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Abortion Rights and MTP Act - Is there a need for an Amendment?

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Abortion simply means the process to terminate a pregnancy either by medicine or through surgery. Abortion when considered a human right implies that every woman should have a right to choose whether to continue or not with her pregnancy and have legal access to safe abortion services. Denial to women and girls, of access to safe and legal abortion has been established through the interpretation of International Human Rights Law, to be a form of discrimination and violation of human rights. Abortion laws throughout the world are largely influenced by moral, cultural, and religious discernments. When the United States of America, a developed country considered to be progressive, took away the right to have an abortion by overturning the historic judgment of Roe v Wade, protests emerged around the country raising concerns about the freedom and rights of Women. In India, causing a miscarriage of a pregnant woman, except to save the life of a woman, is a punishable offence under the Indian Penal Code, but by the virtue of the Medical Termination of Pregnancy Act, 1971 amended in 2021, abortion has been legalized in certain cases. But still, a question exists how far these legislations have been successful in establishing the autonomy of Women concerning their bodies and is there a scope for amendment?

Keywords: *abortion, mtp act, reproductive rights, maternal mortality.*

INTRODUCTION

Reproductive rights are the rights related to reproduction and the reproductive health of an individual. These rights include “prenatal services, safe childbirth, access to contraception and access to legal and safe abortion”¹, and are essential for a woman as they recognize her ability to make the best choice about her body and life. There is no particular human rights instrument committed solely to reproductive rights but the Convention on Elimination of all forms of Discrimination against Women in its articles 12 and 16 recognizes the rights of women concerning family planning services, access to health care including sexual health, mentions services in connection with pregnancy and the right to decide on the number and spacing of children.² Reproductive rights of women also include the right to legally and safely terminate their pregnancy.³ In India, the constitution guarantees these rights through the right to choose under Article 21. “Right to reproductive choice is an inextricable part of a woman’s liberty and every woman has a sacrosanct right to bodily integrity”⁴. The right to life under the constitution has been given a wider ambit by establishing women’s right to reproductive autonomy as its dimension in the case of *Suchitra Srivastava v Chandigarh Administration*⁵. In the case of *X v Union of India*⁶, the court allowed the termination of pregnancy beyond 24 weeks stating that the “right to the bodily integrity calls for permission to allow her to go for abortion”.⁷ In *Z v State of Bihar*⁸, it was observed by the court that “A woman's right to make reproductive choices

¹ ‘Reproductive Rights and Abortion’ (*Human Rights Watch*, 23 July 2018)

<<https://www.hrw.org/topic/womens-rights/reproductive-rights-and-abortion>> accessed 09 February 2023

² Convention on Elimination of All Forms of Discrimination against Women 1979, art 12, art 13

³ ‘Reproductive Rights Are Human Rights’ (*The Danish Institute for Human Rights*, 1 December 2014)

<<https://www.unfpa.org/publications/reproductive-rights-are-human-rights>> accessed 11 February 2023

⁴ Mustafa Plumber, ‘Right of a Woman to Exercise Her Reproductive Choice Is a Dimension of Personal Liberty under Article 21: Karnataka High Court’ (*Live Law*, 25 November 2021) <<https://www.livelaw.in/news-updates/karnataka-high-court-mtp-act-reproductive-choice-personal-liberty-article-21-186285>> accessed 17 February 2023

⁵ *Suchitra Srivastava v Chandigarh Administration* (2009) 14 SCR 989

⁶ *X v Union of India & Ors* 20 April 2021

⁷ *Ibid*

⁸ *Z v State of Bihar* (2018) 11 SCC 572

is also a dimension of personal liberty as understood under Article 21 of the Constitution of India.”⁹

RIGHT TO ABORTION V RIGHT TO LIFE OF FOETUS

The right to abortion comes with the incessant debate of its conflict with the right to life of an unborn child. Abortion is condemned by regard it as murder or nearly as wrong as murder, by depriving a foetus of its right to life¹⁰. To decide on which, side the rights fall heavier, the approach of the court and policymakers should be sensitive and there needs to be a comprehensive consideration of all facets involved.¹¹ An important argument in the favour of the right to abortion can be that human rights are only vested with a person on birth and thus an unborn foetus still in the womb of the mother cannot be said to have such rights. In a detailed study on this debate, Ronald Dworkin has observed that a foetus has no interest before the third trimester as until this point it cannot feel any pain and the brain is not properly developed.¹² “Thus, whether abortion is against the interest of a foetus must depend on whether the foetus itself interests has, not on whether interests will develop if no abortion takes place.”¹³

