



Medical termination of pregnancy in India: Right vs. privilege

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Abstract

Abortion has been a common practice in our society for a very long time and has evolved to take on numerous forms in political, social, and cultural contexts. One segment of society believes that abortion is a woman's human right, making it a contentious issue in developing nations like India and South Africa. In certain countries, constraints on this human right are made in the name of the "right of the mother to health," while in other nations, restrictions are made in the name of the "right of the embryo to life," leading to an increase in female feticide as well as moral and social restrictions. In order to encourage a greater preference for and access to safe abortions in India, the Medical Termination of Pregnancy (Amendment) Act, 2021, was developed with a noble and liberal goal. Furthermore, it aimed to raise awareness of women's bodily autonomy and reproductive rights. While the earlier MTP Act of 1971 was substantively progressive, the most recent revision aimed to modify Indian abortion law to reflect social and humanitarian issues that have been gaining momentum globally.

The Medical Termination of Pregnancy (Amendment) Act of 2021 amends the MTPA of 1971 by extending the legal term of abortion for some women from 20 to 24 weeks. The amendment increases the maximum gestation period for some groups of women from 20 to 24 weeks. These groups, which would be listed in the MTPA 2021, include rape survivors, incest victims, and other vulnerable women (such as women with disabilities and minors), among others.

Keywords: Medical termination, political, social, and cultural, contentious issue

Introduction

Recently, the U.S. Supreme Court overruled the American women's constitutional right to abortion, which was given in the case of *Roe v. Wade*^[2] and gave the power to states to make legislation on abortion either to regulate it or permit it^[3]. The major states in the United States are affected by the conservative and orthodox Christian mindset, so they are in the process of making abortion illegal in their states^[4].

Women in any country, developed or underdeveloped, are susceptible to the problem of unplanned pregnancy. The contentious right to abortion has been argued in national and international forums of various countries. Although abortion is prohibited by several religions, there are additional controversial issues that raise serious moral and ethical issues, including infanticide and the rights of women. Nonetheless, the concern of whether the mother has the right to an abortion or the kid has a right to life persists. Even in nations where abortion has long been legal, such as India, the United States, or South Africa, many ethical, philosophical, and scientific concerns remain unanswered, and the morality of using it is still viewed as controversial, contentious, and in doubt. The right to gender equality guaranteed by the constitution is directly impacted by the illegality of abortion. A contentious argument exists between the overlapping fields of law and morality at the same time. Not to mention that it illustrates the necessity of striking a compromise between the two sets of competing rights to prospective life and mothers. It is obvious that there are two sects with two distinct ideologies: pro-choice, which supports the autonomy and privacy of the woman, and pro-life, which promotes the right to life of the foetus. The question of legitimacy in this way inexorably leads to the evaluation and subsequent distribution of the various rights, and it symbolises a conflict between the "right to premature end vs. right to birth" under the right to life. The

debate over legalisation in this way inevitably leads to an evaluation and subsequent distribution of the various rights, and it symbolises a conflict between the "right to abort against the right to birth" under the right to life.

The most basic and inclusive principle is the right to life. Article 21 of Part III of the Indian Constitution, which states that "*No individual shall be deprived of his life and personal liberty except procedure established by law*," guarantees the right to life. The right to an abortion is one of the many recognised and available rights to a woman, and it falls under the category of the right to privacy, which is a subset of the right to personal liberty and is derived from the right to life.

