ABORTION: A SOCIAL CONFLICT

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Abortion is a sensitive issue affecting a large population of the society both ethically and sociologically. India currently faces a population of over 1.3 billion, the fertility rate being one of the major indicators of the demography of the country has declined from 3.6 in 1991to 2.4 being the average rate of childbirth of women in their reproductive age(15-49).Unwanted pregnancies are ever increasing with the changing concepts of family planning however due to limited awareness and access for prevention, more than half of the recorded pregnancies that are unintended in India, 70 per 1000,the abortion rate in such cases is only 47per 1000. Since medical abortion has stigmatized notions, it is not generally resorted to especially in rural areas. Therefore, reproductive outcomes vary widely throughout the globe, reflecting the social, demographic and economic diversity of states and differential access to health services. In relation thereof, the paper embarks on a doctrinal study of abortion laws in India. The paper looks into the existing laws of our country that deal with abortion, pre and post natal care , following which a critical analysis of the Medical Termination of Pregnancy Act,1971 is made. The paper further looks into the intricacies of the legislations of various countries which have already developed a mechanism to combat with the current problem. Finally the paper talks about the recommendations and suggestions which can prove to be useful in order to fill in the loopholes that exist in the current scenario of our country.

I. INTRODUCTION

Abortion is a deliberate termination of human pregnancy either through natural or medical processes. Medically induced abortion whether safe or unsafe, legal or illegal becomes a major part of the lives of citizens, in both developed and developing countries. India is one of the most populous countries of the world and has one of the highest rates of unintended pregnancies globally, especially due to the lack of access to available heath care services and effective counseling centers for family planning[2]. In such cases, access to safe induced abortion and a supportive legal environment becomes critical to ensure the health and safety of a woman. Abortion is an essential reproductive service that should be available as a legal right to the

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[2]Khan, M E & Barge, S & Kumar, N & Almroth, Abortion in India: Current situation and future challenges.(1999).

women in order to ensure better health, family planning and population control in the society[3]. However, even after being deliberated since times immemorial abortion still continues to be a topic on controversy even today as the practice often attracts ethical, moral, political and legal debates. The primary reasons for abortion being one of the most controversial topics is because it essentially concerns taking of human life which is seen to be ethically and morally wrong and often hurts the religious beliefs of the society. Therefore, the society can be broadly classified into two groups:

- **Pro Life**: "pro-life" believes that the government is under the obligation to preserve human life, regardless of viability, intent, choice, or quality-of-life concerns. They regard abortion as killing of human life. Certain religious text even considers it similar to murder which is a sin that should be avoided at all cost. Pro life ethic often conflicts with personal autonomy and has a conservative approach towards abortion and assisted suicide[4].
- **Pro Choice**: People who are "pro-choice" believe that individuals have unlimited autonomy with respect to their own reproductive systems provided they don't breach the autonomy of others. The pro-choice movement argues that the fetus can't live outside the womb and therefore before the point of viability for which the government doesn't have the right to impede a woman's decision to terminate the pregnancy.[5]

The paper herby aims to make ananalysis of the existent ethical and religious views on abortion critically review the existing abortion laws of India and compare different international legislations. Finally, enumerate the shortcomings of the existing legislations and ways to improve the same.

II. SOCIO-ETHICAL ISSUES

Abortion has a major impact on the society as it touches on the cultural, economic, political, religious and social aspects. Abortion is considered to be a sin in majority of religions and was a disapproved practice in most of the nations during the seventeenth and eighteenth century. With

[3]Patra, Ambika & Rayamane, Anand & Kumar, Kusa & A Kundargi, Pooja & Mohanty, Manoj & Das, Siddhartha, Practice of Illegal Abortion in India: With Reference to a Case Report, 6-12, (2014).
[4]Tom Head, The Pro-Life vs. Pro-Choice Debate,(2018)https://www.thoughtco.com/pro-life-vs-pro-choice-721108.
[5] Head, Supra ,3