Unintended pregnancies can have devastating effects on the mental and physical health of a woman, especially for the vulnerable section of women. Unmarried girls find themselves compelled to hide their pregnancies due to the social stigma attached to sex outside marriage. This leads to women opting for veiled and most likely harmful methods of aborting pregnancies which can lead to maternal mortality.¹⁴ Depriving a woman of her right to choose whether she wants to become a mother or not, infringes her intrinsic rights to be free from violence, to health,

⁹ Mrinal Satish, ‘Z v State of Bihar: Reproductive Autonomy and State Liability’ (2020) 3(1) Journal of Victimology and Victim Justice 1

¹⁰ KD Gaur, ‘Notes and Comments: Abortion and the Law in India’ (1986) 28 JILI 348
<<https://www.sconline.com/Members/SearchResult.aspx>> accessed 08 February 2023

¹¹ Aakanksha Saxena, ‘Abortion rights in India -What Could, And Should Be’ (2017) SCC OnLine Blog OpEd 8
<<https://www.sconline.com/Members/SearchResult.aspx>> accessed 08 February 2023

¹² Ronald Dworkin, ‘Freedom’s Law: The Moral Reading of the American Constitution’ (1999) 23(2) Oxford University Press <<https://philpapers.org/rec/DWOFLT>> accessed 17 February 2023.

¹³ Sai Abhipsa Gochhayat, ‘Understanding of Right to Abortion Under Indian Constitution’ (Manupatra, 2021)
<<https://manupatra.com/roundup/373/Articles/PRESENTATION.pdf>> accessed 16 February 2023

¹⁴ Aakanksha Saxena (n 11)

to privacy, to family, and even the right to life¹⁵. It is true that “the shield of foetal rights is used to cover the more deep-seated reason being that the society even today harshly frowns upon premarital sex.”¹⁶

LEGISLATIVE FRAMEWORK FOR ABORTION IN INDIA

Abortion has been criminalised as unlawful termination of pregnancy under the Indian Penal Code 1872¹⁷. Section 312 of the act stipulates “voluntarily causing miscarriage” (premature removal of a foetus in the womb of the mother, before the completion of the natural gestation period) except in good faith to save the life of a woman, as a punishable offence¹⁸. Even a woman who consents to her miscarriage or causes herself to miscarry is also held liable¹⁹. This was the only law regarding abortion in India till the 1960s and around this time it was realised that there is a need to liberalise abortion as these penal provisions were felt to be unduly restrictive leading to “an avoidable wastage of the mother’s health, strength, and sometimes, life”.²⁰ In 1967, Shantilal Shah Committee was set up by the Government of India and its recommendations led to the formulation of the Medical Termination of Pregnancy Act (“MTP Act”) 1971 as an exception to the provisions of IPC in specified cases so that women do not resort to unsafe methods of aborting the foetus to evade penal consequences²¹. It provides for terms regulating the termination of pregnancies in India by specifying conditions to be fulfilled for terminating a pregnancy, including situations when such termination can take place, the persons who are competent to carry out such procedures, and places where the procedure may be performed.²² The 1971 act legalised abortion up to 12 weeks with permission of one registered medical practitioner (RMP) and for abortion up to 20 weeks, the permission of two RMPs was made

¹⁵ Dipika Jain, 'Time to Rethink Criminalisation of Abortion? Towards A Gender Justice Approach' (2019) 12 NUJS L Rev 21, 5

¹⁶ Aakanksha Saxena (n 11)

¹⁷ Indian Penal Code 1872, s 312-316

¹⁸ SN Misra, *Indian Penal Code* (22nd edn, Central Law Publications 2020) 650

¹⁹ *Ibid*

²⁰ MTP Act 1971, Statement of Objects and Reasons

²¹ Geetanjali Krishna, 'Abortion in India: legal, but not a woman’s right' (2022) 4 BMJ <<https://doi.org/10.1136/bmj.o2733>> accessed 11 February 2023

