

Safe Abortion as a Women's Right

Perceptions of Law Enforcement Professionals

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A study conducted among law enforcement officials in seven countries across Asia by the Asia Safe Abortion Partnership to measure the level of knowledge, attitude and awareness of women's rights as well as safe and legal abortion shows lack of understanding about the Medical Termination of Pregnancy Act and the subsequent amendments. Many lawyers believe that even if it did become a regular component of the law curriculum, there would be few takers, given the low potential for such cases in the practice. In the current environment, where the issue of implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques Act tends to wrongly overshadow discussions on safe abortion and the MTP Act, these views are important as they affect the way safe abortion is perceived as a women's right and have an impact on restriction or liberalisation of women's access to safe abortion services.

Sexual and reproductive health and rights for the women of India sometimes appears to be a distant vision. The International Conference on Population and Development (ICPD) Programme of Action (PoA), the Millennium Development Goals, the Beijing Declaration, the Medical Termination of Pregnancy (MTP) Act 1971,¹ the supportive policies and government programmes such as the National Rural Health Mission notwithstanding, maternal mortality continues to be high in many parts of India. Patriarchal norms and structures reinforce women's lack of autonomy and decision-making capacities. Deprivation, physical and sexual violence, rape, unsafe abortions and other reasons imperil their lives on a daily basis. The estimates for the number of abortions taking place in India vary widely. It is estimated that there are about 60 lakh abortions annually in the country, of which only 10 lakh are legal (Duggal and Ramachandran 2004). Abortion-related morbidity and mortality is high in the country. Unsafe abortions are believed to contribute to 12,000 deaths a year (Dixit 2013), that is, 9%–13% of the maternal mortality in India. But this average hides pockets of high mortality from certain districts (Bhattacharyya et al 2011). Data on safe and unsafe abortions has been notoriously difficult to obtain but there are many reports of a high rate of both (Menon 2013) with unsafe abortions being responsible for as much as 50% of the maternal mortality in some of the districts in India (Srivastava et al 2013).

This dismal scenario is despite the fact that in India the law on abortion is relatively liberal and permits terminations of pregnancy under specific conditions to be approved by a specifically qualified doctor. The MTP Act permits the termination of pregnancy up to 20 weeks, where the continuance of the pregnancy would involve a risk to the life of the pregnant woman or cause her grave physical or mental injury; or where there is substantial risk of the child being born with serious physical or mental abnormality. This includes pregnancy due to failure of contraceptive methods and as a result of rape.

The act further specifies that the written consent of the guardian is mandatory for termination of pregnancy in a mentally ill woman or a woman below 18 years. In case of other women, only the consent of the woman is essential.

Pregnancy can only be terminated by allopathic doctors who are registered with the state medical council and have specified experience or training in gynaecology or obstetrics in facilities approved for the purpose by a district-level

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committee (DLC) led by the chief medical officer (CMO). The rules under the act authorise the CMO in case of doubts about safety of services offered at an approved place, to call for any information, seize any article, medicines, records or other documents at the place. Any wilful contravention or failure to comply with the provisions of the act is liable for legal and punitive action.

Laws and policies are crucial indicators of government commitment to promoting reproductive rights and outline the ethical limit of the government's legitimate authority. Throughout history, access to safe abortion services has been a source of considerable debate and controversy. The knowledge and stance of law enforcement officials on women's right to abortion has a strong bearing on how the MTP Act is implemented on the ground and how it has an impact on women's access to safe abortion services.

