

### Legislation Review - Medical Termination of Pregnancy Act, 1971

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### INTRODUCTION

Abortion, a subject often discussed in medico-legal circles, interims various streams of thoughts and multiple discipline, like theology, because most religions have something to say in the matter, ethics, because human conduct and its moral evaluation are the basic issues involved; medicine (in several of its sub-disciplines), because, interference with the body for a curative or supposedly curative issue is at focus; and law, because regulation of human conduct by sanctions enforced by the state through the process of law ultimately become the central theme for discussion<sup>1</sup>.

Abortion may be classified into various categories depending upon the nature and circumstances under which it occurs. For instance, it may be either, natural; accidental; spontaneous; artificial or induced abortion<sup>2</sup>.

Abortions falling under the first three categories are not punishable, while induced abortion is criminal unless exempted under the law. Natural abortions is a very common phenomena and may occur due to many reasons, such as bad health, defect in generative organs of the mother, shocks, fear, joy, etc.<sup>3</sup>. Accidental abortion very often takes place

<sup>1</sup> Leela Visaria, Abortion in India: Emerging Issues from Qualitative Studies, Economic and Political Weekly, Vol. 39, No. 46/47 pp. 5044-5052, (30<sup>th</sup> march, 2020, 09:28), <https://www.jstor.org/stable/4415809>.

<sup>2</sup> Bhavish Gupta & Meenu Gupta, The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practise, ILJ, Winter Issue 2016, pp 140-150.

<sup>3</sup> Ibid.

because of pathological reasons where pregnancy cannot be completed and the uterus empties before the maturity of foetus. Induced abortions is denied in law as an untimely delivery voluntarily procured with intent to destroy the foetus. It may be procured at any time before the natural birth of the child.

It is believed that out of the many rights one major right of women is the reproductive right. Reproductive rights are the rights of individuals to decide whether to reproduce and have reproductive health. This may include an individual's right to plan a family, terminate a pregnancy, use contraceptives, learn about sex education in public schools, and gain access to reproductive health service<sup>4</sup>. However, earlier abortion was not permitted and was strongly opposed by the society. It was seen as a murder of the foetus. Abortion got legal sanction only after the famous US SC decision of *Roe v. Wade*<sup>5</sup> where in it was established that anti-abortion laws violate the right to privacy. This decision made abortion legal in US which were followed by other countries as well. Medical termination of pregnancy act 1971 is one such act passed by India to regulate abortion in our country.

### HISTORICAL PERSPECTIVE

During the last thirty years many countries have liberalized their abortion laws. The worldwide process of liberalization continued after 1980. Today only 8% of the world's population lives in countries where the law prevents abortion. Although the majority of countries have very restricted abortion laws, 41% of women live in countries where abortion is available on request of women<sup>6</sup>.

In India, The Indian Penal Code 1862 and the Code of Criminal Procedure 1898, with their origins in the British Offences against the Person Act 1861, made abortion a crime

<sup>4</sup> Leela Visaria, Abortion in India: Emerging Issues from Qualitative Studies, Economic and Political Weekly, Vol. 39, No. 46/47 pp. 5044-5052, (30<sup>th</sup> march, 2020, 09:28), <https://www.jstor.org/stable/4415809>.

<sup>5</sup> 410US 113(1973).

<sup>6</sup> Pyali Chatterjee, Medical Termination of Pregnancy Act: A Boon or a Bane for a Woman in India - A Critical Analysis, ISSN, 236-240, Sept. 2016.

punishable for both the woman and the abortionist except to save the life of the woman i.e. sec 312 to 316 of IPC. 1980s<sup>7</sup>. The liberalisation of abortion law in India began in 1964 in the context of high maternal mortality due to unsafe abortion<sup>8</sup>. Doctors frequently came across gravely ill or dying women who had taken recourse to unsafe abortions carried out by unskilled practitioners<sup>9</sup>. They realised that the majority of women seeking abortions were married and under no socio-cultural pressure conceal their pregnancies and that decriminalising abortion would encourage women to seek abortion services in legal and safe settings. The Shah Committee, appointed by the Government of India, carried out a comprehensive review of socio-cultural, legal and medical aspects of abortion, Shantilal Shah Committee in 1964 recommended liberalization of abortion law in 1966 to reduce maternal morbidity and mortality associated with illegal abortion. On these bases, in 1969 Medical termination of pregnancy bill was introduced in Rajya Sabha and Lok Sabha and passed by Indian Parliament in Aug<sup>10</sup>. 1971. Although some States looked upon the proposed legislation as a strategy for reducing population growth, the Shah Committee specifically denied that this was its purpose<sup>11</sup>. The term "Medical Termination of Pregnancy" (MTP) was used to reduce opposition from socio-religious groups averse to liberalisation of abortion law. Medical Termination of Pregnancy Act, 1971 (MTP Act) was implemented from April 1972. Implemented rules and regulations were again revised in 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. The MTP Act, 1971 preamble states "an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto"<sup>12</sup>.

