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# ABORTION LAWS IN INDIA - NEW VISTAS

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## **ABSTRACT**

In the year 1971, the Medical Termination of Pregnancy Act was passed by the Government of India, which took effect in the year 1972, allowing women the right to terminate her pregnancy on several grounds with the aim of securing her physical and mental health. According to the Act, a woman could undergo abortion within the twelfth week of her pregnancy that is the first trimester. In certain exceptional cases of foetal abnormalities that would pose risks to the health of the mother or the foetus, the pregnancy could be terminated within the twentieth week with the permission of two medical practitioners. This upper limit of twenty weeks often seemed to be very short and stringent to many, giving rise to hardships and several other problems. This is a major problem. This article aims to emphasize and examine the indispensable need of an amendment relaxing the stringent upper limit. Moreover the article also aims to examine the constitutionality of the present law regarding the upper limit of abortion.

## **INTRODUCTION**

The tight upper gestational limit of abortion has resulted in various problems along the span of time. These problems have always been major social problem and women had to go through immense amount of mental and physical agony. One woman loses life approximately every four minutes due to want of healthcare during pregnancy or childbirth, in this country<sup>1</sup>. Despite the country legalizing abortion in 1971, access to abortion is so limited that every year an estimated amount of 6.7 million women seeking to terminate a pregnancy has to undergo unsafe procedures performed by unlicensed practitioners<sup>2</sup>. One of the main objectives of the Medical Termination of Pregnancy Act, 1971 was to prevent maternal mortality, but at present there are women who get to know about their pregnancy in the 18th – 20th week of pregnancy.

Unsafe abortion is the third leading cause for maternal deaths in India<sup>3</sup>. After the United Nations' rebuke to India's apex court in 2012, the Medical Termination of Pregnancy (Amendment) Bill,

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<sup>1</sup>Avani Mehta Sood, LITIGATING REPRODUCTIVE RIGHTS: Using Public Interest Litigation and International Law to Promote Gender Justice in India. 1, 19(2006)

<sup>2</sup>Id

<sup>3</sup> TNN, Illegal abortions cause of many maternal deaths, TOI, Jul. 22, 2016, 09:52 IST

2014 was introduced in the Houses but was stalled. Several attempts have been made in the face of bills after the enactment of the Amendment Act of 2002 on the Medical Termination of Pregnancy, 1971, neither of which could see the light of the day.

Taking into account both the public opinion and the recommendations from the deliberations, the proposed Medical Termination of Pregnancy (Amendment) Bill, 2016 was drafted. The measures regarding liberalising laws concerning and aiding abortion in cases of foetal abnormalities is summarised as follows:-

1. The proposed amendments to MTP Act 1971 focuses on developing the scope of legal approach to MTP for special category of women like survivors of rape, victims of incest, single women and other vulnerable women (differently-abled women)
2. The upper gestational limit for termination of pregnancy for survivors of rape has been proposed to be increased from 20 weeks to 24 weeks. Pregnancies diagnosed with substantial foetal abnormalities, would be subject to no upper gestation limit would apply for abortion.
3. As per the directions of the Hon'ble Supreme Court, State/UT Governments had been asked to constitute Permanent Medical Boards in each State for urgent examination of cases referred to by the Hon'ble District Courts, High Courts and Supreme Court for MTP beyond 20 weeks so that immediate opinion can be given and urgent action can be taken.

Ultimately in 2018 a parliamentary panel had recommended to extend the threshold of abortions until 24 weeks of pregnancy. Consequently the Medical Termination of Pregnancy Amendment Bill, 2020 was approved by the Union Cabinet on 29<sup>th</sup> January and passed by the Lok Sabha on 17<sup>th</sup> March, 2020 extending the upper limit to 24 weeks.

### **ARBITRARY NATURE OF THE 20 WEEK UPPER LIMIT**

The MTP Act was adopted almost five decades ago with the aim of “terminating of certain pregnancies by registered medical practitioners.”<sup>4</sup> The law does not frame abortion from a

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<sup>4</sup>The Medical Termination of Pregnancy Act, 1971

women's rights perspective, but instead focuses on establishing where registered medical providers are exempted from penalties under the IPC, 1860 with regard to causing miscarriage and foetal death.