Within the legal profession, lawyers make use of the law to defend or prosecute women or abortion service providers, the judges and magistrates interpret the provisions of the law and decide the fate of the woman or service provider accordingly and legal experts are at the forefront of legislative advocacy. Moreover, the court is a powerful arena to effect changes in society. It may hold these state agents liable if they fail to comply by the law and also ensure compliance by these state agents. Needless to say, the role of the lawyers is important in a society where changes are effected, in part, through the judiciary. A petition pending with the Chhattisgarh court is a case in point.² Amendments have also been proposed to the MTP Act which aims to improve access through an expanded pool of service providers. Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH) doctors as well as nurses and midwives have now been recognised as service providers.³

A number of studies, particularly in the recent past (Duggal and Ramchandran 2004; Sjöström et al 2014), have looked at the issue of safe abortion services, their reach and the perspective of both users and service providers in the country (Pallikadavath and Stones 2006). However, very little is known about the expertise, attitude and the skills of the officials who enforce the law pertaining to abortion as a women's right

In 2008, the Asia Safe Abortion Partnership (ASAP) was formed "to promote, protect and advance women's sexual and reproductive rights and health in Asia by reducing unsafe abortion and its complications and by promoting access to comprehensive safe abortion services." ASAP planned a study that went beyond the community-provider interface and explored the views of gatekeepers such as lawmakers and implementers, who are outside the traditional service provision field. This study of legal professionals and law enforcement officials was planned to explore their knowledge, attitudes and understanding towards women's rights to safe and legal abortion.

The term "law enforcement" officials is being used in this study to include those who have studied/are studying law, legislators, high-ranking police personnel, jailors, medical practitioners, head of hospitals, other persons, who are tasked

with the implementation of the law as well as those whose opinion and experience carries weight in legal and policy advocacy. The latter were integral to the study as changes in the field of law and policy need to be propelled and informed by the experiences and wisdom of those implementing the law at the ground level.

Methodology

Since the study aimed at exploring the knowledge, attitude and understanding of legal professionals and persons involved in law enforcement, qualitative methods were considered appropriate for data collection. It was decided to conduct in-depth interviews to collect information. Semi-structured tools were used to guide the interviews with 50 members of the legal profession (law students, practising lawyers, magistrate and judges), enforcement officials (police personnel, jailors, women cell and medical practitioners), PCPNDT officers⁴ and deputy directors from the health department. The sample was representative, but not statistically selected.

The researchers made a concerted attempt to identify members involved in handling abortion-related cases, or, in a position to influence policy debate or decision-making process of the judiciary. However, in near absence of law professionals who had handled abortion cases in the sample, interviews were conducted with representatives from the profession who were willing to discuss the issue.

From the medical professionals associated with implementation of the law, only one person was willing to be interviewed. The police department was neither aware nor agreeable to personal interviews. A group discussion was therefore held where deputy director of the state health department, retired director general of police, assistant commissioner of police, retired judge of the high court, relevant medical officers of the municipal corporation, members of the Indian Medical Association, non-governmental organisation (NGO) representatives, independent consultants, women's rights activists, and members of the Human Rights Commission as well as Women's Commission participated. Strict confidentiality was maintained about the participants' identity and identity coding was used in place of their name.

Data Entry and Analysis

Interviews were transcribed in English, analysed manually using Atlas Ti to describe and demonstrate patterns, emerging themes and specific characteristics pertaining to abortion laws and enforcement mechanisms. Attitudes and perceptions of law professionals, enforcement officials and gatekeepers regarding women's rights, unwanted pregnancies, abortion (safe/unsafe) and law enforcement mechanisms were also studied. Secondary data analysis was carried out to describe the legal context of the communities under study.

Sample Profile

We interviewed 50 respondents. More than two-thirds (35) were qualified lawyers, 20 of them practised family law, criminal law, corporate law or civil law, 14 taught in law schools

and one was a retired judge of the high court. More than half of these qualified lawyers had experience of more than a decade in their field. Fourteen respondents were third year students.

About a fourth of our respondents (13/50) were below the age of 25 and eight of them were above 50 years of age. Seventeen were women and 33 were men. One respondent, at the time of the interview, was a medical officer-in-charge of inspecting and approving the facility for providing abortion services under the MTP Act.

Findings

The findings from the interviews of the legal professionals are presented against the overview of the abortion statistics and the legal context of abortion in the country.