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the onset of the modern era and in the early years of policy framing on the issue of abortion majority of countries put a ban on the practice of abortion making it a legal offence[6]. However, with the onset of 20th century and awareness of rights of women and their health was given importance the ban on abortion was allowed only in certain cases specified by the laws of their respective countries. Almost all religions have a strong position regarding abortion as there is a general belief that the issue related to abortion encompasses profound issues of life and death, nature of human relationships, nature of the society and acceptable standards of right and wrong which makes it a major religious concern[7]. Religious practices like Islam considers abortion as haram (Sin) and Christianity, especially Roman Catholics have a very conservative view toward abortion and consider it to be gravely contrary to the moral law and that life is based on thedoctrine of natural law and on the written word of God and believe that the inception of life happens when the male sperm fertilizes the woman egg therefore abortion at any stage is a sin as it is against the will of god[8]. On the other hand religions like Hinduism, Buddhism, and Sikhism have a comparatively liberal approach when it comes to the issue of abortion. Although, according to these religions abortion or killing a life is a sin however the same is permitted in certain cases where the balance of convenience is higher in saving the mother's life that is to prevent the greater evil of the two[9]. Therefore, there are both negative and positive arguments on the issue of the abortion:

- **Negative arguments:** The pro life activists are of the view that abortion cannot liberate a woman of her responsibilities by giving them a right to choose whether or not to be a mother moreover due to the abortion process the woman has to go through a number of physical procedures which are likely to not only damage the physical heath but also the mental health of the woman in long term[10].They also believe that abortion does not sidestep the oppression of women or the existing social problems, according to them the problem of rape cannot be solved by killing a human being just because the conception of

[6] Centre for Reproductive Rights, Human Rights Law Network, available at: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf (last visited on Feb. 10, 2017).
[7] Bhavish Gupta and Meenu Gupta,THE SOCIO-CULTURAL ASPECT OF ABORTION IN INDIA: LAW, ETHICS AND PRACTISE,Winter Issue 2016,ILI Law Review,140-150.
[8] Andrew Matt, BBC, 2016 URL http://www.bbc.co.uk/ethics/abortion/.
[9] Bhavesh Gupta, Supra, 6.
[10] Siddhivinayak S Hirve,Abortion Law, Policy and Services in India: A Critical Review,2005, http://www.tandfonline.com/loi/zrhm.

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the child was due to rape or because a parent cannot maintain a particular lifestyle of a child resulting out of poverty according to the pro life view all these are social problems that cannot be solved by abortion[11].

- **Positive arguments:** according to the pro choice view a woman should have the right to choose what happens to her body as it is necessary for the promotion of woman rights and gender equality. Also, putting a ban on abortion doesn't let an individual woman to achieve their full potential and poses a major risk of illegal and unsafe abortions which may have adverse effects on the physical and mental wellbeing of a woman[12]. Not only does it help in population control and family planning by eliminating unwanted and unplanned pregnancies it can also be helpful in eliminating life long suffering of the parents and the child which may arise out of deficiency, disability or complications in pregnancy which can prove to be fatal for either the mother or the child[13].

III. MEDICAL TERMINATION OF PREGNANCY ACT, 1971 AND THE PRE-CONCIEVED & PRE-NATAL DIAGANOSTIC TECHNIQUES, 1994

Prior to 1971, abortion in India was governed only the Indian Penal Code, 1860. Under sections 312 and 313 of the penal code, abortions were illegal unless done to save the life of the woman. When the Indian Medical Council was formed in 1956, it maintained this stance.

Amidst the chaos for finding a solution to India's overpopulation crisis and to prevent the misuse of induced abortion by unsafe or illegal means, parliament in 1971 enacted the Medical Termination of Pregnancy Act, 1971 which allows termination of pregnancies only in certain cases and bypasses the general law spelled out by the penal code.

Under the MTP act 1971, a woman can seek an abortion up to 12 weeks for any reason. Beyond twelve weeks but prior to twenty weeks, if two registered medical practitioner are of the opinion that either the continuation of the pregnancy would pose as a threat to the life of the woman or cause her any grave physical or mental injury or if there is a substantial risk that the child is going to be born would be seriously handicapped owing to some physical or mental abnormality,

[11] Abortion Arguments: 10 Arguments For Abortion, 10 Arguments Against Abortion, available at: http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm
[12] Supra, 10.
[13] Bandewar S. Quality of Abortion Care: A Reality From Medical, Legal and Women's Perspective. Pune7 CEHAT, (2002).