<sup>7</sup> Ibid.

<sup>8</sup> Siddhivinayak S. Hirve, Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters, Vol. 12, No. 24 (3<sup>rd</sup> march, 2020), pp. 114-121, <https://www.jstor.org/stable/3776122>.

<sup>9</sup> Ibid.

<sup>10</sup> Bhavish Gupta & Meenu Gupta, The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practise, ILJ, Winter Issue 2016, pp 140-150.

The preamble is very clear in stating that termination of pregnancy would be permitted in certain cases. The cases in which the termination is permitted are elaborated in the Act itself. Moreover, only a registered medical practitioner who is defined in Sec.2 (d) of the Act as "a medical practitioner who possess any recognize medical qualification as defined in Cl.(h) of sec.2 of the Indian Medical Register and who has such experience or training in gynaecology and Obstetrics as may be prescribed by rules made under this Act" is permitted to conduct the termination of pregnancy<sup>13</sup>. Also other matters connected there with the incidental thereto are incorporated, for example, the question of consent of termination of pregnancy, the place where the pregnancy could be terminated, the power to make rules and regulations in this behalf.

### ANALYSIS OF PROVISIONS

Medical termination of pregnancy act, 1971 is a small act of which comprises of 8 sections. This act basically provides that when a pregnancy can be terminated and by whom it can be terminated. This act also provides that any termination of pregnancy in contravention to mention in the act are punishable but as such does not provide for punishments. Some of the main provisions of the act are as follows:-

The Preamble of the Act states, "An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto"<sup>14</sup>.

Sec 3 of the act which is the most important section of the act it provides when the pregnancy can be terminated. The Act allows an unwanted pregnancy to be terminated up to 20 weeks of pregnancy, and requires a second doctor's approval

<sup>11</sup> Siddhivinayak S. Hirve, Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters, Vol. 12, No. 24 (3<sup>rd</sup> march, 2020), pp. 114-121, <https://www.jstor.org/stable/3776122>.

<sup>12</sup> Punam Kumari Bhagat & Pratish Sinha, Abortion law in India: The debate on its legality, IJL, Vol. 4 Iss. 2, pp 272-276 (March 2018).

<sup>13</sup> Ibid.

<sup>14</sup> The Medical Termination of Pregnancy Act 1971 (No.34 of 1971).

if the pregnancy is beyond 12 weeks<sup>15</sup>. The grounds on which it can be terminated includes grave risk to the physical or mental health of the woman in her actual or foreseeable environment, as when pregnancy results from contraceptive failure, or on humanitarian grounds, or if pregnancy results from a sex crime such as rape or intercourse with a mentally-challenged woman, or on eugenic grounds, where there is reason to suspect substantial risk that the child, if born, would suffer from deformity or disease<sup>16</sup>.

According to the Act, 'a medical practitioner who possess any recognized medical qualification as defined in cl. (h) of Sec.2 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 gynaecology or obstetrics as may be prescribed by rules made under this Act is permitted to conduct the termination of pregnancy'. Allopathic doctors who are duly registered with the State Medical Council are authorized to do abortion<sup>17</sup>. Other like homeopathic, ayurvedic, unani doctors and unqualified doctors like RMP, Quacks, et al are not entitled to perform abortion. Even among allopathic doctors, only those who satisfy one or the other of the following qualifications are eligible to do MTP. Once a doctor satisfies the require qualifications, he automatically becomes eligible to do abortions<sup>18</sup>. He need not apply for eligibility to any authority. A doctor cannot refuse to do abortions on religious grounds. If he does so, his name is liable to be erased from the Medical Council. If he is a Govt. doctor, he is liable for departmental action<sup>19</sup>.

The MTP Act confers full protection to a registered allopathic medical practitioner against any legal or criminal proceedings for any injury caused to a woman seeking abortion, provided that the abortion was done in good faith

under the terms of the Act, as per sec 8 of the act. Further the act provides that the consent of women undergoing abortion procedure is must<sup>20</sup>.

