

## **Criminalization of Termination of Pregnancy in Context of Four Liberty Limiting Principles of Criminalization**

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**Abstract:** In India, fetus removal has been permitted in restricted conditions since the Medical Termination of Pregnancy Act, 1971 (“MTP Act” *hereinafter*) was passed, making an exemption for the offense of early termination under the Indian Penal Code, 1860. The law’s main role was populace control and family planning<sup>1</sup> and it comes up short on a rights-based structure. The law is specialist-driven and over-medicalizes early termination, stripping pregnant people of their right to substantial and decisional independence and vesting the choice to cut short with the specialist. On 25<sup>th</sup> March 2021, the Indian Parliament passed the MTP Amendment Act 2021, another arrangement of alterations to this almost fifty years old law. Tragically, this Act neglects the existing reproductive rights jurisprudence developed by the Supreme Court of India<sup>2</sup> and the fundamental rights to autonomy, bodily integrity, and privacy<sup>3</sup>. This paper analyzes the principles of criminalization and under which principle the criminalization of termination of pregnancy can best be justified. The author has also tried to enquire about the current policy of the government in criminalizing the termination of pregnancy.

**Keywords:** *Criminalization, Pregnancy, Legal Moralism.*

### **1. Introduction**

Endeavors to decriminalize termination of pregnancy in nations with prohibitive laws every now and again face established difficulties in courts. Commonly, legitimate supporters persuade those guidelines taking into account lawful termination of pregnancy are not violative of the Constitution and its arrangement ensuring the right to life. Simultaneously, advocates certify the women’s right to lawful termination of pregnancy on other protected grounds, like the safeguarding of her own life and well-being, individual independence, privacy, and equality. For a really long time, the outlining of the legitimate

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<sup>1</sup> Department of Family Planning, Report: Committee on Legalisation of Abortion (1966)

<sup>2</sup> *Suchita Srivastava v Chandigarh Administration* Civil Appeal No. 5845/2009

<sup>3</sup> *Justice K.S. Puttaswamy (Retd.) v Union of India* Writ Petition (Civil) No. 494/2012

contention as a theoretical conflict of absolutes between the existence of the unborn and the freedoms of the pregnant woman has been detrimental to women. From one perspective, this sort of outlining doesn't do equity to the mind-boggling truth of early termination, and once in a while defames women as individuals. Then again, it gives passes judgment on a bogus division that isn't quite shortsighted, yet in addition misinformed. This methodology has started to change, in any case, and another account is coming to fruition, with its various components recognizable in a gathering of European and Latin-American abortion court choices. This noble account accompanies its own strategic outlining - the Proportionality Guideline<sup>4</sup>, which urges judges to consider and ponder proof and new contentions concerning fetus removal that have been normally ignored in the legitimate discussion. When these contemplations are incorporated and given legitimate load in the legal investigation, the outcome upholds noncriminal ways to deal with fetus removal guidelines.

## 2. Principles of Criminalization (Liberty Limiting Principles)

**Harm Principle:** This principle is also known as the “Master Principle of Criminalization”. Mill says that liberty shouldn't curtail until harm to someone else. It is a good reason to curtail the liberty of autonomous rational agents. It is a good reason in support of criminal prohibition *i.e.*, it would be effective in preventing harm to other people and provided no other means of an equally effective way to do so. This principle plays a pivotal role in criminalizing those conducts of individuals which cause harm to any other individual. What qualifies “harm to individuals” under this principle? Many criminal law jurists opined that “some kind of loss or being worse off” qualifies harm to individuals. Fienberg says it is “thwarting, setting back or defeating of an interest”.<sup>5</sup>

Mill's idea on the Harm Principle is the “power of the State to stop harm on others”. The harm principle limits the State's power to coerce individuals by legal or moral pressures. Then he states that on an individual there is a duty to not infringe others' liberty. Mill's primary objective was of negative liberty *i.e.*, wrong reasons for limiting liberty, and against this is paternalistic reasoning *i.e.*, moralistic non-compliance is not enough for taking away liberty. What is right or wrong is not convincing ground. A lot of deliberation on the

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<sup>4</sup> Rebecca J. Cook, *et. al.*, *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014) 77-97

<sup>5</sup> Tatjana Hornle, *Theories of Criminalisation* (Oxford University Press 2014)

distinction between paternalism. Paternalism is also of two types *i.e.*, soft paternalism and hard paternalism. He also talked about harm to self which should be regulated in small cases wherein indirect harm to others.

**Legal Moralism:** State is morally legal to prevent conduct on the basis that it is intrinsically immoral even though it causes neither harm nor offense to the other person accused himself. It is a fable in that the State knows what is right or wrong. Based on that legal moralism, for example, Section 377<sup>6</sup> of IPC, Anti-Romeo Laws in Uttar Pradesh, etc. Some scholars see morals as binding cement which gives shape to society and if no shape then it will disintegrate. Wolfenden Committee, 1955 came out with shocking revelations. Also, in *Shaw v. DPP*<sup>7</sup> in England, where Shaw came out with London's Lady Directory where physical attributes in the 1960s along with their contact numbers were published, there was a shock in society. This act was not covered under any offense at that time. So, the House of Lords particularly Lord Simon said this is against public morality and should be treated as an offense. This led to the debate that legal morality should be ground for criminalization and others said it should be otherwise *i.e.*, the Hart-Devlin debate.

