A Study of Knowledge, Attitudes and Understanding of Legal Professionals about Safe Abortion as a Women's Right

SAFE ABORTION - a need, a choice AND A RIGHT!

asap
Asia Safe Abortion Partnership

Authors: Dalvie S[1], Barua A[2], Apte H[3].

Background: Sexual and Reproductive rights and health for the women of Asia sometimes appears to be a distant vision. The ICPD, the Millennium Development Goals and the Beijing Declaration notwithstanding, maternal mortality continues to be high in many parts of Asia and patriarchal society structures reinforce women's lack of autonomy and decision making capacities thus putting their lives at risk on a daily basis through deprivation, physical and sexual violence, rape, unsafe abortions, and others. Unsafe abortions still contribute to 13-50 % of the maternal mortality in some of these countries.

The Asia Safe Abortion Partnership (ASAP) www.asap-asia.org was formed in March 2008 as the regional network supported by the International Consortium for Medical Abortion (ICMA) www.medicalabortionconsortium.org. The objectives of ASAP are to promote new technologies for safe abortion, serve as a forum for information and experience sharing, strategic thinking and planning for a collective vision aimed towards regional/ international advocacy and support members to advance the partnership goal in their country contexts through law and policy advocacy, capacity building, research and documentation and service delivery.

The ultimate goal of ASAP is : "To promote, protect and advance women's sexual and reproductive rights and health in Asia by reducing unsafe abortion and its complications; and where it is legal, by promoting access to comprehensive safe abortion services."

A number of studies, particularly in the recent past have looked at the issue of safe abortion services, their reach and the perspective of both users and service providers. Therefore, SAP planned a multi-country study that went beyond the community- provider interface and explored the views of gatekeepers such as lawmakers and implementers who are outside the service provision field. A survey of legal professionals and law enforcement officials was planned with a view to assess their level of understanding and support for safe abortion as a women's right and public health issue in countries where abortion laws are restrictive and where it is legal.

The aim of the study was to obtain an understanding of the differences in knowledge, attitudes and understanding among legal professionals and law enforcement officials towards women's rights to safe and legal abortion in countries where abortion is severely restricted and where it is legal, in order to inform the strategies for advocacy to liberalize abortion in those countries.

In order to make significant changes in improving access to safe abortion reforming national laws and policies (especially in restrictive environment); setting forth more effective principles and guidelines for public information and service delivery (in countries with more liberal policies); and other changes may be critical. When it comes to examining the law as it is and the law as it should be, it is therefore important and necessary to look at the role of the legal profession as agents of change.

The legal profession, in its first sense, means not only the private practitioners, but also the judges, magistrates, law students, and law professors (academe). Lawyers after all, make use of the law to defend or prosecute women or abortion service providers who are held to account under the law; the academe's opinions are consulted by the judges and magistrates who in turn, interpret the provisions of the law and decide the fate of the woman/service provider accordingly. Legal experts (whether private practitioners, members of the judiciary or the academe) are always at the forefront in legislative advocacy - drafting of bills, as well as providing legal expertise and support for the sponsors of proposed legislative measures, to ensure that the proposed measure measures up to the agreed-upon standards, i.e.,

1. Coordinator ASAP. 2. Executive Director, Foundation for Research in Health Systems (FRHS). 3. Independent Consultant, Pune.

the Constitution and in many cases, the state's international commitments.

The court is a powerful arena to effect changes in society. Through the avenue of the courts, restrictive laws may be stricken down as invalid; failure to implement the law by state agents, may hold these state agents liable, in their official as well as personal capacity; refusal to heed the requirements of the law, may also compel the courts to enforce compliance by these state agents. Needless to say, the role of the lawyer in advocating for these reliefs, and of the judges / magistrates in deciding to grant and ordering the reliefs sought, are important in society purporting to be under the rule of law, where society evolves and changes are effected, in part, through the courts and justice system.

Legal profession, when used in this study, however, does not simply refer to those who have had formal schooling in law and are bestowed the titles as such. This study adopts an expanded definition of the legal profession and includes also legislators, high ranking police personnel, jailers, medical practitioners, head of hospitals, and other persons who are tasked with the implementation of the law, as well as those whose opinion and experience may be given weight in legal and policy advocacy.