The law allows any hospital maintained by the Government to perform abortions, but requires approval or certification as per sec 4 of the act. Sec 5 provides that, In the event of abortion to save a woman's life, the law makes exceptions: the doctor need not have the stipulated experience or training but still needs to be a registered allopathic medical practitioner, a second opinion is not necessary for abortions beyond 12 weeks and the facility need not have prior certification<sup>21</sup>.

Exercising power u/s 6&7 which provides that central or state government can formulate rules and regulation for the purpose of implementation of the act. The Medical Termination of Pregnancy Rules and Regulations 1975 is framed it define the criteria and procedures for approval of an abortion facility, procedures for consent, keeping records and reports, and ensuring confidentiality. Any termination of pregnancy done at a hospital or other facility without prior approval of the Government is deemed illegal and the onus is on the hospital to obtain prior approval and get registered as per the provisions of the act.

### CONSTITUTIONALITY OF THE ACT

This act was challenged in the court of law as being unconstitutional. In the case of *Nand Kishore V. UOI*<sup>22</sup> the MTP Act was challenged on the basis of violates Ar. 21 of constitution and it was argued that there are already provision existing in IPC but it was held by the court that it is not violated as it is to save pregnant woman life and not against

<sup>15</sup> The Medical Termination of Pregnancy Act 1971 (No.34 of 1971).

<sup>16</sup> Bhavish Gupta & Meenu Gupta, The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practise, ILJ, Winter Issue 2016, pp 140-150.

<sup>17</sup> Ibid.

<sup>18</sup> Pyali Chatterjee, Medical Termination of Pregnancy Act: A Boon or a Bane for a Woman in India - A Critical Analysis, ISSN, 236-240, Sept. 2016.

<sup>19</sup> Bhavish Gupta & Meenu Gupta, The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practise, ILJ, Winter Issue 2016, pp 140-150.

<sup>20</sup> Punam Kumari Bhagat & Pratish Sinha, Abortion law in India: The debate on its legality, IJL, Vol. 4 Iss. 2, pp 272-276 (March 2018).

<sup>21</sup> Siddhivinayak S. Hirve, Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters, Vol. 12, No. 24 (3rd march, 2020), pp. 114-121, <https://www.jstor.org/stable/3776122>.

<sup>22</sup> AIR 2006 RAJ 166.

the birth of child and the provisions under IPC are old and need reforms.

In *Nikhil D. Dattar v. Union of India*<sup>23</sup>, section 3 and 5 of MTP Act was challenged on the ground of non-inclusion of eventualities *vires* of the Act. In this case the foetus was diagnosed for complete heart block thus the Petitioner, in her twenty sixth week of pregnancy, had sought termination of pregnancy. The petitioner contended that section 5(1) of the MTP Act should be read down to include the eventualities in section 3 and consequently, a direction should be issued to the respondents to allow the petitioner to terminate the pregnancy. The court held that the courts are not empowered to legislate upon a statute. Sections 3 and 5 provide for right to terminate pregnancy only under the specified circumstances. And the remedy under section 5 can only be available when the non-termination of pregnancy would be dangerous to the life of pregnant woman. While dismissing the petition the court further held that since twenty six weeks of pregnancy has already passed the court could not pass any direction for exercise of right under section 3<sup>24</sup>. This case further reiterated that the physical and mental trauma which may be experienced by women in such circumstances. It also highlighted the ethical issue faced by the doctors in similar situations.

But, the situation has changed and judiciary has played important role in granting permission for abortion beyond 20 weeks on various grounds.

*Anusha Ravinder v. UOI*<sup>25</sup> the court laid down certain guidelines as to where the termination of pregnancy can be allowed even beyond the period given under the act and court feel it necessary to do so.

In another case of *Suchita Srivastav v. chd. Administration*<sup>26</sup> the court granted the permission to terminate pregnancy where the period was beyond 20 weeks but it was clear from

the reports of medical experts that if the child born it will be suffering from heart ailment and there were high chances of the child being abnormal.

There have been number of cases where the judiciary has intervened and give permission for termination of pregnancy even beyond the statutory period due to which it was felt that amendment was required in this act of 1971 and the amendment is proposed in the year 2020.

### PROPOSED AMENDMENTS

Looking at the changing scenario a recent amendment in the act is moved in the parliament in 2020. This amendment bill:-

- Bill seeks to amend Medical Termination of Pregnancy (MTP) Act, 1971.
- extends the 20 week period to 24 week period for some specific sections of women
- Opinion of one registered medical practitioner to terminate the pregnancy below 20 weeks and Two registered medical practitioners for termination of pregnancy of 20-24 weeks of gestation.
- Enhanced the gestation limit for 'special categories' of women which includes survivors of rape, victims of incest and other vulnerable women like differently-abled women and minors.
- It also states that the "name and other particulars of a woman whose pregnancy has been terminated shall not be revealed",

The fate of bill is yet to be decided as it is pending in parliament.