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then termination of pregnancy is possible.[14] The act further explains that any pregnancy caused due to rape[15] or due to failure of a contraceptive device,[16] wherein the couple is trying to limit their children, will be taken as valid grounds for allowing termination of pregnancy. Also, the woman's actual or reasonable foreseeable future environment plays a crucial role while considering whether the pregnancy would constitute as a risk to the woman's health.[17]

In order to determine, whether the fetus suffers from any physical or mental abnormality, the only possible route is through pre natal diagnostic tests. These tests are regulated by the Pre-Conceived and Pre-natal Diagnostic Techniques Act, 1994. Unlike the common misconceptions, the MTP Act and the PC & PNDT Act are in no way contrary to each other. PC & PNDT Act allows such pre-natal diagnostic tests only for detection of chromosomal abnormalities, genetic metabolic defects, haemoglobinopathies, sex-linked genetic diseases, congenital abnormalities, or any other abnormalities specified by the central government supervisory board.[18] However, the act places a complete ban on determination of the sex of the child prior to birth owing to the huge number of incidents of female feticide in our country. Any pre-natal diagnostic test done in contravention of the PC & PNDT Act is illegal and warrants a criminal trial.

IV.ISSUES RELATED TO THE INDIAN LEGISLATION.

The major issue related to the abortion law and policy of India lies on the fact that the major population has an immense social baggage of religious believes along with the rampant problem of illiteracy and poverty[19]. The lack of awareness also leads to the problem of accessibility, most of the rural population are not aware of the fact that abortion is legal. However, the real problems lie in the implementation of to the Medical Termination of Pregnancy Act, 1971[20]. According to the act it is the responsibility of the government to set up public hospitals and to provide for abortion facilities where the process of abortion is carries out by qualified medical

[14] MTP Act, Section 3 (a) and (b), (1971)
[15] MTP Act, Explanation 1 Section 3, (1971)
[16] MTP Act, Explanation 2 Section 3, (1971)
[17] MTP Act, Explanations 3 Section 3, (1971)
[18] PC & PNDT Act, Section 4, (1994)
[19] Kalpagam B. PSS experience of early abortion services, 11–13 (2000).
[20] Siddhivinayak Hirve, "Abortion Policy In India: Lacunae and Future Challenge" Abortion Assessment Project 2004, India Centre for Enquiry into Health and Allied Themes, Bombay (2004).

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practitioners[21]. The Medical termination of pregnancy act is inconsistent, although there are a number of public healthcare units set up to provide free abortion services in urban areas rural areas highly lacks access to such services. Also, public hospitals majorly lack the infrastructure to provide the same. The MTP Act has given doctors a final say in deciding whether a woman should terminate the pregnancy and after 20 weeks the consent of 2 medical practitioners are required which make the process exceptionally difficult in rural areas. Also, the stigma related to unmarried pregnancies often pushes women to opt for substandard medical abortions which often lead to prolonged heath implications on the woman which may include infertility.

V. INTERNATIONAL PERSPECTIVE:

There is no treaty or convention which directly provides a woman with the right of abortion. However, the language of Article 16(1) of the Convention on Eliminating Discrimination against Women seems to be the closest as it comes in support of abortion by giving every woman equal right in deciding freely and responsibly the number of children she wants to have.[22]

Recently, United Nations declared abortion rights as human rights. Under its General Comment No. 36 (2018) on Article 6[23] of International Covenant on Civil and Political Rights, on right to life[24], the United Nations Human Rights Committee remarked that restrictions on the ability of a woman or a girl to seek abortion must not cause them physical or mental pain of suffering in violation of article 7[25] of the convention or arbitrarily interfere with their privacy. Restrictions on abortion cannot discriminate against women or put their lives at risk. Abortion as a health service is only required by women and thus its criminalization by any state is form of discrimination against them. Where carrying of the pregnancy to the term might cause substantial pain or suffering to the woman or girl especially where such pregnancy is a result of rape or incest upon such person, it becomes the duty of the state to provide for safe and legal abortions.

[21] . Medical Termination of Pregnancy (Amendment) Act [No.64 of 2002]. New Delhi7 Ministry of Health and Family Welfare, 2002.
[22] CEDAW, Article 16, 1979
[23] Article 6 ICCPR, 1966
[24] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life Adopted by the Committee at its 124th session (8 October to 2 November 2018), CCPR/C/GC/36
[25]ICCPR, Article 7, 1966

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Worldwide abortion laws and access to safe abortions vary drastically. Where some states allow abortions at any stage of pregnancy, some states prohibit abortion altogether, even in cases where continuation the same might end up endangering the life of the woman.