Global policymakers have long struggled with the issue of whether a mother's life is more valuable than that of an unborn child. Anti-abortion advocates, who frequently hold conservative opinions that are frequently based on a narrow interpretation of religious doctrine, have consistently backed anti-abortion legislation. For instance, abortion has recently been prohibited from conception onward in the Republican State of Alabama in the United States. Similar to the United States, Ireland has recently pondered repealing the ban on abortion despite being progressive on other social fronts. Abortion's moral ramifications have proven complicated. Both pro-choice and anti-abortion advocates have made strong cases for allowing or forbidding abortion. The majority of pro-life campaigners have defended the restrictions on the grounds of the unborn child's sanctity of life and the social stigma attached to abortion, which is decried as a "killing" in many nations. Since most religions forbid abortion due to immorality, religious movements and scholars have acted as a barrier to abolishing bans. Even though abortion is legal in many countries around the world, societal stigmas and a lack of legal knowledge force women to choose risky procedures that endanger their health and

lives. Due to the risks involved with late-term abortions, abortion was traditionally restricted to a set trimester. However, thanks to tremendous technological improvement, it is now possible to have an abortion without risk using surgical techniques. So, in an ideal world, a mother's agreement is required for an abortion to be legal at any point in the pregnancy. But, India's legal system has yet to acknowledge a woman's complete exercise of physical autonomy. By legalising abortions at any stage on the grounds of foetal abnormality and raising the upper gestational limit for obtaining abortions, the recent amendment to the MTP Act made a significant contribution to expanding access to safe abortions. Yet, it did not fully accomplish gender fairness. Inadequate abortion supervision throughout India, gaps in the law, and widespread medical and legal illiteracy among the populace are all current issues. The current framework on abortions has shown to be insufficient to deal with the practical realities of a culture that is primarily rural and developing.

Historical background

Looking back at India's abortion regulations, we can see that they were unable to prevent unlawful abortions prior to the Medical Termination of Pregnancy Act of 1971 (MTPA). Before the Medical Termination of Pregnancy Act, it was estimated that almost 500 million abortions were performed annually, of which nearly three million were back to the street. The lack of sufficient evidence to support this is the main challenge in dealing with it. Only a medical examination can establish that pregnancy has been aborted, and under the 1973 statute, the accused cannot be made to give the report. In actuality, the ladies who are implicated will likewise refuse to file the report^[5].

We must look back in time to understand how people's attitudes against abortion have changed over time and how the Medical Termination Pregnancy Act came to be in order to fully comprehend the need for this law.

The Central Planning Board of the Government of India suggested the idea of family planning measures in 1964, which marked the beginning of the fundamental shift in mindset. The government feared that religious organisations or their leaders would begin to demonstrate against the liberalisation of the law^[6].

In order to evaluate the existing colonial law, which prohibited any induced act of miscarriage under Section 312 of the Indian Penal Code, Maharashtra Health Minister Shri Shantilala Shah established a Central Planning Committee in 1964.

In 1966, the committee presented a report calling for the repeal of Section 312 of the Code and the creation of a separate law to address abortions. This resulted in the Medical Termination of Pregnancy (MTP) Act, 1971, which was a special piece of legislation pertaining to abortion.

The number of approved abortion facilities and the number of abortions reported by those facilities only slightly increased (8–10%) in the first decade following the legalisation of abortion, from 1972 to 1986. In contrast, the number of abortions reported in facilities that had been approved decreased in the late 1980s and early 1990s. Around two-thirds of permitted facilities in 1997 were located in urban areas, highlighting the persisting grave disparity in access to approved abortion facilities between urban and rural areas in a nation that is still predominately rural. Less than 10% of the estimated total number of

abortions was reported to the authorities in the middle of the 1990s. It is uncommon and unreliable to find data on abortions performed outside of authorised facilities. Speculative estimates from the early 1990s through more recent years have ranged from 2 to 11 illegal abortions conducted for every legal abortion^[7].

The Medical Termination of Pregnancy Act, 1971

A registered allopathic medical practitioner is fully protected by the MTP Act (No. 34 of 1971) from any legal or criminal action for harm caused to an abortion-seeking woman, provided that the abortion was performed in accordance with the Act's requirements in good faith^[8]. The Act permits the termination of a pregnancy up to 20 weeks of pregnancy if the medical practitioner is formed an opinion in good faith that continuing the pregnancy would amount to a risk to the life of the pregnant woman or any grave physical or mental health or there is a substantial risk that if the child were born he or she would suffer any serious physical or mental abnormality^[9]. In the case where the length of pregnancy exceeds twenty weeks but does not exceed twenty-four weeks opinion of at least two registered medical practitioners is required^[10].

