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ABORTION - A PERSONAL DECISION, NOT A LEGAL DEBATE

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ABSTRACT

Abortion is an issue overshadowed and always been a taboo in our Indian Society. Women are the most precious gift given to us and her rights and decisions must be the prime concern for our country. Women should be given full authority with regards to her bodily rights and each one of us must respect their decisions.

This article with the help of different legislations, precedents, reports, case laws, newspaper reports and legal article aims at discussing some of the issues with regard to the abortion laws in India and how there is room of much improvement in the issue.

This article analyses the laws related to Abortion in India.

Keywords - Abortion, rights, laws, child, mother.

INTRODUCTION

“No woman can call herself free until she can choose consciously whether she will or will not be a mother.” - Margaret Sanger

Women in our Country don't have much right with regard to their own body and hence they are abstained from aborting the child. The reasons for pressurizing the women to keep the child mostly comes from their families. Human rights are the inherent and inalienable rights of every individual and there should be no discrimination with the rights of individual irrespective of the gender. Amongst the various rights, 'Right to Abortion' is also a universal right and every mother has a right to abort a child if she wishes so.

After the judgement of the “*Roe V Wade*” in 1973 by the U.S. Supreme Court,¹ in which the court declared that access to safe and legal abortion is a constitutional right. The right of abortion has legally sanctioned by most of the nations but many people are still against this. Though many countries are now legalising abortion but women are still facing a lot of problems with the same.

¹ Roe v. Wade, 410 U.S, 113, (1973)

MEANING AND HISTORY

An abortion is a procedure to end a pregnancy by using various means like medicines, surgeries etc. to remove the embryo or foetus and placenta from the uterus. This procedure is done by a licensed health care professional.

Generally, abortion has two broad classes-

1. Spontaneous or Natural abortion which is often called as the miscarriage. It is the natural death of an embryo or foetus before it is able to survive independently.
2. Induced or artificial abortion is and abortion performed by the pregnant women either by herself or by the help of some other person. It is an abortion that is brought about intentionally.²

The practice of Abortion has been known since ancient history. It has been prevalent since 450 BC. Until the 1900s, abortions were not allowed in many countries. In 1960, 15 countries legalised abortions. By the end of 1970s, 16 out of 50 states supported the abortion rights movement. In 1966, Shah Committee recommended legalising abortion in its report to prevent wastage of women's health which leads to the enactment of Medical Termination and Pregnancy Act, 1971 legalising abortion all over India. Later in 1973, the US Supreme Court's decision in "*Roe V Wade*"³ allowed abortions worldwide. On December 18, 2002 the Medical Termination of Pregnancy Act 1971 was amended for the first time.⁴ Later in years 2014, 2017, 2018 and 2019 the MTP Amendment Bill were drafted but not passed.

On March 17, 2020, the Medical Termination of Pregnancy (Amendment) Bill, 2020 was passed in the Lok Sabha.

LAWS GOVERNING ABORTION IN INDIA-

1. The Constitution of India

² <https://www.acog.org/patient-resources/faqs/special-procedures/induced-abortion>

³ *Id.*,1

⁴ Saurabhk9431, *A critical analysis on the abortion laws in India*, I PLEADERS, July14,2018.

The right of Abortion surely falls under the purview of *Article 21 of the Indian Constitution*. Article 21 talks about the Right to life and personal liberty to all the person within the National territory of the India except according to procedure established by law.⁵ Every person has a right to live with dignity and make free choices of their own. So according to Article 21 of the Indian Constitution, it is implied that every woman has a freedom of her own and make choices regarding her body.

2. The Indian Penal Code, 1860

Before 1971, *The Indian Penal Code, 1860*, declares induced or artificial abortion as illegal all over India. Section 312 of the Indian Penal Code, 1860 called this as the miscarriage that is intentional in nature. It applies to the woman who carries out miscarriage on purpose⁶. This section provides an exception and permits abortion only when it is justified for the good faith of saving the life of the mother.

3. Pre - Conception and Pre- Natal Diagnostic Technique Act (PCPNDT), 1994

There is no contradiction between PCPNDT and MTP act. *Pre- Conception and Pre- Natal Diagnostic Technique Act, 1994* is an act to stop the female foeticide in our Country. The Act outlaw sex-selective acts and prohibit prenatal diagnostic techniques for determination of the sex of the foetus, while on the other hand MTP Act, 1971 allows Abortions in India with certain conditions⁷. People have started misusing the PCPNDT Act and started using it as a weapon by law enforcement agencies to clamp down on all abortions. Doctors too are cautious of abortions due to the possibility of being prosecuted under the PCPNDT Act, which calls for severe punishment for offenders.⁸ The PCPNDT outlaws such medical action that is meant to determine the gender of an unborn child as long as the sex of the foetus is not known prior to the act of abortion it is completely fine.