While the members of the legal profession are important agents of change in society, they cannot effect lasting change on their own. We recognize that these changes in the field of law and policy need to be propelled and informed by the experiences and wisdom of those at the ground level in the implementation of the law.

The study findings are expected to help in a greater understanding of the perspectives of this group and will inform future capacity building, attitude reconstruction efforts and the development of advocacy tools for action.

Research Questions:

The main research questions asked were:

- Are legal and law enforcement personnel aware of the abortion related law in their country?
- What is their attitude towards access to safe abortion being seen as a women's right?
- What is their understanding of safe abortion (or lack of it) as a social justice and public health issue?
- What impact do they perceive this has on access to safe abortion by the women in their country?
- What influences their position vis a vis women in the community in the context of the right to safe abortion services?
- What interventions can be recommended to ensure a more supportive role for these persons in enhancing women's right to safe abortion?
- What can be recommended to improve the situation for women in these countries to improve their access to safe abortion services?

Methodology:

This study is unique in its attempt to move beyond the women/community- provider interface and look at gatekeepers outside the service provision field. Since the study aimed at understanding the perceptions of legal professionals and law enforcement qualitative methods were considered appropriate for data collection. It was decided to conduct in-depth interviews to collect information. Semi structured questionnaires were administered to 50 members of the legal profession[1],

1. Legal profession to include law students, practicing lawyers, magistrates, judges

law enforcement officials[2] and relevant officers from the health department. The sample was representative but not statistically selected and was largely self selected.

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

From amongst the medical professionals associated with implementation of the law, only one could be contacted and was willing to be interviewed. The police department was neither aware nor agreeable to interviews on the issue. 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, NGO representatives, independent consultants, women's rights activists, and members of Human Rights and Women's commission participated.

Strict confidentiality was maintained of the identity and coding was used. The location and names of the respondents was coded using unique numeric codes. The master list of names and codes was available only with the principal investigator of the study and till the completion of data collection (to ease repeat access in case of incomplete interview). No other person associated with the study had access either to the name or the exact location of the respondents. This ensured that the confidentiality of the respondents was maintained. Except one none of those approached refused to be interviewed.

Data entry & Analysis:

Interviews were transcribed. They were coded and analysed using Atlas Ti. Analysis was also done manually as and when necessary. Secondary data analysis was carried out to describe the legal context of the communities under study.

Analysis was done to describe and demonstrate patterns, emerging themes, and specific characteristics linked to

1. Abortion laws, rationale, law enforcement mechanisms
2. Knowledge, attitudes, and perceptions amongst law professionals, enforcement officials and gatekeepers regarding unwanted pregnancies and abortion (safe / unsafe)
3. Differences in knowledge, attitudes, and perceptions amongst law professionals and enforcement officials regarding abortion laws, rationale, law enforcement mechanisms

Sample: We interviewed 50 respondents. 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 male respondents. Fourteen respondents were students in the third year and five of them were members of Moot court society of the college. More than two thirds (35) were qualified lawyers, 20 of them practiced family law, Criminal law, Corporate Law or Civil Law, 14 were teaching 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. One respondent, at the time of the interview, was a medical officer in-charge of inspecting and approving the facility for provision of abortion services under the MTP Act.

2. Police personnel, Jailors, women cell, and medical practitioners (Obs & gyne of government hospitals responsible for providing post abortion care to women with complication of unsafe/clandestine) can be included in the sample.

Sample profile

		Number
Category	Student	14
	Lawyer	20
	Law teacher	14
	Judge	1
	MO	1
Years of experience	<5 years	7
	5-10 years	9
	11-20 years	12
	>=21 years	8
Type of law	Civil	16
	Corporate	3
	Criminal	4
	Co-operative Act	2
	Property	6

Context in India

The estimates for the number of abortions taking place in India vary widely. It is estimated that there are about six million abortions annually in the country, of which only one million are legal[3]. Abortion related morbidity and mortality is also high in the country. Consequences of unsafe abortions are estimated to contribute to 9% of all maternal mortalities in the country. And estimates suggest that there are 12,000 deaths a year on account of unsafe abortion[4].

