



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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The Medical Termination of Pregnancy (Amendment) Act, 2021: nominally progressive or profoundly liberal?

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Received 28 May 2021; Accepted 09 June 2021; Published 11 June 2021

The long-standing debate between pro-choice i.e., the right of women to make independent decisions concerning abortion and pro-life i.e., the compelling interest of the State to protect the life of a foetus has lately gained momentum in India post the amendment to the Medical Termination of Pregnancy Act, 1971. While the amendment has garnered praise and received support to an extent, it is not immune from deficiencies. It continues to lack a rights-based approach to the practice of abortion and does not recognize the right to abortion as an elementary reproductive right. The surging incidents of sex crimes in the country have resulted in a pressing need for the law to be inclusive of all victims and remove the conditionality attached with it. The idea of laying down specific conditions when abortions are exclusively permissible is problematic and deprives women of their bodily autonomy. Research reports have testified to the inaccessibility of safe abortion facilities due to healthcare infrastructural inadequacies which have compelled women to rely on unsafe methods. As much as abortion is a sensitive issue, it is stigmatized. Law is a dynamic field and needs to be revisited when it becomes obsolete so that it can be efficiently used for the betterment of society. This paper attempts to analyze the positive and negative aspects of the recently passed Medical Termination of Pregnancy (Amendment) Act, 2021. It also provides a set of suggestions that can be considered for further amelioration of the law to end the struggle of the stakeholders and make it truly beneficial for them.

Keywords: *abortion, foetus, gestation.*

INTRODUCTION

Abortion is a practice that stands criminalized under Sec 312 of the Indian Penal Code, 1860 until it is carried out in good faith for the saving the life of the woman.¹ The Medical Termination of Pregnancy Act, 1971² (hereinafter referred to as MTP Act, 1971) is an exception that permits the termination of pregnancy by women under certain specific conditions through a procedure authorized by law. The MTP Act, 1971 was amended for the first time in 2002³ followed by the Rules of 2003. The Medical Termination of Pregnancy Act, 2021⁴ (hereinafter referred to as MTP Act, 2021) is the latest amendment to the five-decade old parent Act. Interestingly, it had lapsed thrice when introduced previously in 2014, 2017 and 2018.⁵ The Bill was introduced in the Lok Sabha by Dr Harsh Vardhan, Minister of Health and Family Welfare, on 2nd March 2020.⁶ It received approval from the Lok Sabha on 17th March 2020, from the Rajya Sabha on 16th March 2021⁷ and the assent of the President of India on 25th March 2021.⁸ It brings along a handful of much-needed and long-sought-after amendments that give it a more progressive outlook. Nevertheless, it fails to renew some core aspects which need serious rethinking and correction by lawmakers.

AMENDED PROVISIONS

The MTP Act, 2021 has engendered some changes, many of which have been lauded by the stakeholders. However, it is not exempted from its share of fair criticism. The permissible upper limit for termination of pregnancy has been enhanced from the previous maximum limit of 20

¹ Indian Penal Code 1860, s 312

² Medical Termination of Pregnancy Act 1971

³ Medical Termination of Pregnancy (Amendment) Act 2002

⁴ Medical Termination of Pregnancy (Amendment) Act 2021

⁵ Ayushi Agarwal, 'Seeking a more progressive abortion law' (*The Hindu*, 10 February 2020)

<<https://www.thehindu.com/opinion/op-ed/seeking-a-more-progressive-abortionlaw/article30777394.ece>> accessed 20 May 2021

⁶ Dipika Jain, 'Proposed Changes to Abortion Law Continue to Sideline Pregnant Persons' (*The Wire Science*, 15 March 2020) <<https://science.thewire.in/health/proposed-changes-to-abortion-law-continue-to-sideline-pregnant-persons/>> accessed 20 May 2021

⁷ 'Rajya Sabha passes The Medical Termination of Pregnancy (Amendment) Bill, 2021' (*PIB Delhi*, 17 March 2021) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1705381>> accessed 20 May 2021

⁸ 'Medical Termination of Pregnancy (Amendment) Act, 2021 gets Presidential assent' (*Bar and Bench*, 26 March 2021) <<https://www.barandbench.com/news/litigation/medical-termination-of-pregnancy-amendment-act-2021-gets-presidential-assent>> accessed 20 May 2021

weeks to 24 weeks⁹ of the duration of pregnancy. Unlike the previous law, for termination of pregnancy within 20 weeks of gestation, the requirement has been limited to the opinion of one registered medical practitioner and two practitioners where the length of pregnancy exceeds 20 weeks but not more than 24 weeks. Further, the Act has amended one of the conditions under which termination is permissible. In case of substantial risk to the child, pregnancy can now be terminated if the child born could suffer from any serious physical and mental abnormality¹⁰ and not necessarily an abnormality where it would be seriously handicapped.