Knowledge of Current Laws

Abortion Situation: While the vast majority (39 out of the 50 respondents) were of the opinion that there is an increasing trend of abortions, both because of increasing demand for services as well as better and wider availability of the services, a few believed that the trend is on a decline and even fewer opined that the situation has not changed.

They believed that women sought abortions for the following reasons causing an unwanted pregnancy: family size (25/50), female foetus (22/50), socio-economic condition (13/50), and health of the woman or the unborn child (6). The majority (39 out of 50), however, confessed that their views were based on conjecture and there was no reliable data. A few of them did mention that they became aware about the importance of the issue after a recent high profile case.⁵ Most of them were interested in knowing more about abortions in the country in view of the trend.

Abortion Laws: Most of them (44 out of 50) were aware of the the MTP Act but the degree of awareness varied. Fifteen had only heard of it or had become aware of it due to the high profile court case which was widely covered by the print and electronic media some years ago, and 25 were aware of some components of the act. Only four respondents were aware of the act in its entirety.

They believed that the rationale for the act was to safeguard women's health (23/44), women's right to have an abortion (16/44), maintenance of sex ratio (14/44), foetal malformations/health (12/44), and the need to control population (5/44).

One of the lawyers summed up the rationale and journey of the act as:

The intention of the law is to save life of the woman because she does not want the child...After independence, gradually women's liberation, women's equality, women's empowerment, movements began taking shape and under those circumstances many laws came up like anti-dowry, violence against women, etc. MTP Act is also one of that (Female lawyer and law professor with 30 years' experience).

However, more than half of the respondents (29/50) were unaware of the subsequent amendments to the act. Of those

21 who were aware, the rationale for the amendments was listed as: increasing public demand for services, need for broader indications for permission for abortion and relevant regulations and punitive measures to prevent unsafe abortions.

Relevance of the Act: Respondents were asked about their views on relevance of the MTP Act. Almost all of them said that abortion cases needing legal attention are few and rare and not an important area for them. Such cases are so few in number and the matter is so "petty," according to them that many have never come across any case of this nature. Given the huge backlog of other cases and enormous delays in the courts and the monetary burden on individuals and the courts, some of them believe that it is better if abortion cases do not come to the courts and are resolved at the health system level. Some of them further explained that the curriculum does not include a study of abortion laws and even if such a topic were to be included in future, only a few students would opt for the course because it will not help them in their careers.

One lawyer, though aware of all the details of the MTP Act, vehemently opposed the very existence of the act. He said,

I do not agree with the idea of abortion in the first place. We have made the act to legalise the disposal of unwanted, unplanned pregnancies which in other words means that we have legalised murder. Abortions are permitted up to 10 weeks and up to 20 weeks but then the consent of two doctors is necessary. I have an objection to even this time limit. Do they allow a murder up to a certain point in time and later consider it as illegal? I do not understand this logic. Is the foetus not alive from the moment a woman conceives? Do the cells grow without any reason to make it a foetus after some weeks have passed? We have considered an amoeba also to be a living organism, then why this?

Need for Amendments: The vast majority (42/50) believed that the law in its current form had some relevance. Sixteen were satisfied with the act in its current format and emphasised the need for more stringent implementation, while 38 respondents felt that the law needs to be amended to keep pace with the changing scenario and medical advances. Eight respondents felt that the act had not kept pace with social and medical advances. A lawyer and a law professor who had 18 years of experience noted:

We legislated this act in 1971 and at that time sex selective abortions were not common because sonography was not so popular and easily available. The law needs to be changed in the light of this fact.

A third year student pointed out:

Law is dynamic like social scenario. Laws need to be revisited, amended, and re-formulated to meet the changing needs of the people.

The head of the law department at a university for the past six years said,

Way of life and lifestyles are undergoing changes very fast and medical science has so many new techniques. Definition of family is changing. Both legal and illegal abortions will be on rise, use of traditional and non-traditional methods will increase. We have to accept

this fact. What else will happen with growing population, growing poverty, growing education in urban area, overall development? Yes the law needs to be revisited. We should have a new or modified policy (Lawyer for 17 years).