This is despite the fact that in India abortion laws are relatively liberal and permit abortions under specific conditions. The Medical Termination Act or MTP Act as it is commonly known, 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 of grave injury to her physical or mental health; or where substantial risk exists of the child being born with serious physical or mental abnormality exists. In the explanation of the Act, the note also indicates that pregnancy due to failure of contraceptive methods could also be aborted as the ***"anguish caused by such unwanted pregnancy may be presumed to contribute a grave injury to the mental health of the pregnant woman".***

The rules and regulations under various sections of the Act specify that the written consent of the guardian is mandatory for termination of pregnancy in a 'lunatic' woman or a woman below 18 years. In case of other women, consent of the woman is essential and that of the husband is irrelevant. The termination of pregnancy can be carried out only by registered medical practitioners ***"who possess any recognized medical qualification as defined in clause (h) of Section2 of the Indian Medical Council Act, 1956, whose name has been entered in a state medical register and who has such experience or training in gynecology or obstetrics as may be prescribed by rules made under this Act[5]".*** Thus, allopathic doctors who are duly registered with the State Medical Council are authorized to do abortion. For the termination of a second trimester pregnancy, the opinion of two such qualified registered medical practitioners is needed to confirm that there is a valid reason for the termination.

As per the rules, for approval of the facility the application in Form A is addressed to the Chief Medical Officer (CMO) of the District. The CMO under sub-rule (2) of the Act verifies information contained in the application or may even inspect the place (within 2 months of application) to satisfy himself about the facilities referred to in sub-rule (1) are available and that the place can provide termination of pregnancies under safe and hygienic conditions. Once satisfied, he s/he recommends approval of the place to

3. www.un.org/esa/population/publications/abortion/doc/india.doc. 4. Ipas-India website. http://www.ipas.org/Countries/India.aspx. Chapel Hill, NC: Ipas, 2008. 5. Either has completed six months of house surgency in gynaecology and obstetrics; or has gynaecology and obstetrics practice of not less than three years; or has post-graduate degree or diploma in gynaecology and obstetrics

the committee. The Committee, after due consideration issues a certificate of approval in Form B (within next 2 months), which the facility has to display at a conspicuous place in the facility.

If the CMO is not satisfied with the facilities specified in rule 5 at the place, s/he provides detailed report to the committee. The committee can suspend or cancel the approval after providing opportunity of representation to the owner of the place. The owner can re-apply after rectification of the deficiencies. The approval is provided within 2 months of the deficiency having been rectified by the applicant.

In case of doubts about safety of services offered at an approved place, the CMO can call for any information, seize any article, medicines, records or other documents at the place. The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to seizure shall apply to seizure made under sub-rule (2).

The MTP Rules framed by the Central Government are cleared by each House of Parliament and the MTP Regulations are framed by State Governments and relate to issues involving opinions for termination, reporting and maintaining secrecy. The regulations indicate that 'any person who willfully contravenes or willfully fails to comply with the requirements of any regulation made under sub-section shall be liable to be punished with fine, which may extend to one thousand rupees'. However, the Act further specifies that 'No suit or legal proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything, which is in good faith done or intended to be done under this Act'.

In 1975 the rules and regulations of the Act were revised to eliminate complex procedures for the approval of the place[6] and to make services more readily available. The Act was amended in 2002 to include the word "mentally ill person" instead of "lunatic", decentralization of recognition of MTP place to the district level[7] and specify punishment for non-conformance with stipulations in the Act. The amendment proposed that "The sub-section (2) of Section 5 of the MTP Act, 1971 should be amended to prescribe punishment for owners of clinics, which are not authorised to conduct abortions and the persons who are not registered medical practitioners as defined under the Act even if they conduct MTPs at approved places. The punishment prescribed for all such cases will be rigorous imprisonment of not less than two years, which may extend to a maximum of seven years".

