



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Navigating the Sociological and Legal Aspects of Abortion in India in the context of the MTP Amendment Act 2021

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Received 03 March 2023; *Accepted* 24 March 2023; *Published* 28 March 2023

Abortion, or the deliberate termination of a human pregnancy by chemical, surgical, or other means, was first legalized in India in 1971 by enacting the Medical Termination of Pregnancy Act in the same year. Since then, the Act has been amended numerous times to adjust the purview under which women can seek abortions, the latest being the MTP Amendment Act 2021. This Act succeeded in addressing some of the shortcomings of the original Act but failed to make abortion a truly "rights-based" framework. Today, abortion remains one of India's most fraught medical issues, as awareness of its legality and access to safe medical procedures remain a dream. The current legal status of abortion overlooks the institutional obstacles and infrastructural inadequacies that capture the reality of reproductive care in the country. Its access is threatened by a deluge of issues such as myths, lack of financial agency, and intense stigma around the procedure that make it an unspeakable taboo. This paper seeks to address how access to abortion is a social and medical issue as much as it is a legal one. Does the current legal framework surrounding abortion center on individual autonomy, or is it just a maze of medical bureaucracy? Has India's legal system failed to recognize abortion as a "right"? What have been the sociological aspects involved in defining what access and awareness of abortion means? The paper will examine these questions while analyzing the scope of the MTP Amendment Act 2021 and the need for an unconditional framework on abortion that keeps the stakeholder at the center.

Keywords: *abortion, mtp act, women, autonomy, healthcare.*

INTRODUCTION

Induced abortion is the deliberate termination of pregnancy by the removal of the fetus through chemical, surgical, or other medical means. Whether this medical service may be safe or unsafe, legal or illegal, induced abortion forms a part of the life of people with biological female sex, families, and communities around the globe that cannot be ignored. In both developing and developed countries, it plays an important role in females' reproductive health care coupled with unintended pregnancies due to several reasons ranging from lack of access to effective family planning to cases of sexual abuse and rape.

Abortions are one of the most common medical procedures performed globally, with around 73 million induced abortions being taken place worldwide each year.¹ However, global estimates from 2010-2014 show that a little less than half of them are unsafe according to WHO guidelines, with developing countries bearing the burden of harboring 97% of all unsafe ones.² These numbers make a strong case that ensuring the safety and accessibility of abortion services lies at the center of the reproductive health care of the female biological sex. Creating a supportive legal environment is pertinent as it gives women the rightful autonomy over their life and bodily choices. Induced abortion in the country has been legal under various circumstances, and a broad range since the introduction of the Medical Termination of Pregnancy (MTP) Act 1971. Unfortunately, despite such legal protection, abortion continues to be "the third leading cause of maternal death in India."³

Amongst these circumstances, it is also imperative to note that not all people who seek abortions identify with the term "woman" or the female gender. These people face additional difficulties in accessing health care owing to technical and societal aspects regarding this subject matter.

¹ 'Abortion' (*Abortion*, 25 November 2021) <<https://www.who.int/news-room/fact-sheets/detail/abortion>> accessed 07 December 2022

² 'Worldwide, an Estimated 25 Million Unsafe Abortions Occur Each Year' (*Worldwide*, 28 September 2017) <<https://www.who.int/en/news-room/detail/28-09-2017-worldwide-an-estimated-25-million-unsafe-abortions-occur-each-year>> accessed 15 February 2023

³ Susheela Singh, 'Abortion and Unintended Pregnancy in Six Indian States: Findings and Implications for Policies and Programs' (*Guttmacher Institute*, 2018) <<https://www.guttmacher.org/report/abortion-unintended-pregnancy-six-states-india>> accessed 07 December 2022

While this paper recognizes that the language is not inclusive, the term "woman" is used throughout it for the sake of consistency. However, the issues and the values regarding this subject are upheld regardless of the social constraints of gender.