Implementation and Enforcement Mechanism: Thirty-nine of the 50 respondents talked about the enforcement mechanism for the act. The rest did not discuss this issue. While 24 mentioned the role of the state government, particularly the health department, 10 mentioned that the onus of implementation rested with the judiciary and five mentioned the police. The police responsibilities according to them included registration and investigations and arresting those breaking the law. In fact, one female lawyer with 29 years of legal practice was categorical that abortion is a “non-bailable, cognisable offence that merits immediate punitive measure.”

A medical officer of the municipal corporation who was part of the state mechanism for approval of MTP facilities highlighted the constraints in implementing the act in its prescribed format. He said,

The State Government is the only implementing body. There are lots of problems in implementation. We as a corporation are supposed to be looking into the matter but our authority is very limited. We have to send our people to inspect the facility and the relevant papers. Once we carry out inspection, we have to send the report to the Deputy Director of Health Services who either grants permission or turns it down. I feel that whatever the decision, taken by the office of the Deputy Director, they should inform us. But nobody does that and we do not have any idea if the applicant has been authorised or not. Unless we receive a complaint, we cannot do anything, and even if there is a complaint that a certain doctor is conducting abortion without a licence, how can we collect any evidence? It is the most difficult thing.

Legal Outcome and Trends: When asked about the legal outcome of the few cases that do reach the court, 17 reiterated that these cases never reached courts. Sixteen mentioned that the person identified as breaking the law (either the woman herself or the service provider) was charged and punished and 11 mentioned that they had no knowledge.

Twenty-nine of the respondents mentioned that the profile of the women affect the outcome of the case. Women who are married, rich and from privileged backgrounds are able to negotiate and manipulate the system to come out unscathed. However, they were also quick to point out that these manipulations did not happen at the level of the judiciary. Twenty-one believed that the profile of the women was totally irrelevant for deciding the outcome of any case.

Expanding Access: A little more than half of the respondents (28/50) talked about the need to increase access to safe abortion services through improved awareness, better infrastructure and proper implementation of the existing stipulations under the act. However, almost all were categorically against de-medicalisation (without supervision by medical professionals) or provision of abortion services by providers other than those specified under the MTP Act.

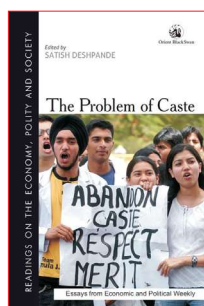
Fourteen respondents expressed reservations against any need for expansion of services and eight had no opinion on the matter. The student who was vehemently against availability of the service in the first place said:

Is abortion a service? Can killing be called a service? It is cruel to call it a service. I have heard of abortion pill. If you now want to kill even the woman also, then demedicalise the process.

The Problem of Caste

Edited by

SATISH DESHPANDE



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Caste is one of the oldest concerns of the social sciences in India that continues to be relevant even today.

The general perception about caste is that it was an outdated concept until it was revived by colonial policies and promoted by vested interests and electoral politics after independence. This hegemonic perception changed irrevocably in the 1990s after the controversial reservations for the Other Backward Classes recommended by the Mandal Commission, revealing it to be a belief of only a privileged upper caste minority – for the vast majority of Indians caste continued to be a crucial determinant of life opportunities.

This volume collects significant writings spanning seven decades, three generations and several disciplines, and discusses established perspectives in relation to emergent concerns, disciplinary responses ranging from sociology to law, the relationship between caste and class, the interplay between caste and politics, old and new challenges in law and policy, emergent research areas and post-Mandal innovations in caste studies.

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Views on Women's Rights

Sexual and Reproductive Rights: Forty respondents (of which eight were female law professionals) were unaware of the debate on women's rights or did not actively subscribe to the notion. The reasons given by the latter were illiteracy and poverty in India. The female lawyer with almost three decades of legal practice quoted the edicts of *Manusmriti*. She said,

Sexual rights are mentioned even in *Manusmriti*. If a person has sex against his wife's wish, Manu has suggested punishment for such a person. These concepts are very ancient in Indian context but they are differently worded.