Criteria and procedures for approval of an abortion facility are governed by the Medical Termination of Pregnancy Rules and Regulations 1975. This regulation provides for various definitions, approval of a place for abortion, procedure for application approval of a place for abortion, rules for inspection of a place, cancellation or suspension of a certificate of approval, and form of consent.

Abortion Law Reforms

India has made a commitment to upholding the human and reproductive rights outlined in numerous international forums. After a long discussion and consultation process, India enacted the Medical Termination of Pregnancy (Amendment) Act, 2002 and amended rules and regulations in 2003. The amendment to the Act decentralised the authoritative approval for the facilities to the abortion place from the state level to the District Committee^[11]. After the Amendment to the Act now District Committees are empowered to approve and regulate abortion facilities. Amendment to the Act also prescribed stricter punishment for the medical termination performed at a place not authorised under the Act or the abortion performed by a medical practitioner who is not authorised under the Act^[12]. The Medical Termination of Pregnancy Act was again amended in 2021. The landmark judgment of *Nikhil Datar v. Union of India*^[13], where the court allowed the termination of pregnancy at 24 weeks due to complications in the foetus as the foetus was suffering from anencephaly, in which the brain of the foetus was almost not developed. In this case, the Apex Court, for the first time, allowed the termination of pregnancy beyond 20 weeks.

In 2021 the Medical Termination of Pregnancy Act was further amended and came into force with effect from 24th September 2021. The amendment to the Act makes the termination more contemporary. This amendment made a major change to the Act as it allowed unmarried women to terminate their pregnancy^[14]. The amendment also allowed all women to terminate pregnancy on the advice of one doctor, and special categories of women, like minors, disabled, victims of rape, etc., can seek termination of pregnancy up to 24 weeks^[15]. The Amendment Act also

mandated to constitute medical boards in all the state and Union territories. It is the duty of the medical board to decide the termination of pregnancy beyond 24 weeks ^[16]. Section 4 of the Amendment Act states that the medical practitioner cannot disclose the details of the women to anyone except the person authorised by the law.

But, the MTP (Amendment) Act, 2021 as discussed earlier, is available to only special circumstances, which limits its application. It should not be narrowed by giving the name of only special circumstances ^[17].

Medical Termination of Pregnancy: A Right or Privilege?

When we see the preamble of the Medical Termination of Pregnancy Act, we see that it uses the word “termination of certain pregnancies”; therefore, this Act only liberalises certain pregnancies which are permitted by this Act. In the case of *Suchita Srivastava v. Chandigarh Administration* ^[18], the Apex Court has recognised the “Best Interest Test”. The court discussed the most prudent course to be followed in the best interest of the victim-

Her physical status poses no major physical contraindications to continue with the pregnancy. The health of foetus can be monitored for any major congenital defects. Her mental state indicates limited mental capacity [intellectual, social adaptive and emotional capacity] to bear and raise the child. Social support and care for both the mother and the child is another crucial component. Therefore, any decision that is taken keeping her best interests in mind as well as those of her unborn child - has to be based on the holistic assessment of physical, psychological and social parameters.

The court is required to identify the legal claims that would protect the interests of the parties in question.

In the case of *X v. State* ^[19], the court observed that in the situation when a woman undergoes sterilisation operation resulting in unwanted pregnancy, she cannot be compelled to bear a child as it would have an impact on the physical and mental health of the woman. Justice S.P Garg, in this case, observed that The prosecutrix is often a major who is aware of the repercussions of her acts, and if she consents after taking future potential mental, social, and economic issues into account, she should be permitted to end the pregnancy based on her express willingness.