Additionally, a previously non-existing body called the Medical Board comprising a Gynaecologist, a Paediatrician, a Radiologist or Sonologist and some other members has been established. The provisions enumerating the gestation limits within which pregnancy may be terminated will not apply to situations where the termination is necessitated by the diagnosis of any substantial foetal abnormality by the Medical Board. Another welcome change is the inclusion of the words “any woman or her partner” instead of “any married woman or her husband”¹¹ in the explanation clause defining conditions such as contraceptive failure under which a termination may be permitted. Lastly, for the protection of privacy of a woman who undergoes such termination, the Act criminalizes the revelation of details of the woman to any person who is not authorized by law.¹²

POSITIVE DEVELOPMENTS

The changes have gone a step further in making India a more liberal nation in terms of its abortion policies, unlike several other countries. 24 countries globally prohibit abortion altogether while 42 allow it only when the woman’s life is at risk. 72 countries (with varying gestational limits) allow abortion upon request. India falls in the fourth category (a step below the most liberal nations) of countries that allow abortion in a range of circumstances based on broad economic and social grounds.¹³ The increase in the lawful time bar for termination from

⁹ Medical Termination of Pregnancy (Amendment) Act 2021

¹⁰ *Ibid*

¹¹ Medical Termination of Pregnancy Act 1971, s 3(2)

¹² Medical Termination of Pregnancy (Amendment) Act 2021, s 5(A)

¹³ ‘The World’s Abortion Laws Interactive Map’ (*Centre for Reproductive Rights*, 23 February 2021)

<<https://maps.reproductiverights.org/worldabortionlaws>> accessed 20 May 2021

20 to 24 weeks deserves appreciation. The group of women who were earlier excluded for exceeding the set limit of 20 weeks will now possess the legal right without having to approach the judiciary. The availability of the option beyond 24 weeks on the recommendation of a Medical Board in case of substantial fetal abnormality has largely minimized the physical, psychological and financial burden of women who no longer have to file writs in courts and go through prolonged court-related procedural hassles to obtain a sanction for the same.¹⁴

Previously, medical boards were formed by courts on a case-to-case basis.¹⁵ Moreover, at times, they would consist of doctors who had no experience in gynaecology or such other specialization as is required for making decisions regarding abortions.¹⁶ The establishment of medical boards as statutory bodies with a pre-determined composition will aid in fast-tracking the process of decision making. The progressive movement of permitting the inclusion of unmarried women and their partners as legitimate parties when seeking an abortion has further widened the scope of the original Act.¹⁷ It is a key move that enables the law to be at par with the socio-cultural changes. A direct consequence of these measures would be increased access of women to safe abortion services. This would further address the maternal mortality and morbidity arising from unsafe abortions since a greater section of women will be willing and eligible to resort to legal methods.¹⁸ Lastly, it will cater towards the fulfilment of India's commitment to the Sustainable Development Goals 3.1(reduction of global maternal mortality

¹⁴ Prachi Dutta, 'Women and the Law: An Analysis on the medical termination of pregnancy law in India vis-à-vis the Medical Termination of Pregnancy Act, 1971 and the Medical Termination of Pregnancy (Amendment) Bill, 2020' (SCC Online, 9 January 2021) <<https://www.sconline.com/blog/post/2021/01/09/women-and-the-law-an-analysis-on-the-medical-termination-of-pregnancy-law-in-india-vis-a-vis-the-medical-terminatcion-of-pregnancy-act-1971-and-the-medical-termination-of-pregnancy-amendment-bill/>> accessed 21 May 2021

¹⁵ *Ibid*

¹⁶ Meenaz Kakalia, 'Abortion in India- still not a right but a privilege' (*The Leaflet*, 3 May 2021) <<https://www.theleaflet.in/abortion-in-india-still-not-a-right-but-a-privilege/>> accessed 21 May 2021