With the advent of Ultrasonography, the contraceptive failure clause under the MTP Act helped the cause of sex selection. The 1991 Census Sex ratio figures were alarming enough for the country's policy makers to enact the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse. PNDT Act) Act on 1st of January 1994 to check female foeticide[8]. Rules framed under the Act prohibit determination and disclosure of the sex of foetus and advertisements relating to pre-natal determination of sex, specifies the need for certification of pre natal test facilities by government agencies and punishment in case of contravention of these provisions.

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.

6. Place government is satisfied can provide abortion services safe and hygienic conditions; and has a labour table, an operation table, surgical instruments, anaesthetic equipment, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation. 7. A District Level Committee is constituted with representation of a Gynaecologist/ Surgeon/Anaesthetist, other local medical professionals, non-governmental organization, and Panchayati Raj Institution of the District. One member has to be a woman. The tenure of this committee is for two years and the tenure of the NGO member cannot be for more than two terms. 8. www.csrindia.org/PDF/Bharti.pdf

Knowledge of respondents

Abortion trends

There was a wide variation amongst the respondents about the abortion scenario in the country. While 39 out of the 50 respondents believed that there is an increasing trend both because of increasing demand for services as well as better and wider availability of the services. Few believed that the trend is on a decline and even fewer opined that it has remained unchanged. While the reason for abortions according to them ranged from unwanted pregnancy because of family size (25/50), socio-economic condition (13/50), female foetus (22/50), and rarely health of the woman or the unborn child (6), those for illegal abortions were the unawareness about legality, approved centres, providers and sometimes stigma of being seen in the approved facilities.

The majority (39) however also mentioned that their views were based on conjectures and speculations in absence of reliable data and also based on their awareness about the large scale clandestine and unsafe abortions which were not recorded. Neither did they have any access nor did they attempt to access information related to abortions from any source. A few of them did mention that they became aware about the importance of the issue after the recent high profile case in the country. However, most did mention that they would like to know more about abortions in the country.

Abortion laws

Forty four respondents were aware of existence of the MTP law / Act but only six of them knew of PCPNDT Act. Amongst the latter the degree of awareness varied. Fifteen had only heard of it or had recently become aware of it due to a high profile court case which was widely covered by the print and electronic media, and twenty five were aware of some components of the Act, either the gestation period for legal abortion, the legal stipulations that permitted abortion. Only four respondents were aware of the Act in its entirety. The rationale for the advent of the Act were listed as safe guarding 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).

More than half of the respondents (29/50) were unaware of the amendment to the Act. Amongst those aware the rationale for the amendments were listed as increasing public demand for services, need for broader indications for permission for abortion, relevant regulations in place, and punitive measures to prevent unsafe abortions.

To quote the rationale as mentioned by some: ***"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".***

More than a fourth (15/49) of the law professionals believed that the law came in to control the declining sex ratios and make women more liberal.

Implementation and enforcement mechanism

Thirty nine of the 50 respondents talked about the enforcement mechanism for the Act. 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 role of police was also mentioned by the other, but only after the registering of a complaint by a third person. The police responsibilities according to them included registration and investigations in the case and arrest of those breaking the law. In fact one lawyer was categorical that abortion is ***"non-bailable, cognizable 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 do the 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 authorized or not. Unless we get some complaint from someone, we cannot do anything and even if there is a complaint that a certain doctor is performing abortions without a license, how can we collect any evidence? It is the most difficult thing."

Legal outcome and trends

When asked about the legal outcome of the cases reaching the court, 11 mentioned that they had no knowledge and 17 mentioned 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 subjected to the specified punishment. Twenty nine of the respondents accepted that profile of the women that reach the court affects the outcome. Women who are married, rich, and from privileged background 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 profile of the women was totally irrelevant for deciding outcome of any case.

Attitudes

Relevance of the Act

Abortion cases are few and rare and not an important area for legal professional. Such cases are so few in number and the matter is so 'petty', according to some, that many have never come across any case of this nature. Also, given the huge of 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 court. To quote one, *"We discourage people from going to higher court".*

Moreover, said a few, currently abortion legality is not part of the curriculum and even if it is included in future, only a few students would take this optional course because they know that it does not have a great potential in practice.