In the case of *Meera Santosh Pal v. Union of India* ^[20] the Apex Court allowed the termination of pregnancy by observing

A pregnancy can be terminated only when a medical practitioner is satisfied that a continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to mental or physical health or when there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

In the case of *Ayesha Khatoon v. Union of India* ^[21], there were several foetal abnormalities, and the court in this permitted her to undergo medical termination of pregnancy at a medical facility of her choice in the interest of justice.

In *Suchita Srivastava v. Chandigarh Administration* ^[22], the court held that a woman’s right to make a reproductive

choice is essentially a facet of personal liberty as guaranteed under Article 21 of the Constitution of India.

In the case of *Mamta Verma v. Union of India* ^[23] the court unequivocally pronounced that the freedom to make reproductive choices is a facet of women’s personal liberty.

Inter-Relationships with other legislations

The MTP Act and PCPNDT Act, 1994

In response to the increase in sex-selective abortions, the Pre-Conception and Pre-Natal Diagnostics Techniques (Prohibition of sex selection) Act, 1994, was enacted to prevent the sex-selective termination of pregnancy in India. The objective of the Act is to prohibit sex selection before or after conception and to regulate pre-natal diagnostic techniques ^[24]. The Act regulates genetic counselling centres, genetic laboratories and genetic clinics. This Act prohibits the same for conducting or helping in conducting activities relating to pre-natal diagnostic techniques ^[25]. Section 3A of this Act prohibits sex- selection.

The MTP Act and the POCSO Act, 2012

When the situation of pregnancy of a minor is caused due to sexual offences such as rape or otherwise in that situation, the POCSO Act 2012 plays an important role. Where the MTP Act requires the medical practitioner to protect the identity of the patient, at the same time POCSO Act mandates that anyone who witnesses a sexual act involving a child under the age of 18 years must report it to the special juvenile police unit or the local police failing which they may be prosecuted.

The MTP Act, 1971 and the IPC, 1860

In India, there is no specific legislation governing endoscopy, bariatric surgery, or open heart surgery. These are in the hands of experts with specialised clinical expertise. Similarly, rather than being guided by law, if sections 312 to 316 of the Indian Penal Code 1860 were deleted and the MTP Act were not enacted in that case medical matters regarding abortion would be left in the hands of those with specialised clinical understanding. In this regard, Justice RM Sahai and Justice BL Hansaria, in the case of *Jacob George v. State of Kerala* ^[26], observed-

After the enactment of the MTP Act 1971, the provisions of the Penal Code relating to miscarriage have become subservient to this Act because of the non-obstante clause in section 3, which permits abortion/miscarriage by a registered practitioner under certain circumstances

Conclusion

Near about 67 percent of abortions in India are classified as unsafe, and eight women die due to unsafe abortion every day ^[27]. The laws relating to medical termination of pregnancy have undergone various changes; however, Medical termination of pregnancy is still not a right but a privilege. The Act allows termination of pregnancy only on the medical grounds when the medical practitioner forms their opinion that there are circumstances affecting women’s life or physical or mental health in jeopardy. The progressive amendments to the Act now allows termination of pregnancy on some humanitarian ground (though the word humanitarian is not used) when the pregnancy is of the result of sexual offences such as rape or otherwise. The new amendment to the Act also allows unmarried women to

terminate their pregnancy. As we know that no statute should be read in isolation, the same applies to the MTP Act 1971 as it also intertwined like a quad-helix with the Pre-Conception and Pre- Natal Diagnostics Techniques (Prohibition of sex selection) Act, 1994, the protection of Children from Sexual Offences Act, 2012 and the Indian Penal Code specifically Sections 312 to 316 of the code. Despite being, these various laws, India is in 135th position out of 145 countries in the Global Gender Gap Index, 2022, which remind that the country should do all things to facilitate ease of living for women. Access to safe abortion for women is an important effort to enable women to direct the course of their own lives.

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