Another 48-year-old male lawyer with 10 years of legal practice said,

I think that the concept of rights has not yet crystallised in India because of low level of awareness among people, low socio-economic status of large population and low levels of education.

Of the 10 who were aware, four perceived these rights only in the context of marriage. Three female law professionals thought women's empowerment meant that women could have sexual relations when they want and only when they want such relations. Another six thought that women's rights are fulfilled when they have the freedom to have children when they want.

Abortion as Women's Right, Public Health or Social Justice Issue: Respondents had varying views and provided multiple responses specifically related to abortion as women's right. The majority (39 out of 50 respondents) believed abortion is a woman's rights issue, while 28 believed it to be a social justice issue and 17 saw it as a public health issue. The general response was that it becomes a woman's rights issue when it is related to health and the pregnancy is the result of a sexual offence. It becomes a public health issue when abortions are conducted by unqualified providers and a social justice issue when abortions are performed on account of sex determination.

Interestingly, all 17 female law professionals looked at abortion as a predominantly women's rights issue. They also mentioned that the issue had implications for public health and social justice. One female lawyer who had been in the legal profession for 30 years said:

Because it is related to performing a surgery, it is a public health issue. A woman undergoes abortion, not men so it is a woman's rights issue and if she has a legitimate reason for not wanting a child she should have the freedom to get it aborted and so this is a social justice issue.

Another woman professional with two decades of practice mentioned that all the three issues were interlinked. She said:

I think it is a matter of both women's right and social justice. They are two sides of the same coin and they complement each other because women's right will give them more decision-making power and social justice as it will ensure equality. Because a woman's life could be at stake, it is a public health issue as well.

One male lawyer who had 10 years of experience and was vehemently opposed to sexual and reproductive rights for women said:

Tell me one thing! Were not handicapped persons born in India? Did they not have rights like you and I? Why do we think that such human beings should not live? Then India should not call itself a welfare state if pregnancies are terminated fearing a mentally or physically challenged baby. Laws influence decision-making because the judges have to give the decision within their framework.

Another dissenter argued:

How can killing be a social justice issue? From the point of view of the foetus, it is social injustice. It is a public health issue because health is a state subject. The question of rights does not arise. Which mother would be happy to take the life of her own baby? I do not know about reproductive and sexual rights but the foetus must have rights. There is a right to live and to be born in whatever condition. If women do not misuse their bodies, they have a right.

Four female lawyers explained that rights of the foetus were recognised in the *Manusmriti* and are recognised even under today's Indian legal system as far as property matters are concerned. These four lawyers looked at the right to abortion as more complex than a mere women's rights issue. A women lawyer who had been practising for nearly 30 years said:

Of course, the foetus has rights and that has always been recognised in India. In the old Hindu law there is a concept of Mitakshari and you should read about that. There is recognition of the rights of the unborn child. The woman has a right over her own body and she must have it. A husband's plea can't prevail upon wife's will.

On the other hand, 10 female law professionals asserted that the right to terminate an unwanted pregnancy was unequivocally a woman's right. To quote two of them:

The right of the women that is more crucial, why should women go through pain if she can't handle the child. When we talk about right to body we mean letting women decide the number of children they would like to have—or not have.

If we decide to safeguard the right of the foetus we will never be able to deal with the rights of the women; as women are often stuck between the vicious circle of morality, religion and patriarchy.