The act of Abortion must be done according to the provisions of MTP Act and without knowing the pre- determination of the sex. Thus, it is imperative for law enforcement agencies

⁵ INDIA CONST. art. 21

⁶ INDIAN PENAL CODE, sec 312.

⁷ Vandana Prasad, *No Contradiction between PCPNDT and MTP acts*, ECONOMIC&POLITICALWEEKLY, March 7, 2015.

⁸ Supra note 4

to understand the purpose behind both the laws and apply accordingly without making any misconception.

4. Protection of Children from Sexual Offences (POCSO) Act, 2012

The Government of India enacted the Protection of Children from Sexual Offences (POCSO) Act, 2012 to prevent and address child sexual abuse. The Act makes it compulsory for the doctors to attending the termination of pregnancy of minors to report such case to the law enforcement agencies firstly and if they do not report these cases and go ahead with the abortion process, they are heavily prosecuted.⁹ As a result, they started going to clinics and institutions that do abortions illegally and might carry out abortions in an unsafe manner. The overlapping between the MTP

Act and the POCSO Act creates confusion and disruptions and it leads to denial of abortion services for young girls¹⁰. There is a severe need to look into the matter of this and as it is putting many lives of young girl at risk. There is a need for the amendment to the POSCO Act so that it does not clash with the MTP Act.

5. The Medical Termination of Pregnancy Act, 1971

The Medical Termination got the universal assent on 10th August,1971 when it was passed by both the houses of the Parliament. It is the sole legislation governing induced or artificial abortions in India. It allows legalization of abortion in India up to 20 weeks of pregnancy by a registered medical practitioner at a registered medical facility. After the 20 weeks an abortion is only allowed if the pregnancy poses a threat either to the mother or the baby's life but only after approval from the apex court.

Section 3 of MTP Act talks about the termination of pregnancy by a medical practitioner if he is of the opinion that the continuance of the pregnancy would involve a danger to the life of the pregnant woman or of grave injury to her physical or mental health or there is a substantial risk that if the child were born, it would suffer from abnormalities. The opinion made by the medical practitioner in the Section 3, must be in a good faith.¹¹If the length of pregnancy is

⁹ Supra note 4

¹⁰ Ms. Kerry Mach Broom, *does a provider have a legal duty to inform a authorities if a minor girl is pregnant*, IPAS DEVELOPMENT FOUNDATION.

¹¹ The Medical Termination of Pregnancy (*MTP*) Act, 1971, No. 34, Acts of Parliament, 1971 (India)

12 weeks or less, then the opinion of one registered practitioner is required, whereas in case of pregnancy extending 12 weeks but not more than 20 weeks, then the opinion of two registered practitioner is required.

Therefore, pregnancy of length extending 20 weeks can't be terminated by this route even if the above conditions are satisfied. There are some extraordinary situations which does not come in the purview of Section. 3. In these unexceptional cases, the only option left with victims is to file a petition in the High Court by for the termination of the pregnancy. The Court either can accept or deny the permission based on the opinion of a medical board constituted by it.

But as an advancement in technology and medicine takes place, amendment to MTP Act is needed. The Act must not be limited to married women only but to all the women. Advancement in medicine today allow for aborting the foetus even beyond 20-week period with no additional risks. The limit of abortion thus should be extended up to 24 weeks because sometimes abnormalities in a foetus can be detected only after 20 weeks. One more reason for the amendment is there is no provision or benefit to the rape victims who gets pregnant and sometimes they don't even aware of the fact that they are pregnant if it happens to a young girl.

Recently in *Mrs X vs. Union of India* Supreme Court allow to terminate a 22-week old pregnancy on the report of a medical board, which recommended that continuation of the pregnancy would gravely affect the woman's physical and mental health. The Court held that "*a woman's right to make reproductive choices is also a dimension of her 'personal liberty' under Article 21 of the Constitution*".¹²

In *Murugan Nayakkar vs. Union of India* the petitioner was a 13 years old girl and a victim of alleged rape and sexual abuse. She filed a writ petition for the termination of her pregnancy. The Supreme Court allowed the termination of a 31-week-old pregnancy of a 13-year-old rape victim held that "Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the trauma she is going through at present and above all the Medical

¹² Mrs. X vs. UOI, AIR 2017 S.C. 593 (India)

Report of Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed.”¹³

However, in *Savita Sachin Patil vs. Union of India* the Court rejected termination of a 27-week pregnancy of a woman. The Medical Board gave a finding that there was no physical risk to the mother but the foetus had severe physical anomalies. The Court then did not permit termination on the basis of Medical Board Report.¹⁴