¹⁷ Adarsh Kumar, 'Medical Termination of Pregnancy (Amendment) Act 2021: A Legislation of Fettered Autonomy' (*Manupatra*, 5 May 2021) <<http://www.manupatrafast.com/articles/ArticleSearch.aspx?sub=Right+To+Information#>> accessed 21 May 2021

¹⁸ Chitra Subramaniam, 'India's new abortion law is progressive and has a human face' (*Observer Research Foundation*, 7 March 7 2020) <<https://www.orfonline.org/expert-speak/india-new-abortion-law-progressive-human-face-62023/>> accessed 21 May 2021

ratio), 3.7(universal health coverage) and 5.6(universal access to sexual and reproductive health and reproductive rights).¹⁹

COMPLICATIONS AND DEFICIENCIES

The amendments are not only deficient but also create ambiguity and leave unanswered questions that can create hindrances at different stages of implementation. Although the MTP Act, 2021 has enhanced the upper limit of gestation within which abortion may be sought and granted, however, it is silent on the question of the group of women who can seek abortion between 20-24 weeks. It has left it to be answered by the rules that will be made by the government.²⁰ Till the time the government fulfils this obligation, women will remain in dilemma or will have no other option but to knock on the doors of the courts. For cases involving rape victims, the provisions do not clarify whether termination can be sought during the pendency of the case or only after trial.²¹ Such vagueness can result in delay causing the person to lose the right if the time bar is crossed. The only possibility for termination to happen post 24 weeks is when the Medical Board diagnoses “substantial foetal abnormalities”.²² Therefore, those women who wish to terminate pregnancies beyond 24 weeks for other reasons such as rape have no recourse but to file a writ petition before the court.

Such distinct categorization of cases of “serious mental and physical abnormality” and “substantial foetal abnormalities” reflects prevailing social prejudices towards persons with special requirements. It gives a touch of eugenism and imposes an ableist outlook on the law. The Medical Boards constituted by the Act have not been prescribed a time frame within which they should ideally be able to arrive at a consensus concerning the state of the foetus. The fact that the MTP Act permits termination within a pre-determined time limit shows the crucial role

¹⁹ 'India's amended law makes abortion safer and more accessible' (*World Health Organization*, 13 April 2021) <<https://www.who.int/india/news/detail/13-04-2021-india-s-amended-law-makes-abortion-safer-and-more-accessible>> accessed 22 May 2021

²⁰ 'The Medical Termination of Pregnancy (Amendment) Bill, 2020' (*PRS Legislative Research*) <<https://prsindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020>> accessed on 22 May 2021

²¹ Anushka Kumari, 'Abortion Laws in India' (*Burnished Law Journal*, 2020) <<http://burnishedlawjournal.in/wp-content/uploads/2020/11/Abortion-Laws-in-India-by-Anushka-Kumari.pdf>> accessed 23 May 2021

²² *Ibid*

of the time factor in matters about pregnancy. Therefore, not specifying the time frame can result in difficulties and cause irreparable damage to the pregnant woman. Further, having a single Medical Board in every state can strongly hinder access to them. Women, especially from the marginalized and rural communities, may have to bear heavy costs for meeting the tedious requirements. Consequently, they may resort to illegal and precarious methods. The boards, as observed in the past, sometimes provide moral opinions along with scientific arguments and go to the extent of considering factors like the viability of the foetus thus not truly serving the purpose they were constituted for.

Another major flaw in the law is its restrictive provider base. The Act permits abortion to be performed exclusively by doctors with specialisation in Gynaecology or Obstetrics.²³ However, the concentration of such qualified doctors is maximum in urban areas. Data from Rural Health Statistics (2019-20) has shown that there is a shortage of 3611 Obstetricians and Gynaecologists i.e., a whopping shortfall of 69.7% at Community Healthcare Centres (CHCs) in rural areas as compared to the requirement for existing CHCs. The position of specialists manpower at CHCs reveal that out of the total sanctioned posts, 1949 seats i.e. 56.1% of the posts of Obstetricians and Gynaecologists are vacant.²⁴ In addition to that, most public healthcare institutions lack the infrastructure required to provide abortion services. Data from National Health and Family Survey (2015-16) suggests that only 20% of abortions take place in public sector facilities and 52% in private.²⁵ As a result, women are compelled to seek these services from private facilities which, owing to their exorbitant charges, remain out of reach for those coming from economically weaker backgrounds. Having no recourse, they unwillingly resort to risky and illegal alternatives. Abortion data show that, according to statistics, the majority are done by a