- **Restrictive laws:**

Certain countries around the world have highly restrictive approach when it comes to abortion. Most of the times, owing to their religious sentiments, these countries have placed a complete ban on a woman who voluntarily seeks to abort her child. Countries like Eygpt, Malta, the Vatican, San Marino and a few others are strictly against abortion and have penalized the act of abortion. The Vatican still remains as one among the six countries to ban abortion even if the woman's life is endangered due to the pregnancy.

Law on abortion in Egypt - Under the Egyptian Penal Code, 1937, abortion has been banned under paragraphs 260-264. The act of terminating a pregnancy entitles imprisonment not only for the woman who voluntarily seeks to commit it but also for the pharmacists, physicians, and midwives etc., who help in performing the abortion.[26] However, in order to save the life of woman or on other grounds of necessity such as fetal impairment or serious risks to the health of the pregnant woman, under paragraph 61 of the Egyptian Penal Code, 1937, a pregnancy can be terminated.[27]

- **Progressive Laws:**

United States:

By the federal law pronounced in the judgment of *Roe v. Wade*[28] by the U S Supreme Court, no state in United States can make any legislation banning abortion before viability of the fetus. A fetus is said to be viable when it can survive outside the mother's womb. This period of viability differs in each case but more or less has been estimated at 24 weeks. Nevertheless, each state has different laws regarding abortions. 27 out of 50 states require the woman to wait for at least 24 hours before getting the completing the process of abortion. 18 states require mandatory counseling sessions before termination of any pregnancy. However, only 16 states out of the total

[26] Oren Asman, Abortion in Islamic countries - Legal and religious aspects 23 Med. & L. 73 (2004)
[27] Egyptian Penal Code, Paragraph 61, (1937)
[28] 410 U. S. 113 (1973)

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50 the states provide funds for all or some of the abortion procedure. District of Columbia is one among 33 other states that prohibit the use of state funds for supporting medical termination of pregnancies.[29]

Iceland:

Iceland falls under states which have most progressive laws on abortion. Uptil16 weeks of gestation period, abortion is permitted on the basis of social, medical factors or if the pregnancy is a result of a criminal act such as rape, as defined by article 9 of Counselling and Education Regarding Sex and Childbirth and on Abortion and Sterilization Procedures.[30] Article 10 of the act states that abortions should be performed, if possible, prior to completion of 12 weeks of gestational period. Beyond 16 weeks abortion is permitted only due to health concerns for the woman or the fetus [31] i.e. if the fetus will be born with a severe genetic disease or deformed or if the mother's life or health is at risk. It was until early 2000s that pre natal diagnostic screening was introduced in Iceland. Thereafter, with the onset of detection of chromosomal abnormalities such as down's syndrome, majority of woman chose to take the optional test to see whether the child was going to be born with any genetic abnormality. Thus every case that tested positive for Down's syndrome, the women in Iceland have chosen to seek abortion, as a result only one or two children per year in Iceland are born with Down's syndrome.[32]

VI. SUGGESTIONS AND CONCLUSION

In India, abortion has been legalized through the MTP Act, 1971 it has failed to yield the expected outcomes. Despite the existence of moderate policies and laws , the majority of women still resort to unsafe abortion due to lack of accessibility to public healthcare for abortion. However increasing access and availability to safe abortion services, creating more qualified providers (including mid-level providers) and facilities along with awareness and education

[29] Guttmacher Institute, An Overview of Abortion Laws, State Policies and Law, (Jan. 1, 2019) https://www.guttmacher.org/state-policy/explore/overview-abortion-laws

[30] Act on Counselling and Education Regarding Sex and Childbirth and on Abortion and Sterilisation Procedures, No. 25/1975, *as amended by* Act No. 82/1998, No. 162/2010 and No. 126/2011, art. 9, http://eng.velferdarraduneyti.is/media/acrobat-enskar_sidur/Act_on_counselling_and_instruction _etc_No_25_1975_as_amended.pdf (unofficial English translation).

[31] *Id*. Art 10.

[32] Sarah Kluznick and Holley Slepian, *Iceland's Abortion Policy concerning Children with Down Syndrome: An Ethical Analysis* 4 TJJHEA (2018)

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related to the matter of family planning and abortion, especially in rural areas. Simplifying the certification process of abortion along with better infrastructure can prove to be helpful in providing better quality of abortion and care. In order for the laws and policies to be properly implemented there is an immediate need for co operative work among the NGOs and government and have to be backed by political support in terms of allocation of adequate resources to safeguard the interests of the women and make the process of abortion accessible and safe.

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