Discussions

The MTP Act was passed in 1971 based on the recommendations of the Shantilal Shah Commission. The commission was set up to look into the high numbers of maternal deaths due to septic abortions. The Indian Penal Code (IPC) still criminalised miscarriage and this act safeguards women and providers under certain conditions. It has had limited success and has faced numerous barriers in implementation. Women do not have the right to safe abortion since the act only specified certain conditions under which a pregnancy could be terminated and required a registered doctor to approve of the conditions. It does not replace or negate the IPC of 1860.⁶ The act only allows the IPC provisions to be set aside under certain conditions. There have been many critiques of the MTP Act (Hirve 2003) and recently there has been an attempt to amend it and improve access for women.⁷

Numerous barriers have been recorded and studied (Duggal and Ramchandran 2004), including those created by the rules and regulations themselves as well as administrative requisites that evolve through practice. Our primary data showed that awareness of the MTP Act and

the subsequent amendments was quite poor amongst those involved with interpreting and upholding the law. The act is not a part of the regular law school curriculum and the lawyers justified their lack of knowledge on these grounds as well as the fact that they rarely came across these cases. Interestingly, while the lawyers believed that socio-economic profile of the cases affected their access to services and even to legal recourse, it was not likely to affect the legal outcome.

None of those interviewed spoke about the IPC or referred to International Covenants which could be relevant to women's right to safe abortion in India.

The attitude of the lawyers towards the entire issue was based largely on hypothetical situations since they did not face these cases in reality. In fact, a number of them labelled the matter "petty" or "too small" in the face of the huge legal delays and backlog of cases in the courts.

Many respondents believed that the law had come into existence to control the declining sex ratios and empower

women, but they had conflicting views about the rights of the unborn foetus. The support if any was in the context of marriage. The lawyers also had their reservations about unrestrained and unregulated expansion of abortion services.

In conclusion, the law enforcement professionals interviewed in our survey suggest a strong need for improving their knowledge as well as attitudes towards recognising the need for safe abortion as a women's right. It also shows a lack of clarity on the ground realities due to lack of reliable (or any) data.

In the current environment, where the issue of sex determination and the PCPNDT Act tends to overshadow discussions on safe abortion rights and the MTP Act, it is important to look at gatekeepers and influencers outside of the traditional service delivery systems who could also have an impact on the way safe abortion is perceived and to the authority these interpretations could have on restricting or liberalising women's access to safe abortion services as a right.

NOTES

- 1 For the provisions of the act see <http://tcw.nic.in/Acts/MTP-Act-1971.pdf>, viewed on 7 January 2015.
- 2 The National Alliance for Maternal Health and Human Rights has filed this public interest litigation, seeking specific directions to the respondents to implement provisions of the MTP Act, 1971 and the Medical Termination of Pregnancy Rules 2003. According to the petitioner, the respondents by violating the provisions of the above said law have failed to provide access to safe and legal abortion services, as mandated by law, to women seeking abortion services, in both the public sector and the private sector. Viewed on 10 January 2015 (<http://www.hrln.org/hrln/reproductive-rights/pils-a-cases/1542-chhattisgarh-high-court-issues-notice-on-a-petition-asking-for-implementation-of-mtp-act.html>).
- 3 On 29 October 2014, the Ministry of Health and Family Welfare sent out this call for feedback from interested stakeholders and general public on the proposed amendments; available at: <http://mohfw.nic.in/showfile.php?lid=2986>
- 4 Those tasked with monitoring the implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques Act (PCPNDT Act).
- 5 The Bombay High Court on 4 August 2008 turned down an application from the couple, who wanted an abortion at 24 weeks because the baby would have had complete congenital heart blockage. Mehta also sought an amendment to the MTP Act which allows terminations only up to 20 weeks, so that serious foetal defects diagnosed in later pregnancy could also be offered this option, <http://www.thehindu.com/todays-paper/high-court-rejects-niketas-plea-to-terminate-pregnancy/article1308624.ece>
- 6 Section 312, Indian Penal Code, 1860, <http://indiankanon.org/doc/1990693/>, viewed on 11 January 2015.
- 7 Proposed Amendments to the MTP Act, [http://www.populationfirst.org/Common/Uploads/HomeTemplate/WNDoc_Proposed%20amendments%20to%20the%20MTP%20Act%20-%20summary%20note%20\(i\).pdf](http://www.populationfirst.org/Common/Uploads/HomeTemplate/WNDoc_Proposed%20amendments%20to%20the%20MTP%20Act%20-%20summary%20note%20(i).pdf), viewed on 12 January 2015.

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