²³ Shamira Sibal, 'Amendments We Should Be Asking For in the Medical Termination of Pregnancy Bill' (*The Wire*, 14 July 2020) <<https://thewire.in/women/medical-termination-of-pregnancy-bill-amendments>> accessed 24 May 2021

²⁴ Table 21, Section V, Part 2, 'Rural Health Statistics (2019-20)' (*Statistics Division, Ministry of Health and Family Welfare*) <<https://main.mohfw.gov.in/sites/default/files/HealthandFamilyWelfarestatisticsinIndia201920.pdf>> accessed 24 May 2021

²⁵ 'National Family Health Survey (NFHS-4) (2015-16)' (*Ministry of Health and Family Welfare*) <<http://rchiips.org/nfhs/nfhs-4Reports/India.pdf>> accessed 24 May 2021

licenced doctor (53 per cent) and the rest is completed by a nurse, auxiliary nurse midwife, dai, family member, or self (47 per cent).

Unsafe abortion is the third-largest cause of maternal mortality in India, and it causes 8% of all maternal fatalities. Abortion was allowed in India in 1971, yet unsafe abortion persists as the country's third-largest cause of maternal mortality. Ten women die every day from reasons associated with unsafe abortion, and countless more experience serious lasting damage as a result. The Lancet's findings, published in 2015, show that 15.6 million abortions were performed in 2015, accounting for around one-third of all pregnancies (as defined by the research). approximately 22% of 3.4 million abortions (or 3.4 million of the 22%) were obtained in health facilities, approximately 73% of 11.5 million (or 11.5 million of the 73%) were medication abortions, and 0.8% of 0.8 million (or 0.8 million of the 5%) were obtained outside of health facilities using methods other with medication abortion. This also suggests that out of all the 78% of abortions in 2015, over half were obtained outside of medical institutions. Overall, 12.7 million (81 per cent) of the abortions were done using the medicine, 2.2 million (14 per cent) were done using surgical techniques, and just 0.8 million (5 per cent) were done using other procedures that are believed to be hazardous. According to the 2.2 million (21%) abortions obtained in public sector facilities, the percentage of abortions obtained in health facilities that take place in public sector facilities was 22% of the total, whereas in private sector facilities the percentage was 73%, and only a small percentage of the abortions obtained in private sector facilities take place in nonprofit facilities. The study shows how insufficient the State's efforts have been and as a consequence, the poor execution of the legislation has made it impossible to effectively apply the legislation.

The greatest flaw in the Act is that it fails to transfer the legal authority to make decisions regarding the termination of pregnancy from medical practitioners to women. It completely neglects the agency of women and disregards their decisional autonomy. It continues to retain a regressive paternalistic framework with women practically having no discretion. It also fails to take account of the jurisprudence developed by the Supreme Court over the years in various hailed judgements. In the landmark *Suchita Srivastava* judgement, The Apex Court has stated

that women can carry out a variety of reproductive options including bearing children, choosing not to bear children, and foregoing the act of bearing children. A woman's right to privacy, dignity, and bodily integrity is respected because it is part of her right to personal liberty under Article 21 of the Indian Constitution. The court restated its previously stated position in the landmark *Puttaswamy v. State of Karnataka* decision and clarified its conception of reproductive rights in that it upheld the constitutional right to abortion as one of the components of one's private right included in Article 21. The Act limits its scope to a single gender, i.e., women. It fails to take into account transgenders and other gender-diverse persons who may need to avail of these services under certain circumstances. This heteronormative gender bias may affect the well-being of the community which is entitled to equal rights²⁶ as others. Warranting the medical practitioner to reveal the details of a woman who has undergone termination to persons "authorized by law" is a gross violation of her right to privacy. The party may not be willing to share such sensitive information without consent especially when there exists a social stigma against abortion.