²² Sai Abhipsa Gochhayat (n 13)

mandatory.²³ In 2021, the act was amended to expand its ambit and protection by introducing a change in Section 3 and extending the upper limit for legal abortion from 20 to 24 weeks. The amended law requires the advice of one registered medical practitioner (RMP) for abortion up to 20 weeks of pregnancy and advice of two RMPs for abortion of pregnancy between 20 to 24 weeks²⁴. Section 3B of the rules prescribed under the act provides for categories of women who can seek abortion beyond 20 weeks and up to 24 weeks namely:

- Survivors of sexual assault or rape or incest;
- Minors;
- Change of marital status during the ongoing pregnancy (widowhood and divorce);
- Women with physical disabilities (major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016);
- Mentally ill women including mental retardation;
- The foetal malformation has a substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped, and
- Women with pregnancy in humanitarian settings or disasters or emergencies as may be declared by the Government.”²⁵

Moreover, the amendment has also extended the benefit of the legal presumption of a grave injury to the mental health of a woman on account of the failure of contraception, to all women and not just married women.²⁶ The MTP Act of 1971, provided that the torment caused by pregnancy (up to twenty weeks) resulting from a failure of a method of contraception used by a “married woman or her husband” to limit the number of children may be presumed to

²³ *Ibid*

²⁴ Mohd Aqib Aslam, 'Medical Termination of Pregnancy (Amendment) Act, 2021' (*Legal Service India*, 25 August 2022) <<https://www.legalserviceindia.com/legal/article-6037-medical-termination-of-pregnancy-amendment-act-2021.html>> accessed 10 February 2023

²⁵ *Ibid*

²⁶ 'X v The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi' (*Supreme Court*) <https://main.sci.gov.in/supremecourt/2022/21815/21815_2022_2_1501_38628_Judgement_29-Sep-2022.pdf> accessed 14 February 2023

constitute a grave injury to the mental health of the woman.²⁷ Now, the phrase “married woman” has been replaced with “any woman” and the term “husband” has been replaced with “partner”²⁸. This has been an important step to keep up with the evolving social norms and broaden the availability of safe and legal abortion services under Section 3 by not confining it to only married women. In the recent case of *X v Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another*²⁹ the Supreme court extended the right to abortion to an unmarried woman observing that “the rights of reproductive autonomy, dignity, and privacy under Article 21 give an unmarried woman the right of choice on whether to bear a child or not”.³⁰ This judgement has been regarded as historic for diminishing the denial of abortion on basis of the marital status of a woman. In another recent judgement in the case of *P v Union of India*³¹ where a 21-year-old unmarried girl approached the court to abort her 29-week pregnancy, the Supreme court keeping her mental health as a paramount concern, allowed her to give up the child for adoption after birth as abortion at such an advanced stage was not a viable option as per the advice doctors.³²

The abortion law in India, when compared to other countries seems quite progressive. If we take the example of the United States, till the year 2022, the landmark judgment in the case of *Roe v Wade*³³, was considered synonymous with its abortion law. It had legalised termination of pregnancy before the foetus is viable outside the womb, stating that a “woman’s decision should

²⁷ Om Prakash Gautam, 'Moral Force in The Rule of Law: Morality behind Abortion Laws and Right to Life of Foetus- In Context of Savita's Case' (2013) 80 SCC Online

<<https://www.sconline.com/Members/SearchResult.aspx> > accessed 8 February 2023

²⁸ 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 Blog OpEd 7, 2021) <<https://www.sconline.com/Members/SearchResult.aspx> > accessed 8 February 2023

²⁹ *X v Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another* Civil Appeal No 5802 of 2022

³⁰ *Ibid*

³¹ Padmakshi Sharma, 'Supreme Court Allows Woman Who Sought Abortion to Give Child for Adoption to A Couple Registered With CARA' (*Live Law*, 2 February 2023)

<<https://www.livelaw.in/top-stories/supreme-court-allows-woman-who-sought-abortion-to-give-child-for-adoption-to-a-couple-registered-with-cara-220572>> accessed 16 February 2023