Majority (42/50), however, believed that the law in its current form was relevant. Eight respondents did not agree. Some of them felt that the Act had not kept in pace with medical advancements. To quote two:

"Certainly not. We have made this act in 1971 and at that time sex selective abortions were not common because sonography was not so popular and easily available. In the light of this one fact, the law needs to be changed".

"Law is dynamic like social scenario. Depending on the demand, the supply has to match. At the same time laws need to be revisited, amended, and newly formulated to meet the changing needs of the people".

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

"The MTP Act is in vogue since 1971. Abortions are permitted to be performed by doctors in hospitals that are authorized by the government - both public and private ones. Failure of contraceptives, sexual offence case and some other conditions have been laid down in the Act. A woman's consent is enough. If the girl is a minor, consent of guardian is necessary….But I do not agree with the idea of abortion in the first place. We have made the act to legalize the disposal of unwanted, unplanned pregnancies which in other words means that we have legalized 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 this time limit that they have put in. 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? Medical science has advanced so much and right from the beginning we have considered an amoeba also to be a living organism, then why this?"

Need for Amendments

Thirty three respondents were of the view that the law needed to be amended to keep in pace with the changing scenario and medical advances. Sixteen were satisfied with the Act in its current format and emphasized on more stringent implementation while one had no opinion.

"Change is necessary because education is increasing; there is development and expansion in transport and communication. Way of life and lifestyles are undergoing changes very fast and medical science has so many new techniques. Definition of family is changing. Living-in relationship is also being debated so we have to keep up with these changes. 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. We have to ask ourselves a few questions - How long can we shirk from the responsibility? How long do we want to close our eyes? How long can we sit dumb and not raise voice? Do we want to be silent spectators? As a social welfare state we have to take action. Our country is partially ready for this but we need more cultural maturity. All of us have to play a role, signally or jointly to ensure health and safety to our people".

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. One woman lawyer quoted the edicts of Manusmriti,

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

Of the ten who were aware, four perceived these rights only in the context of marriage. Three female law professionals thought women's empowerment to have sex when they want and another six thought that the freedom to have children when they wanted, are women's rights.

"According to me, right to marry, to have children are rights included in article 21 of the constitution. A foetus has right to be born. This right cannot be denied on the basis of the child being a female. Also one cannot ignore woman's right to her own body. Why we ask this question only in case of females? If men have right over their body females must have right over their bodies without question".

Abortion as Women's Right, Public Health or Social Justice Issue

Thirty nine respondents mentioned that abortion can be argued as a woman's rights issue, twenty eight believed it to be a social justice issue and seventeen as a public health issue. The general response was that it becomes a woman's rights issue when it is related to her health and the product is the result of sexual offence. It becomes a public health issue when abortions are conducted by unqualified doctors and a social justice issue when abortions are on account of sex detection.

Interestingly, all 17 female law professional looked at abortion as a predominantly women's rights issue and half each mentioned that the issue had implications for public health and social justice. The arguments they gave were:

"It does become a woman's rights issue when it is related to her health and the product is the result of sexual offence. It becomes a public health issue when abortions are conducted by unqualified doctors and a social justice issue when abortions are on account of sex detection".

"Because it is related to performing a surgery, it is a public health issue. A woman undergoes abortion, not men so it 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"

"It is a social justice issue because it is related to the entire society. Public health because the life of the mother and child is one of the prime concerns and it certainly is a woman's rights issue because abortion is related to the baby in the womb of the woman, her body, mind and physique".

"Abortion and its circumstances is an issue, which touches all the three. …Health of the unborn baby and the mother are important because right to life is a fundamental right and so it does become a public health issue. Women should have a freedom to choose what they want and what they feel is good for them so it is a rights issue and to get justice against any atrocities is universally acceptable and so social justice is also close to abortion issue. According to me, right to marry, to have children are the rights included in article 21 of the constitution. A foetus has right to be born. This right cannot be denied on the basis of the child being a female. Also one cannot ignore a woman's right to her own body. Why we ask this question only in case of females? If men have right over their body, females must have right over their bodies without a question".