It may very well be mentioned that in a credible survey report of Lancet Global Health around 15.6 million abortions (14.1 million–17.3 million) took place in India in 2015 and around 11.5 million (73%) abortions were medication abortions done outside of health facilities, and 0.8 million (5%) abortions were done outside of health facilities using methods other than medication abortion.<sup>5</sup>

Another objective of the Medical Termination of Pregnancy Act, 1971 is to allow abortions up to 20 weeks gestation if the mother's life is at risk, if the foetus suffers severe abnormalities or, if the contraceptive method used fails to stop pregnancy<sup>6</sup>. It prevents the pregnant women from unsafe abortions. However, a foetal impairment can be detected after a 19 weeks because the proper testing could be done only after the legal limit.

Human rights scholars have emphasized that absolute gestational age cut offs can lead to arbitrary denials of rights<sup>7</sup>. The 'Freedom of Womb' has been strongly advocated by many sections of the society such as women liberalization movement, legal, medical and demographic experts, for various reasons. From the point of view of a woman, her mental and physical health, freedom is above all life. The process of liberating women shall remain complete until and unless she is treated as a full human being and not a mere human incubator. For this it is necessary that she is prevented from suffering due to ageless bondage of unwanted child, rather she should be given a right not to have a baby, she does not want.

The Human Rights Committee has repeatedly found that governments must ensure that their laws and policies do not force women and girls to continue pregnancies in cases of fatal foetal impairment, including the provision of appropriate and expansive interpretations of exceptions

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<sup>5</sup>Susheela Singh, Prof Chander Shekhar, Rajib Acharya, Ann M Moore, Melissa Stillman, Manas R Pradhan, et. al., The Incidence of Abortion and Unintended Pregnancy in India, 2015, LJI, VOL. 6, ISSUE 1, P.111-120, January 01, 2018.

<sup>6</sup> Supra note 4

<sup>7</sup>Joanna Erdman, Theorizing Time in Abortion Law and Human Rights, 1 Health and Human Rights Journal 19, 35 (2017).

related to life and health. The failure to do so violates many rights, including the rights to privacy, equality, and freedom from cruel, inhuman, and degrading treatment.

## **CONSTITUTIONALITY OF THE MTP ACT**

There has been a fundamental need to amend The Medical Termination of Pregnancy Act extending the threshold of abortion until 24 weeks of pregnancy for a long time. The Medical Termination of Pregnancy Amendment Bill, 2020 was passed by the Parliament to cater the need.

Section 3(2)(b) of The Termination of Pregnancy Act,1971 states that a woman can terminate her pregnancy beyond 12 weeks and not beyond 20 weeks provided that two registered medical practitioners are of the opinion that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. This provision imposes severe restriction on the exercise of the reproductive choice of the woman by providing a precondition that an opinion of the medical practitioner about there being a risk to the life of the lady or of grave physical or mental injury or risk of serious foetal abnormalities if the pregnancy is continued. During the intervening period after the Act was enforced, several genuine cases have come up where the fact that foetuses with serious risk of abnormalities with grave risk to physical and mental risk to mother had been noticed after twenty weeks. As a result, many women were forced to move the Supreme Court for permission to end pregnancy beyond twenty weeks, leading to a lot of mental and financial hardship to such pregnant women.

In *Devika Biswas v. Union of India &Others*<sup>8</sup>, the Supreme Court unequivocally held that Article 21 includes the “reproductive rights of a person.” The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21, and defined such rights to include the right to “access a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free, and responsible decisions about their reproductive behaviour. This Act restricts the choice of women to make

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<sup>8</sup>(2016) 10 SCC 726

reproductive choice beyond 20 weeks which also violates her personal liberty which is an essence of Article 21 as held by the Supreme Court.

Also, In *Poornima DevuMandavkar v. Union of India*<sup>9</sup>, ‘personal liberty’ was construed as an integral part of the fundamental tenet that the Constitution provides the privilege of to a mother specifically mentioned in Art. 21

In the 2016 case of *High Court on its Own Motion v. State of Maharashtra*<sup>10</sup> the Bombay High Court held that unwanted pregnancies disproportionately burden women and states that forcing a woman to continue a pregnancy “represents a violation of the woman’s bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.” The judgement also clearly mentions that “The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone”.

In 2012, the High Court of Madhya Pradesh echoed the Delhi High Court’s judgment in *Sandesh Bansal v. Union of India*<sup>11</sup>, a public interest litigation seeking accountability for maternal deaths, recognizing that “the inability of women to survive pregnancy and childbirth violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India” and “it is the primary duty of the government to ensure that every woman survives pregnancy and childbirth.”