### CRITICAL ANALYSIS

<sup>23</sup> S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India) (March 10, 2020), <http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf>.

<sup>24</sup> Bhavish Gupta & Meenu Gupta, The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practise, ILJ, Winter Issue 2016, pp 140-150.

<sup>25</sup> Writ petition (civil) 934/2017.

<sup>26</sup> 2009 9 SCC 1.

The MTP act is criticised on various grounds one of the major criticism is that it was never enacted to give reproductive rights to female. It was enacted to stop illegal abortions by non-medical practitioners and control overpopulation. Some of the others criticism of the act are-

1. Hindrance in reproductive rights of women. Her reproductive choices are made by state through this law and she does not have any right over it after specified period of time<sup>27</sup>.
2. Foetal anomalies that are detected late and/or cases of sexual assault and rape, particularly of minors are mostly detected at later stage. Those cannot be terminated as per this act because of the time limit
3. Ambiguity around unmarried women. Unmarried woman as per this act cannot opt for abortion due to contraceptive failures.
4. These individual cases should never need to go the court and MTP Act should be amended to provide guidance to doctors for every situation rather than going through cumbersome procedure of courts to seek permission for abortion beyond 20 weeks.
5. Right to Privacy is hampered because sexual or reproductive choices are private in nature and should depend upon the desire of woman whether to disclose or not especially unmarried woman.
6. The act fails to cope up with Modern trends and westernised lifestyle of people<sup>28</sup>.

Even after the proposed amendments there are still few grey areas which are not covered. Some of the drawbacks of new amended bill are-

- i. First, it doesn't allow abortion on request at any point after the pregnancy. Still the process is same and time period increased up to 24 weeks is not for all the women.

- ii. Second, it doesn't take a step towards removing the prejudice against unmarried women by amending the relevant provision and including them in circumstance where the pregnancy is caused due to contraceptive failure.

- iii. Finally, it enhances the gestational limit for legal abortion from 20 to 24 weeks only for specific categories of women such as survivors of rape, victims of incest, and minors.

### CONCLUSION

So to conclude, it is commendable that India's abortion law from 46 years ago is more liberal than the laws of many countries even today. But, there are certain defects that need to be rectified. One of such defect is the act itself does not provide punishment for violation of provisions of the act.

Secondly, India, despite its liberal abortion law, does not compute 'choice' as a factor for abortion. A lesser-known fact about the MTP Act is that a woman cannot simply choose not to be a mother; abortions are conditional and predicated on reasons like the physical or mental health of the mother, a potentially handicapped or malformed child, rape, underage pregnancies, pregnancies in women of reduced mental capability and failure of contraception. By making abortion a qualified right, the law does not recognise women as individuals with autonomy over their own bodies, a glaring mistake by all accounts.

Moreover "It is an old law, that needs to be reviewed and strengthened," says Dr Rishma Dhillon Pai, president of the Federation of Obstetric and Gynaecological Societies of India (FOGSI), a body representing 34,000 gynaecologists in the country. "There is greater focus on the time frame than what needs to be done in the best interest of the mother and the baby. You can't say that abortion is safe at 19-and-a-half weeks, but unsafe at 20-and-a-half weeks." Thirdly, due to advancement in technology the abnormalities in foetus can

<sup>27</sup> Ibid.

<sup>28</sup> Siddhivinayak S. Hirve, Abortion Law, Policy and Services in India: A Critical Review, Reproductive Health Matters, Vol. 12,

No. 24 (3rd march, 2020), pp. 114-121, <https://www.jstor.org/stable/3776122>.

also be detected at later stages so time should not be one of the factors to decide as to permission for abortion should be granted or not it should be the severity or necessity of the situation or the desire of women should be some of the factors that should be taken into consideration.

### SUGGESTIONS

Some of the suggestions that researcher would like to make according to her research are:-

- There should be no time limit for abortion when it comes to unmarried women because that might act as a mental trauma for such woman and there are high chances that such child will end up in some shelter home.
- Time limit should not be the major deciding factor it should be the severity of the situation or right of woman to decide.
- Doctors should be given more autonomy to decide for abortion beyond the stipulated period rather than following lengthy process of court.
- Punishments for the violation of the provisions of the act should be provided within the act itself.
- Failure of contraceptive measure should be ground available to all rather than for only married woman
- The amendment bill should be considered and should be passed because the current bill is unable to cope up recent advancements.

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