Lord Simon in support of Devlin that moral is the cement. But Hart said societies are changing all the time and no concept of sacrosanct of a particular set of morals and he referred to Wolfenden Committee, 1955. He took the pragmatic view that looking into morals as cement is only an assumption that is not bagged by any research and if some of the morals remain unenforced there is no way that society would disintegrate. He also argued that there can never exist a universal moral agreement in society at a given time. Another argument Hart made was not following a few morals doesn't mean that a person doesn't follow any rules.

**Offense Principle:** J. Fienberg was the main proponent of this principle. Sometimes, it is essential to prohibit certain offenses to a person other than those who have acted and is an effective way to that end *i.e.*, to stop offense to others. Fienberg is not referring to harm but to offense. Harm is tangible but the offense is over and above. A person may not be able to say that he is harmed but he may be offended. Sensory offenses can be cited here. Ride on a bus where he is showing that some people boarding and some are de-boarding which some co-passengers can't take it, they offend the sensor. This principle of

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<sup>6</sup> Indian Penal Code 1860, s 377

<sup>7</sup> *Shaw v DPP* [1962] AC 220

criminalization helps the state to take the plea that individuals have the right to protect their interests. Any individual cannot offend another individual as the principle here underlines. If any law is made in the context of offense principle, it will help in securing the crimeless society.

**Legal Paternalism:** The myth of the State knows the best is enforced and legal paternalism is saying that it is necessary for the State to prevent harm to the actor itself too. State right from early time recognized society as the sovereign, and then comes the State. So, an individual is considered an important resource of the State and the State knows what is best, etc. So, on basis of this, if someone indulges in an act that is harmful to him then can penalize him, for example, attempting to commit suicide, wearing a helmet, etc. Punishment compulsorily treated as the reformatory principle is interrelated with this as he should be treated and then get back to the society. It is related to the Parens-Patria doctrine.

### **3. Criminalization of Termination of Pregnancy comes under which Principle?**

In our opinion, it comes under the Harm Principle or Legal Paternalism Principle. Legal Paternalism is the principle that is enforced when the State feels necessary to prevent harm to the actor itself. In India, the termination of pregnancy laws was enacted to check illegal abortion and to protect the health of women. Under this law, the State work as Parens-Patria. The State better knows what is right and what is wrong for a particular individual. It is the duty of the State to protect the individuals from any harm to the actor itself and to look after the health of each individual. The Legal Paternalism principle very much fits in the law made to safeguard the termination of pregnancy. Under this principle, the State exercises its power to control illegal abortion which is for the betterment of individuals.

India still is patriarchal in nature. In many remote areas, people are not much civilized, and they are engaged in abortion after enquiring that a female child will be born. This mindset of giving the boy a preference among the people in India will hamper women's empowerment and it is the duty of the state to stop these illegal abortions. For these to stop, the State can take the plea of the Legal Paternalism principle by making law. According to our understanding as of now, Legal Paternalism contributes to women's empowerment and gender neutrality which the individuals itself does not have prior

knowledge about the same. But sometimes it is said that illegal abortion is also against the moral values of society.

If the State passes a law on the ground of morality that the act is immoral, then the criminalization of termination of pregnancy will come under legal moralism. The State is morally legal to stop conduct on the basis that it is intrinsically immoral even though it causes no harm or any offense to the other person or the perpetrator himself. When the individual does any act which is immoral and against the moral values of society then they can take the plea of legal moralism to criminalize that act. The termination of pregnancy is immoral in the context of some religious texts and ethics. Many religious stakeholders continuously oppose abortion as it is detrimental to religious values and standards. Therefore, it can be put under legal moralism also.

We finally submit that the State can make law on termination of pregnancy through the two principles of criminalization *i.e.*, Legal Paternalism and Legal Moralism.

#### **4. Conclusion**

After analyzing the Principles of Criminalization (Liberty Limiting Principles), we found the justification that termination of pregnancy can be criminalized under the principle of Legal Paternalism of criminalization. But sometimes, the State can also consider Legal Moralism as a principle of criminalization to criminalize termination of pregnancy.

The Indian Apex Court has made strong laws on reproductive rights. In the landmark privacy judgment, Justice Chandrachud held that regenerative choice should be scrutinized inside the singular liberty guaranteed under Article 2<sup>8</sup> of the Indian Constitution. The MTP Act 2021 moreover makes sense of the requirement to ensure regard, autonomy, order, and value for women who need to end their pregnancy. Regardless, the amendments don't change over into a genuine change in power from the expert to the singular searching for early termination. In this manner, the end of pregnancy remains a prohibitive game plan and not an absolute right that goes under legitimate paternalism.

The long trip of regulating permission for safe fetus removal that started in 1971<sup>9</sup> can truly be said to wrap up exactly when India decriminalizes early termination. Meanwhile, there

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<sup>8</sup> Constitution of India 1950, art 21

<sup>9</sup> Medical Termination of Pregnancy Act 1971

is a need to make a right set up to legitimate design regarding early end that is as per safeguarded characteristics and India's worldwide fundamental freedoms regulation obligations. The fight continues for a regulation that keeps up with the opportunities for correspondence, autonomy, genuine clique, and security; and for one that can change the natural framework inside which people can rehearse their full extent of conceptive honors, and particularly their decisional freedom to search for early terminations.