³² *Ibid*

³³ *Roe v Wade* 410 US 113

be free from unjustified interference by the government into such a fundamental matter”³⁴, hence recognising the right to abortion as a part of a woman’s right to privacy and self-determination. Before this judgement, the abortion standards in the U.S.A were quite stringent and did not give authority to women to abort unless the pregnancy would cause a significant risk to the pregnant woman’s health.³⁵ In 2022, the U.S. Supreme Court overturned the decision in *Roe v Wade*, calling it exceptionally weak thereby curtailing women’s right to abortion.³⁶ Now, “abortion rights, which have been available to women for over two generations will be determined by individual States.”³⁷ For a country that is considered so progressive and developed, this decision is surely shocking and a paradigm of misogyny and gender-based discrimination.

NEED OF FURTHER AMENDMENT - CONCLUSION

The MTP act is considered an important step towards liberalising abortion law in India, but is it rights-based legislation or merely an exception to the criminalisation of abortion provided under IPC? It is important to note that the act operates within a framework of criminalisation such that providing and seeking an abortion is a criminal offence unless it falls within a certain exception and allows termination of pregnancy only on certain specified grounds and mandates the permission of registered medical practitioners to do so.³⁸ So, is it right to leave the fate of a woman completely at the discretion of a doctor who may or may not give permission? In a country like India where sex outside marriage is considered a sin, can an unmarried woman enforce her right to abortion? The decision of doctors is often influenced by their perceptions and views regarding the insensitivity and social prohibition of abortion. With all the criminality

³⁴ Priyanka Chakrabarty, ‘Abortion Laws for Women: Why Is the Womb So Heavily Legislated’ (*Shethepeople*, 2020) <<https://www.shethepeople.tv/health/women-reproductive-rights-india-abortion/>> accessed 12 February 2023

³⁵ Apoorva Kaur, ‘Legislated Womb vis-a-vis Abortion Rights of Women in India’ (2022) 2(4) *Lex Forti Legal Journal* 2

³⁶ Sriram Lakshman, ‘U.S. Supreme Court overturns landmark *Roe v Wade* ruling on abortion rights’ (*The Hindu*, 24 June 2022) <<https://www.thehindu.com/news/international/us-supreme-court-overturns-landmark-roe-v-wade-ruling-on-abortion-rights/article65561632.ece>> accessed 11 February 2023

³⁷ *Ibid*

³⁸ Aparna Chandra & Ors, ‘Legal Barriers to Accessing Safe Abortion Services in India: A Fact-Finding Study’ (*National Law School of India University, Bengaluru*, 2022) <<https://www.nls.ac.in/publications/legal-barriers-to-accessing-safe-abortion-services-in-india-a-fact-finding-study/>> accessed 15 February 2023

surrounding abortion, a lot of times, in the fear of penal consequences, the doctors end up refusing to abort to prevent themselves from any liability³⁹. This also reflects the lack of knowledge of the law. Keeping the decision-making power in the hands of RMPs rather than the woman herself shows that the MTP act is not centred on a woman's reproductive rights but rather "seeks to shield the RMP from criminal liability"⁴⁰. Hence, the path of a woman to exercise what should be a most basic right of her is, in reality quite tough and arduous. There is an exigency for reform in this regard and the act needs to become more women-centric. It needs to address the concerns of surrogate mothers and transgender women. Moreover, the act allows only certain specified categories of women to abort pregnancies between 20 to 24 weeks⁴¹. This means that women who fall out of these categories will have no right to abortion for pregnancies beyond 20 weeks, even if it causes significant physical or mental agony to them. The act needs to be amended in this regard to provide safeguards to all women.

Though abortion is legal in India, it cannot be said to be an absolute right vested with women because it is highly obstructed by factors like family pressure, the discretion of RMPs, social stigma, lack of knowledge of the law, etc. Despite the legislation for safe and legal termination of pregnancy, "Unsafe abortions continue to be a leading cause of maternal mortality in India, and around eight women die from consequences of unsafe abortions each day".⁴²

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ Apoorva Kaur (n 35)

⁴² United Nations Population Fund, 'State of the World Population Report' (UN, 2022) 26

<https://www.unfpa.org/sites/default/files/pub-pdf/EN_SWP22%20report_0.pdf> accessed 12 February 2023