Now, there had been a need for termination of pregnancies beyond the limit of 20 weeks because most of the Indian villages does not have access to doctor chambers and hospitals also due to the fact that most of the foetal abnormalities is determined in 19<sup>th</sup>-20<sup>th</sup> week of pregnancy.

In *XYZ v. Union of India*<sup>12</sup>, the Bombay High Court clearly mentioned that even when a pregnant mother is between 10th and 13th week; triple marker test between 18th and 20th week and the crucial anomaly scan in, around the 20th week. So, many abnormalities of the foetus may not be detected until the 19th or 20th week of pregnancy. So, it is not possible for a woman to terminate her pregnancy within a short time.

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<sup>9</sup>W.P. No. 10835 of 2018, Bombay High Court, 3rd Apr. 2019

<sup>10</sup>W.P. (CRL) No. 1/2016

<sup>11</sup>W.P.No.9061 of 2008

<sup>12</sup>2019 Sc Online Bom 550

A Constitutional right can be curtailed only by a law which is just fair reasonable and proportionate as held by the Supreme Court in a nine- judge bench in K.S. Puttaswamy v UOI<sup>13</sup>. The test of Proportionality was given by the nine-judge Bench of the Supreme Court in K.S. Puttaswamy v UOI<sup>14</sup> which listed three components to be looked at in order to determine proportionality in which the Court upheld privacy as a fundamental right. It has been held that when a law limits a constitutional right, such a limitation is constitutional if it is proportional. It was held by the Supreme Court that:

“21. An invasion of life or personal liberty must meet the three-fold requirement of

- (i) legality, which postulates the existence of law;
- (ii) need, defined in terms of a legitimate state aim; and
- (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them”

This Act fails to meet the proportionality test as given in K.S. Puttaswamy v. Union of India<sup>15</sup> because there is no legitimate interest of State regarding the prevention of reproductive choice of women as abortion in the second trimester is safe, so the State has no interest in severely preventing reproductive choice. Also, severe restriction is disproportional to the legislation’s intended aim of preventing maternal mortality. The restriction imposed by the State does not have nexus with the object of the Act i.e. to prevent maternal mortalities and complications associated with unsafe abortion.

Now for these reasons there had been a need for amendment of the Medical Termination of Pregnancy Act. The Medical Termination of Pregnancy Amendment Bill, 2020 which was passed states that a woman can terminate her pregnancy till 24 weeks and not 20 weeks. Hence as mentioned in many judgements of the Supreme Court, the foetal abnormalities may be detected between 19<sup>th</sup> and 20<sup>th</sup> week of pregnancy so it gives her a reasonable amount of time and also at the same time it protects the right of women under Article 21.

Now Article 21 under the Indian Constitution has many aspects and is very wide and is made wider day by day by Supreme Court. If women are given absolute right under Article 21 that means they

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<sup>13</sup>(2017) 10 SCC 1

<sup>14</sup>ibid

<sup>15</sup>ibid

can terminate pregnancy according to their wish at any time. Now, the Medical Termination of Pregnancy Amendment Bill, 2020 restricts that right until 24 weeks and right under Article 21 does not apply beyond that. Moreover, it may be mentioned that the bill is not violative under Article 21 as because it is only after 24 weeks the foetus becomes viable meaning it could survive outside foetus and to do abortion it has to be taken out of the foetus and then abort. So, it will lead to state sponsored murder. Hence, it does not violate Article 21.

So, clearly from the above discussion it can be concluded that the Medical Termination of Pregnancy Act,1971 was violative of Article 21 but the Medical Termination of Pregnancy Amendment Bill, 2020 is not violative of Article 21 and is made for good reasons.

### **INDISPENSABLE NEED OF AN AMENDMENT**

If danger to the health of the mother is the unwarranted outcome, why does the upper limit for abortion vary from country to country? Abortion till the 24th week is available to women on request in most of the foreign countries<sup>16</sup>. But for foetal anomalies or for conditions that can cause grave injury to the mother, there is no definitely fixed upper limit in countries like United Kingdom, France, Germany, Turkey, and Italy etc. An upper limit of 22 weeks has thus been set for Russia and Spain whereas it is 28 weeks in China. Restrictive abortion laws do not prevent abortion but forces women to seek illegal and usually unsafe abortions. In South America, where abortion is more or less deemed to be illegal, the mortality rate is between 30 and 60 per 1000 women<sup>17</sup>.