A woman professional mentioned that all the three issues were interlinked. She said, "I think it is a matter of both women's right and social justice both are two sides of the same coin and they compliment 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 certainly a public health issue also".

One male lawyer vehemently opposed to sexual and reproductive rights, particularly to women said, *"It is very good. I say this because the court did not allow ***'s to abort the foetus. God took care on its own in due course. Tell me one thing! Were not handicapped persons born in India? Did they also have not have rights like you and I have? Why we think that such human beings should not live? I am of the opinion that if we feel that persons with physical and mental challenge are thought to be unfit for living, then India should declare itself as a non-welfare state. Laws influence decision making because the judges have to give the decision within the framework of the conditions stipulated".*

Another dissenting voice where the lawyer argued in favour of rights of the foetus said, *"How can killing be a social justice issue if the person has been given the right to finish one life. From the fetuses point of view it is a social injustice issue. 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. 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 recognized in Manusmriti and are recognized even under today's Indian legal system as far as property matters are concerned. These four lawyers therefore looked at right to abortion as more complex than a mere women's rights issue.

"Of course, the foetus has rights and they have always been recognized 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".

"I told you about Manusmriti and I believe that one has these rights but people have no awareness about it. I also feel that the foetus has or should have all rights. The foetus gets created because of someone else. It is not its own demand

that it should be formed and it also has life from day one. I am a student of botany from the good old days and I feel that the cell division also happens in living cells and so it is life, even in a foetus just formed and if it has life in some form, it must have rights like other living beings of its own kind. A woman has a right over her own body. She is simply not empowered in India to understand this concept. The reasons are illiteracy and also poverty; because if the woman is aware but has no resources, what she will do even if she understands that she has a right to her own body".

On the other hand, ten of the female law professionals were categorical in their view that right to terminate an unwanted pregnancy was unequivocally a woman's right. To quote two of them

"I feel it's the right of the women that is more crucial, why should women go through pain if she cant handle the child due to personal limitations so I feel when we talk about right to body we mean letting women independently decide the number of children she would like to have or not to have".

"I think if we decide to safeguard the right of the fetus 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".

Expanding access

A little more than half of the respondents (28/50) talked about the need to increase in access to safe abortion services through creation of awareness, better infrastructure and proper implementation of the existing stipulations under the Act. However, almost all were categorically against demedicalisation (without supervision of medical professionals) or provision of abortion services by providers other than those specified under the MTP Act. To quote one, *"There should be demedicalisation of services only if safety is ensured. I feel that laws should be framed keeping in mind the societal norms. But many times social norms are guided by irrational and constraining religious ideologies. These should be handled carefully as these might conflict with the medical advancements".*

Fourteen respondents expressed their reservations against any need for expansion of services and eight had no opinion on the matter. A respondent who vehemently against availability of the service in the first place said, *"Is abortion a service? If someone kills can that become services? 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. You may have more medical centres but not abortion centres. Expansion is not beneficial to anyone"*

Discussion

The MTP Act that was supposed to eliminate unwanted or forced pregnancies and unsafe abortion fell short of serving its purpose due to multiple reasons. The impression that abortion was legalized through the Act itself was erroneous as the Act only specified certain conditions under which a pregnancy could be terminated. It does not replace or negate the Indian Penal Code (IPC) of 1860, which draws heavily from the British Penal Code and in Section 312 clearly states: "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. A woman who causes herself to miscarry is within the meaning of this section[9]". The Act only allows the IPC provisions to be set aside under a prescribed set of conditions[10].

Moreover, the Act has loopholes that can be exploited though varied interpretations. For example, though the Act mentions that the medical opinion must be given in

9. www.cehat.org/publications/pc19a91.html. 10. iussp2009.princeton.edu/download.aspx?submissionId=92797.

"good faith", the term good faith has not been defined (Section 52 of the IPC defines good faith to mean as act done with 'due care and caution'). Further though the Act provides some guidance in the form explanations it does not explicitly define what would involve a risk or a grave injury to the woman's mental health. The gravity of the injury or the extent of the risk are left to the interpretation of the clause by the medical practitioner[11].