RECOMMENDATIONS

"A Pratigya Campaign for Gender Equality and Safe Abortion report titled *A study Assessing the Judiciary's Role in Access to Safe Abortion* analysed the Supreme Court and High Court judgements on abortion-related cases between June 2016 and April 2019." It was observed that despite the gestation period being less than 20 weeks, a total of 40 petitions were filed before High Courts seeking termination of pregnancy.²⁷ As per the law, women have the right to seek termination up to 20 weeks (24 weeks after the MTP Amendment Act 2021) of gestation and such cases do not require one to approach the court. Such incidents show a lack of awareness regarding the laws governing abortion and their reproductive rights. Therefore, awareness regarding the same

²⁶ Constitution of India, art 14

²⁷ Conclusions and Recommendations, Chapter III, 22, 'Assessing the Judiciary's Role in Access to Safe Abortion, A Pratigya Campaign for Gender Equality and Safe Abortion Report' (*Pratigya Campaign*, 28 September 2019) <<https://pratigyacampaign.org/wp-content/uploads/2019/09/assessing-the-judiciarys-role-in-access-to-safe-abortion.pdf>> accessed 25 May 2021

must be generated. It will also enable women to avoid delays and make the decision at the right time.²⁸

Statistics have shown the appalling state of public health infrastructure in the country, especially in rural areas. To ensure that the infrastructural inadequacies do not create hindrances in the process, it is of utmost importance to upgrade the healthcare infrastructure.²⁹ Expanding the provider base can be a breakthrough. The draft MTP Bill of 2014 recommended that the phrase “registered medical practitioners” be substituted by “registered health care providers” where the latter included practitioners who possessed recognised qualification in Ayurveda, Siddha, Unani, Homeopathy and nurses and midwives who possessed a recognised qualification in general nursing or auxiliary nurse-midwifery.³⁰ Authorizing AYUSH practitioners, auxiliary nurses and midwives to conduct abortions in the early stages of gestation can be a major aid for those who are unable to avail of services from the current pool of providers for reasons noted in Section IV.

As noted previously, abortion may be a requirement for transgender and intersex persons and therefore they should be brought within the ambit of the Act to ensure access to legal and safe abortion services. State funding can help a large section of women especially those who are compelled to resort to unsafe and unauthorized methods due to financial constraints. Eradicating the stigma surrounding abortion by conducting sensitization programmes can go a long way in saving numerous women who succumb to avoidable deaths because of the taboo attached to abortion. The conditionality attached with the current law should be done away with. Abortion access should be within a framework of autonomy and self-determination. Abortion should be available upon request and not necessarily in circumscribed conditions. Motherhood should be a choice rather than an imposition. Lastly, the law should be framed

²⁸ Saumya Maheshwari, 'Reproductive Autonomy in India (2017) 11 NALSAR Stud L Rev 27, 50

²⁹ Aarzoo Snigdha, '13 women die in India every day due to unsafe abortions' (*India Today*, 11 August 2018)

<<https://www.indiatoday.in/india/story/13-women-die-in-india-every-day-due-to-unsafe-abortions-1296850-2018-07-26>> accessed 25 May 2021

³⁰ Notification No 12015/49/2008-MCH, Draft Medical Termination of Pregnancy (Amendment) Bill 2014

taking into account the opinion of representative stakeholders so that it can serve its purpose both in letter and in spirit.

CONCLUSION

When abortion was first legalized in India in 1971, even though it was restricted to a limited set of conditions, it was viewed as a liberal law for a conservative and developing country. It was hailed and lauded because at that time very few nations globally had laws permitting abortion. The journey had just begun back then and the 1971 legislation was the first milestone. The law was unable to accommodate a lot of women and that was realized when the need to approach the courts arose. A struggle that was undertaken in the last 50 years was expected to end with the introduction of the MTP Amendment Bills in Parliament. The MTP Act, 2021 came in consequence but the struggle has not yet subsided.

The Act has failed in matching pace with the socio-cultural advancement of society. It disregards women's agency, their control over their body and undermines their decisional autonomy in terms of reproductive behaviour. Moreover, it is oblivious to the ground reality of requisite healthcare facilities and the access to safe services. In other words, the law is nowhere close to upholding the principle of ensuring dignity, autonomy, confidentiality and justice for women that it envisages. Abortion continues to remain a privilege authorised by the State upon fulfilment of some criteria rather than a right executable at volition. India is in dire need of a women-centric law that gives due recognition to their liberty and privacy. It is achievable if the decision-making power is vested with women and they are assisted in making an informed resolution after considering all factors rather than compelling them to abide by the decision that State-authorized persons make based on State-determined inadequate factors.