It may be stated in this context that about 19-20 million abortions are done by individuals without the requisite skills, or in environments below minimum medical standards, or both. Nearly all unsafe abortions (precisely 97%) are carried away in developing countries<sup>18</sup>. An estimated 68,000 women die as a result, and millions more get complications, many permanent. Important reasons of death are haemorrhage, infection, and poisoning. Legalisation of abortion on request by aggrieved is a desirable but inadequate move towards improving women's safety; in some

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<sup>16</sup>Sutapa Bandopahyay Neogi, Abortion for Fetal Abnormalities in India: Need for Critical Review. 1, 2 (2010)

<sup>17</sup> Id

<sup>18</sup>David A Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra, Friday E Okonofua, Iqbal H Shah, Unsafe Abortion: The Preventable Pandemic. 1, 1 (2006).

countries, such as India, where abortion has been legal for decades but access to competent care remains limited because of other obstacles. Access to safe abortion improves women's health, and vice versa, as documented in Romania during the regime of President Nicolae Ceausescu<sup>19</sup>. Increasing legal access to abortion is associated with improvement in sexual and reproductive health. Conversely, unsafe abortion and related mortality are both highest in countries with narrow grounds for legal abortion<sup>20</sup>. In 2006, Colombia's constitutional court ruled in favour of expanded indications for legal abortion, when a woman's life or health is in danger and in cases of rape or foetal malformation<sup>21</sup>.

It has often been observed that the most important foetal impairments have been detected on or after the 20th week of pregnancy. There are cases where the scenario shifts significantly or there is a delay in recognising pregnancy, this forces women and girls to seek termination of pregnancy. Certain health complications for the pregnant woman may only come to light after 20 weeks. Foetal echocardiography is a medical test which detects the abnormalities in a foetus' heart. It is typically done in the second trimester, i.e. between weeks 18 to 24 because of the earliest best accuracy of the test in such period. The Federation of Obstetric and the Gynaecological Societies of India (FOGSI), a body comprising of 24,000 plus members stated: "the risk to the mother in case of termination of pregnancy at 25 weeks is not notably higher than the risk at 20 weeks" FOGSI advised that "in case of foetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such foetus should be allowed to be terminated, even after 20 weeks."<sup>22</sup>

Although the MTP Act does not require judicial authorization for abortion, the SC and HCs across the country have been undertaking a case-by-case analysis to approve or deny abortions for women and girls beyond 20 weeks of pregnancy. There have been at least 25 such cases since 2015. These cases typically involved pregnant women who received a diagnosis of foetal impairment or pregnant adolescents who were victims of rape.

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<sup>19</sup>David A Grimes, Janie Benson, Susheela Singh, Unsafe abortion: the preventable pandemic, *Sexual And Reproductive Health*, Vol. 368, Issue 9550, p.1908-1919, November 25, 2006.

<sup>20</sup> Id

<sup>21</sup> Id

<sup>22</sup> X & Y v. Union of India &Ors., W.P.(Civ.) No. XXXX of 2014.

The decisions have been mixed – even in cases with petitioners seeking terminations in seemingly similar circumstances – leading to confusion about the law and the need for reform.

The Royal College of Obstetricians and Gynaecologists in the United Kingdom has clarified that “the majority (of foetal impairments) will only be identified on an anomaly scan at 18-20 weeks”. It has also emphasized that “the emotional impact of a diagnosis of abnormality is highly significant and causes considerable distress” and that women facing a diagnosis of foetal impairment “must not feel pressured to make a quick decision, but once a decision has been made, the procedure should be organized with minimal delay.”<sup>23</sup>

Foetal structural malformations are seen in 3 to 5% of all pregnancies<sup>24</sup>. In majority of countries worldwide, second trimester scan between 18 and 22 weeks remains the standard of care for foetal anatomical assessment; however, most recent literature shows a significant improvement in detection of foetal abnormalities in first trimester of pregnancy<sup>25</sup>.

Although first trimester ultrasound can detect about 50% of foetal malformations, it cannot replace second trimester ultrasound because several malformations develop later than the first trimester. Out of total malformed fetuses, 103 (33%) were detected prior to 20 weeks of gestational age and 209 (66.9%) were detected after 20 weeks of gestational age. Out of 103 women who were diagnosed with foetal malformations before 20 weeks, only 5 (1.6%) were detected prior to 12 weeks of gestational age and the remaining 98 (31.4%) were diagnosed between 12 and 20 weeks<sup>26</sup>.