Under section 5(1) Act the authorized doctor can terminate a pregnancy if it is "immediately necessary to save the life of the pregnant woman". In such situations the stipulations such as gestational age, two medical opinions and place of termination are not applicable[12]. However, Section 312 of the IPC permitted abortions by anyone with the object of saving the life of the mother. Thus the Act promotes medicalisation and regulates medical practices related to abortion but fails to empower women to control their reproduction. Also, it mentions that MTP is permitted in case of failure of contraceptive device used by any married women or her husband for the purpose of limiting the number of children, thus locating pregnancy within the context of marriage. The Act clearly specifies that a doctor who satisfies the required qualifications is automatically eligible to do abortions and cannot refuse to do abortions. If s/he does so, her/his name is liable to be erased from the Medical Council and if s/he is a Government doctor, s/he is liable for departmental action. However, though, legally, unmarried women are not denied access to an MTP, these women may face censure or denial of services leading them to quacks rather than safe services.

The Report of the Committee on the Status of Women in India highlighted that while the consent of minors over the age of twelve was necessary for other surgical procedures, according to Section 3, sub section (4) (a) of the Act, consent of a minor girl was not enough for MTP. This clause has the potential to provide the opportunity to guardians to compel young girls to undergo abortions without their consent. Also, Section 8 of the Act provides an overriding precaution to the doctor for any damage caused during the process, a protection unavailable incase of other surgical procedures and therefore with a potential to lead to negligence. The 2002 amendments in the MTP Act did not address the grave concerns and legal loopholes mentioned above[13].

On the other hand the faulty interpretation of PCPNDT Act in many states led to biased implementation. For instance, cases in a north Indian state were registered under the archaic Section 213 of the Indian Penal Code of 1860 though it had been superseded by the Medical Termination of Pregnancy Act, 1971, which legalized abortion and thus brought abortion into the category of crime instead of sex-determination which is a crime[15]. Also, according to critiques the Act does not spell out the proper procedure, to take cognizance of offence.

A review of abortion policy in the country indicated that often the rules and regulations themselves create barriers to implementation. Further, administrative requisites that evolve through practice are interpreted as mandated by law and become barriers for access to services. Spousal consent and marital status of women are two such barriers[14]. Unawareness about the precise stipulations of the Act and attitudes of all the stakeholders are thus largely responsible for the large number of unsafe abortion that continue to take place in the country.

Our primary data showed that awareness about the MTP and PCPNDT Act and the subsequent amendments was very poor amongst the law professionals. These Acts were

11. www.legalservicesindia.com/articles/pregact.html. 12. perspectivesonlaw.blogspot.com/.../11/constitutionality-of-20-week-limit-in.html. 13. Kriti Dwivedi, National Law Institute University. Medical Termination of Pregnancy Act, 1971:An Overview. 14. Siddhivinayak Hirve, Abortion Policy In India : Lacunae and Future Challenges.

not a part of the regular law school curriculum and the lawyers justified their lack of knowledge both on the grounds of it not being in the curriculum as well as the fact that they rarely came across these cases. Since these cases rarely ever featured in their law practice, they were not able to comment on the legal trends or outcomes. 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 the legal outcome. They believed that the judiciary was not affected by such factors, whereas the other enforcement authorities such as police and doctors were.

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 labeled the matter "petty" or "too small" for paying so much attention in the face of the huge legal delays and backlog of cases in the courts. In fact, many believed 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.

Majority said that the law was still relevant in its current form except that some argued in favour of more stringent implementation. These lawyers, however, also talked about any law keeping in pace with the changing socio-cultural context.

Most respondents believed that the law had come into existence to control the declining sex ratios and make women more liberal but also indicated that though abortion was seen as woman's right; they did not particularly support this as an example of women's rights. The support if any was in the context of marriage. The lawyers also had their reservations about unrestrained and unregulated expansion of abortion services.

Thus, to summarise, the lawyers were not only poorly informed but also had reservations about the entire debate on expansion of abortion services and abortion as woman's right. There were still voices which believed that problems if any associated with this issue were largely due to inappropriate and lenient attitude of enforcement authorities and many favoured stringent implementation of the Act.

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