India in 1964 constituted a committee under the chairmanship of Mr. Shantilal Shah, the then Minister for Public Health, Law and Judiciary, Government of Maharashtra to examine the issue of abortion in India. The committee, also known as the Shah Committee, after a thorough analysis of the abortion laws in different countries concluded that the legislation of abortion has helped various countries across the world in reducing morbidity and mortality rate among women due to unsafe abortion. Therefore, the committee recommended the need to liberalise the existing provisions of abortion – on medical, humanitarian and eugenic grounds – under the IPC in order to expand women's access to safe abortion. Thus, on the basis of the Shah Committee

report the practiceof abortion was decriminalised and legalised in India through the enactment of the Medical Termination of Pregnancy Act, 1971 which was later amended in 2020. The other laws dealingwith abortion are the Protection Of Children from Sexual Offences (POCSO) Act, 2012; Pre- Conception & Pre-Natal Diagnostic Techniques Act, 1994; etc. However, India's legal framework at present provides a very conflicting guidance to medical practitioners as it fails toadequately protect the confidentiality of the patient, treats all pregnant adolescents as rape victims or victims of aggravated penetrative sexual assault and mandates the involvement of the criminal justice system. Therefore, despite the legality of abortion the inconsistencies, conflict and lacuna in the legal framework contribute to the persistently high prevalence of unsafe abortions among women in India and limit their access to safe abortion services.

Thus, the author here will review the legal framework relating to abortion in India explaining how these conflicting and inconsistent laws clubbed with the stigma of abortion force many adolescent girls to seek abortion from unlicensed or unqualified practitioners which negativelyimpact the health of such adolescent girls. There are several legislations which are in conflict,but the scope of this essay is limited to the conflict between the Medical Termination of Pregnancy (Amendment) Act, 2021 and the Protection Of Children from Sexual Offences (POCSO) Act, 2012.

There are multiple laws in relation to abortion and each of these legislations were enacted for different purposes. Some of them were enacted in order to protect adolescent girls from sexualabuse, while the other laws were enacted with the intention of facilitating safe abortion accessfor women that qualify. However, there are situations wherein the adolescent undergoing abortion may fall under the ambit of more than one law, and this leads to inconsistency and conflict. For instance, on one hand, the POCSO Act was enacted to address and prevent child sexual abuse. Section (2)(1)(d) of the POCSO Act defines a "child" as any person below the age of 18 years. Section 3 of the POCSO Act criminalises penetrative sexual assault and thus, considers any sexual activity with a minor/child as statutory rape. Section 19(1) of the POCSOAct mandates that any person who may find out about any offence punishable under the POCSO Act in a personal or professional capacity (parents, doctors, counsellors, etc.) is required to convey such information either to the special juvenile police unit or local police. Moreover, consent being immaterial under the POCSO Act, the reporting requirement extendsto all adolescent sexual activity (sexual activity before the age of 18 whether consensual or non-consensual). Failure to report, as required under Section 19, is punishable with imprisonment of up to six months or fine or both. Whereas, on the other hand, the MTP Act was enacted with the intent of providing access to safe abortion services for women. Section 5A of the MTP Act provides for the protection of a woman's privacy and states that the medical practitioner shall not disclose any details or particulars of a woman whose pregnancyhas been terminated except to a person authorised by law. Thus, the POCSO Act – Section 19(1) is in conflict with this confidentiality (privacy) provision – Section 5A under the MTP Act. The POCSO Act criminalises all sexual activities that involves an adolescent as it does not recognise an adolescent's capacity to consent and therefore, if a pregnant adolescent girl approaches a medical practitioner for an abortion, the medical practitioner - is bound to reportthe minor girl as a survivor of sexual abuse even if it was consensual and goes against her will- failing which the medical practitioner can be punished with up to six months of imprisonment. Although the rationale for the reporting requirement is to make sure that there is no immunityfor any sexual abuse offences against a child, this mandate may actually discourage people from reporting, in cases where the perpetrator is a family member, out of the fear that a criminalaction may be initiated against them if reported by the doctor. The survivors may sometimes also not report due to the fear of social boycott, and in cases where the victim is emotionally or financially dependent on the perpetrator. In such situations of mandatory reporting the medical practitioners face an ethical conflict and dilemma as they may have to subvert multipleethical principles including patient autonomy. The doctor-patient relationship is built on the basis of trust and confidentiality. This confidentiality contract enables and assures the patient to have an open and honest conversation with the doctor. However, the mandatory reporting requirement questions the concept of confidentiality; makes the survivors, who are not willingto involve the criminal justice system or the police authorities, compromise on their health; andinstils a fear in them of mentioning the true sequence of events and injuries suffered by them. Thus, this not only impacts their sexual and reproductive health rights, but also restricts the adolescents' access to safe abortion services.

CONCLUSION

Therefore, the POCSO Act criminalises all adolescent sexual activities, considers the conceptof consent to be immaterial and provides for mandatory reporting requirement – all of which hinder the adolescent girls from obtaining safe abortion services. The POCSO Act also poses an ethical dilemma for the medical practitioners because of the conflict of the reporting requirement and their duty of confidentiality. Thus, there is conflict between the MTP Act andthe POCSO Act as it violates the principle of confidentiality along with the adolescent's right to reproductive autonomy. Reproductive autonomy is a right that every adolescent girl/womanis entitled to and this also includes the right to safe abortion services. Irrespective of the fact that abortion enjoys a legal status in India, it is contingent on the decision of the medical practitioner which may limit the adolescent girls' access to safe abortion services compelling them to obtain unsafe, unqualified, unlicensed and dangerous services. Thus, the need of the hour is to consider and implement woman-centred abortion services rather than having a provider centric law and service. This can be achieved only through a further liberalisation of the MTP Act and allowing the adolescents the right to autonomous decision-making and the right to sexual and reproductive autonomy.

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