A woman's or couple's decision to abort a pregnancy because an abnormality has been detected is already one fraught with emotional and moral or ethical dilemma. To subject the mother or parents to this decision at an even later stage is highly regrettable, more so in case of delayed diagnosis. If the problems cannot be doubtlessly determined, the only plausible solution is to broaden upper limit allowing for delays in diagnosis.

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<sup>23</sup>Report of a working Party, Termination of Pregnancy for foetal Abnormality, Royal College of Obstetricians and Gynaecologists (2010).

<sup>24</sup>E. Garne,,&” H. Dolk,,&”M. Loane,,&”P. A. boyd, prenatal detection congenital anomalies, 17, 97-98(2010).

<sup>25</sup>A. Syngelaki,,&” T. Chelemen,,&” T. Dagklis,,&” L. Allan,,&”K H. Nicolaides, Challenges in the diagnosis of fetal non- chromosomal abnormalities at 11-13 weeks Prenatal Diagnostic, 31, 90-102 (2011).

<sup>26</sup> Id

## **ROLE OF INDIAN JUDICIARY IN THE PATH OF LIBERALISATION OF ABORTION LAW**

In *Meera Santosh Pal and Ors v Union of India And Ors*<sup>27</sup>, the Bench of S.A. Bobde and L. Nageswara Rao, JJ allowed a woman to undergo medical termination of her 24 weeks pregnancy in the light of the apprehended danger to her physical and mental health in case of continuance of pregnancy.

In the judgement of *Saurabh Bindal v Union of India and Ors*<sup>28</sup> it was held that in a case where the condition of the foetus is, as in the present case, incompatible with life, the rigour of Section 3(2) of the Termination of Pregnancy Act, 1971 deserves to be relaxed, and the right to terminate the pregnancy cannot be denied merely because gestation has continued beyond 20 weeks.

In *Sarmishtha Chakraborty v. Union of India*<sup>29</sup>, the Supreme Court said that the right of a woman to have reproductive choice is an integral part of her personal liberty, as envisaged under Article 21 of the Constitution and she has a sacrosanct right to have her bodily integrity.

In *Ms. Z v. State of Bihar and Others*<sup>30</sup> it was observed that the fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision.

In an expansion that may have far-reaching consequences, the Supreme Court of India have decided that severe foetal abnormality can be a valid ground for the medical termination of pregnancy, even if the foetus is more than twenty weeks old. The Supreme Court granted a twenty four week pregnant woman and rape survivor the permission to go for an abortion in the case of *Ms. X v. Union of India*<sup>31</sup>. Here, it is pertinent to specify that the International Federation of Gynaecology and Obstetrics (hereinafter referred to as FIGO) recognises an ethical obligation to allow women to terminate a severely malformed foetus. FIGO emphasises that in such cases the decision to abortion should rest primarily on the parents.

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<sup>27</sup>WRIT PETITION (CIVIL) NO.17 OF 2017

<sup>28</sup>W.P. (C) 9793/2018

<sup>29</sup>W.P.(C) 431 of 2017, at 7, S.C.C

<sup>30</sup>Civil Appeal No.10463 of 2017

<sup>31</sup> Writ Petition(Civil) No. 81 of 2017

In *Vaishali Pramod Sonawane v. Union of India*<sup>32</sup> the Bombay High Court observed: “Although, sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971 put a cap of 20 weeks for permitting the pregnant woman to terminate the pregnancy, on consideration of Section 5, it would be logical to conclude that the contingencies referred in clauses (i) & (ii) of sub-section 2(b) of Section 3 will have to be read in Section 5 of the Act and as such in an exceptional case, the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks can be considered.”<sup>33</sup>

## **CONCLUSION**

On one hand, the judgments that liberally interpreted the law for abortion in the cases of foetal anomalies are a crucial victory for women who face such difficulties. It represents a growing trend of allowing access to abortion services post-20-week limit outlined in Section 3 of the MTP Act. On the other hand, women with similar conditions have been denied access to safe abortion services. Every woman who receives a diagnosis of severe foetal abnormalities will have to petition a court if she wants to terminate the pregnancy post-20 weeks due to absence amendments in the statute. Many serious foetal abnormalities cannot be diagnosed until after 20 weeks and in India, many women do not have ready access to the diagnostic tools necessary to check for abnormalities. If the 2014 or/and the 2016 proposed MTP Act amendment is considered and passed, women would not have to fight to terminate non-viable pregnancies in the High Court and the Supreme Court. Moreover, it will be a very progressive step towards a positive social change.

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<sup>32</sup>2019 SCC OnLine Bom. 932 (India)

<sup>33</sup> Id