All the cases of abortion of after 20th week that have come before Court, the court constitutes a medical board, which constitutes expert committee of medical profession that produce a report. The report address weather continuation of Pregnancy causes any mental and physical injury to the mother or the child would suffer from any mental and physical disabilities.¹⁵

MTP AMENDMENT BILL, 2020

After fighting a long battle, Lok Sabha has finally passed the Medical Termination of Pregnancy (Amendment) Bill 2020 on March 17,2020 which seeks to extend the gestation period of pregnancy from 20 weeks to 24 weeks for the special categories of women. The “special categories of women” include rape survivors, victims of incest, the differently Ables and minors, said by Health Minister Harsh Vardhan while moving the Bill.¹⁶The bill was first proposed by the Ministry of Health and Family Welfare (MOHFW) in 2014 following in 2017 and 2018, all of which previously lapsed in Parliament and now clear by the Lok Sabha. The Bill require further approval in the assuring session of the Parliament to form a revised act.

Key Features of the Bill-

1. No medical practitioners have the right to reveal the name and details of the women whose pregnancy has been terminated except to the person authorised by law.

¹³ Murugan Nayakkar vs. UOI, AIR 2017 S.C. 749 (India)

¹⁴ Savita Sachin Patil vs. UOI, 2017 S.C. 121 (India)

¹⁵ Shradha Thapliyal, *Abortion jurisprudence in the Supreme Court of India: Is it the woman’s choice at all*, CENTER FOR LAW & POLICY RESAERCH, Feb8,2109.

¹⁶ Special Correspondent, *Lok Sabha passes bill to raise limit for abortion till 24 weeks for special categories*, THE HINDU, Mar. 17,2020.

2. The bill increases the gestation period from 20 to 24 weeks for special categories of women such as vulnerable women including survivors of rape, victims of incest, differently-abled women and minors.
3. Pregnancy may be terminated by opinion of a single medical practitioner if the gestation period doesn't exceed 20 weeks and if the gestation period is between 20 weeks to 24 weeks than the opinion of two medical practitioner is required.
4. Upper gestation limit not to apply in cases of substantial foetal abnormalities diagnosed by Medical Board. The rules, procedure, functions and other details of Medical Board to be prescribed subsequently in Rules under the Act.
5. According to explanation 2 provided in section 3(2) of the Act where pregnancy occur due to contraceptive failure used by “only married woman or her husband”, now the Bill seeks to relax the contraceptive-failure condition for “any woman or her partner” allowing unmarried women to medically terminate the pregnancy.¹⁷

Need for the Amendment-

1. According to a study published in the Lancet Global Health, out of 15.6 million abortions occurred in India in 2015, 78% were carried outside health facilities which cause danger to women life and promote grey market in India.¹⁸ Though abortion was legalised in 1971.
2. 2015 study in the Indian Journal of Medical Ethics has observed that 10-13% of maternal deaths in India can be attributed to unsafe abortions.¹⁹ It roughly translates into at least six to seven women losing their life due to unsafe abortions every day. This bill helps in reducing Marital Mortality Rate.
3. Studies have shown that the 20-week gestation period limit on abortion is based on outdated medical concepts from the 1970s. Advancement in technologies and medical science which include medical abortion pills and vacuum aspiration which allow for safer

¹⁷ THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL, 2020 “introduced in Lok Sabha on 2nd March 2020”

¹⁸ Himani Chandna and Debayan Roy, *Indian women set to get right to abort pregnancy in 6th month, instead of 5th*, THE PRINT, Jan. 29, 2020.

¹⁹ Smriti Irani, *Its gender justice: Amendment to MTP act will align the reproductive rights of women with 21st century medicine*, TOI, Jan 31,2020.

abortions in advanced stages of pregnancy. “Science has moved on. Now, Pregnancy can be terminated up to 24 weeks,” said Indian Medical Association Secretary RV Asokan.²⁰

4. The amendment is significant because in the first five months of pregnancy, some women realise the need for an abortion very late. Usually, the foetal anomaly scan is usually done during the 20th-21st week of pregnancy. If there is a delay in doing this scan, and shows a sign of lethal anomaly in the foetus, 20 weeks is limiting.²¹
5. A woman now has the legal recourse if the pregnancy has gone over 20 weeks to terminate because the judicial process is slow that victim’s pregnancy crosses the gestation period and she is unable to get the abortion done. “Once the amendments to the MTP Act got pass, women would not be forced to move the highest court for permission for termination.
6. Globally, as per the data of 2010-14, 73% of abortion were obtained by married women and 27% were unmarried women.²² One can’t ignore the data of unmarried woman abortion. Well, the following amendment help the unmarried women to have their abortion legally.

Drawbacks of the Amendment-

1. The act has enhanced the gestation limit for legal abortion from 20 weeks to 24 weeks for the special category of women only. There is no provision for the remaining women who do not fall into this category which state that they would not be able to seek abortion beyond 20 weeks, no matter they suffer from grave mental and physical injury due to the pregnancy.
2. At all stages of abortion, weather the abortion has to carried out or not, the final call of medical practitioner will be valid only, not the women who herself seeking abortion has the autonomy for the same.²³

It is a step towards safety and well-being of the women which helps them to have a safe and legal abortion services on therapeutic, eugenic, social and humanitarian grounds. The Ministry of Health and Family Welfare proposed amendments after consultation with various stake holders and several ministries. The new MTP (Amendment) Bill, 2020 further empower women, especially

²⁰ Rohan Gupta, *Abortion in India: Experts call for changes*, DOWN TO EARTH, Aug. 27,2019.

²¹ *A deliverance: On pregnancy termination Bill*, THE HINDU, Jan. 31,2020.

²² [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(17\)30453-9/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(17)30453-9/fulltext)

²³ Ayushi Agarwal, *Seeking a more progressive abortion law*, THE HINDU, Feb. 10,2020.

those who are vulnerable and victims of rape. The Government needs to ensure that all norms and standardised protocol in clinical practice to facilitate abortion are followed in health care institutions across the country.

SOCIETY PERSPECTIVE

1. Male's Ego

One can't ignore the fact that we live in a male dominated society where not wearing condom for their satisfaction is more important for them rather than respecting their partners body. According a report, latest figures produced by Family Planning 2020 reveal that female sterilisation of the contraceptive methods comprises 74.4% while male sterilisation is mere 2.3%. It shows that more than 86% of the time, it's the women taking the burden of birth control and generally male refuse to wear condom because of lack of pleasure for him and after that women will remain with no option rather than to take birth contraception pills like I-Pill and insert Copper-T etc. It is a high time for male to understand that women's body is neither a rag doll nor a Battleground.²⁴

2. Unmarried Women

Unmarried Motherhood in our society is looked on as violation of cultural norms. This result in mental stress on pregnant unmarried women as she deals with anxiety of getting safe abortion done and at the same time fear of family getting knowledge that she was sexually active. In India, social taboo and lack knowledge of MTP act lead unmarried women to have illegal and unsafe abortion, although they are legal.²⁵ Typical reactions upon this recognition were fear, anxiety and guilt, reported by 70%, 80% and 18% of the unmarried young women, and 14%, 44% and 3% of the married, respectively.

²⁴ Nicola Desouza, *Abortion and Contraception in India: the role of men*, OPEN DEMOCRACY, (July 26,2016) <https://www.opendemocracy.net/en/5050/abortion-in-india-what-men-say/>

²⁵ Soumya Gupta and Isha Trivedi, *Attitudes to Abortion putting women at risk of exploitation*, LIVE MINT, Nov. 17,2017.

3. **Feminist**

The women's movement in India has been battling since the late 1980's. Feminist see this as necessary because pregnancy and child raising are the sole responsibility of women. They should therefore, have the right to choose when and under what circumstances to bring a child into the world and to take care of their bodies and lives. In India abortion has been legal since the Medical Termination of Pregnancy (MTP) Act of 1971, which has been passed not because of feminist concerns, or concern for women, but as a method to control population.²⁶ The only goal of an ideal feminist world is that they have greater control over unwanted pregnancy, and have autonomy on their own body.

4. **Rural Society**

It is fact of class battle that Abortion is illegal only for the poor women. The rich women have recourses to interrupt their unwanted pregnancies, either they know a doctor who perform abortion, capable to purchase expensive medicines and can travel to the place where abortion is legal. Laws restricting access to abortion may lead to worst financial crises for the poor women. Research shows that the poorest, the uneducated, those living in rural or remote areas, and adolescents encounter greater barriers to accessing skilled birth attendance and are likely to undergo unsafe abortion when they want to terminate a pregnancy.²⁷

CONCLUSION

After 50 years, the Medical Termination of Pregnancy Bill, 2020 has been amended but still we have a long way to go with regard to women's right with abortion. The law makers must strive to make 'Induced Abortions' less conditional, more liberal and according to the will of the pregnant women so that they can make free choices with her body. Sometimes there are unordinary situations in which women became pregnant. For example, if we enforce a decision on the rape victim or some unaware teenager to continue with the pregnancy, she might face post child birth

²⁶ Nivedita Menon, *Abortion as a feminist issue*, OUTLOOK, May12,2012.

²⁷ https://www.popcouncil.org/uploads/pdfs/2014STEPUP_IndiaCountryProfile.pdf

depression or she might not be able to take good care and well-being of the child. There is no sense in continuing a pregnancy where the mother is unwilling to accept the child. All the pregnant women irrespective of caste, class or religion must be given full authority to exercise their rights. The law also focuses on making abortions safer and more affordable to all.