THE MTP ACT, 1971

The Medical Termination of Pregnancy (MTP) Act was enacted in 1971 by the Indian legislature to legalize and regulate access to safe abortion services for women on a conditional basis. The law was enacted to provide for specific exceptions in which pregnancies could be terminated in legally recognized ways. Thus, it came up with a legal framework that permitted the termination of pregnancy by registered medical practitioners under a broad ambit of conditions up to twenty weeks of gestation as specified follows by Section 3 of the Act:⁴

- Where the length of the pregnancy does not exceed twelve weeks if the such medical practitioner is, or
- Where the length of the pregnancy does not exceed twenty weeks if not less than two medical practitioners think, formed in good faith, that-

i. The continuance of the pregnancy would involve a risk to the pregnant woman's life or serious harm to her physical or mental health; or

ii. There is the presence of a substantial risk that if the child is born, it will suffer from such physical or mental abnormalities as to be seriously handicapped.

The explanations to section 3(2) (b) stipulate the conditions under which the continuance of pregnancy shall cause grave anguish to the woman, like "a pregnancy caused by rape or a pregnancy occurred as a consequence of the failure of contraceptives used by a married woman or her husband to limit children."⁵ Section 5 of the Act permits abortion after twenty weeks of gestation, but only to save the pregnant woman's life.⁶ The Act further specifies who can terminate the pregnancy, when a pregnancy can be terminated, and where a pregnancy can be

⁴ Medical Termination of Pregnancy Act 1971, s 3

⁵ Medical Termination of Pregnancy Act 1971, s 3(2)(b)

⁶ Medical Termination of Pregnancy Act 1971, s 5

terminated. As per the rules laid down in the Act, "only the consent of the woman undergoing an abortion is needed. However, in the case of a minor or a woman of unsound mind, the consent of her guardian (not exclusive to her parents) is needed." The current law permits only registered allopathic medical practitioners to terminate pregnancies to save a woman's life or to conserve her mental or physical health.

Since the enactment of legislation on abortion services in India, the Government of India has taken steps to facilitate increased access to abortion with changing times by amending the original Act quite a few times. Even though abortion was made legal in the public sector on a conditional basis, actual provisions at lower-level public facilities were few before 2000. In the same year, the National Population Policy officially recommended expanding the provision of abortion up to eight weeks of gestation to public facilities, with the inclusion of primary health centers. Despite these recommendations, public health centers on the community level continue to be the primary providers of abortion services, and access to these procedures remains a challenge because of infrastructural inadequacies and the lack of certified abortion providers.⁷

In 2002 and 2003, the Act and the regulations were amended to facilitate better implementation and expand access to abortion, especially in the private sector. The MTP Regulations, 2003 set forth the conditions and procedures for implementing the Act. According to World Health Organisation, access and availability of public health and healthcare facilities form a significant part of the right to health.⁸

THE MTP AMENDMENTS 2021

Acknowledging the pitfalls in the existing legislation regarding abortions and their access to the masses, the Medical Termination of Pregnancy (MTP) Amendment Act, 2021 was enacted with some key amendments:

⁷ R Duggal, 'The Abortion Assessment Project- India: key findings and recommendations' (2004) 122, 129

⁸'Human Rights and Health' (29 December 2017) <<https://www.who.int/news-room/factsheets/detail/human-rights-and-health>> accessed 24 September 2022

- As per the Act, medical petitioners can perform abortions up to twenty weeks of gestation on the advice of one doctor, and women who may be survivors of sexual abuse, rape, incest, disability, and minors can seek abortion services up to twenty-four weeks.
- The amended Act also ensures the confidentiality of the person undergoing abortion by imposing a fine, imprisonment up to a year, or both if the medical practitioner reveals the details of the person to someone not authorized by law.
- With this amendment, the marriage clause mentioned in the earlier legislation has been removed to increase accessibility to abortion for unmarried women on the grounds of contraceptive failure.
- The new Act also directed the formation of medical boards in all states and union territories for diagnosing possible fetal abnormalities during pregnancy. The board will be charged with deciding whether abortion may be performed after twenty-four weeks. Each board will consist of a radiologist/oncologist, gynecologist, pediatrician, and other members as per the notifications given by the government.

LOOPHOLES IN THE LAW

Even after 50 years of implementation, the "Medical Termination of Pregnancy Act" continues to criminalize abortion in the truest sense. It continues to systematically limit the choice of the person bearing the fetus. If a person gets pregnant without using any contraception and they do not want this baby out of choice, Indian law would not permit them to permit to terminate the pregnancy. At the end of the day, the current law fails to put the choice of the primary stakeholder at the center of the abortion access framework. The law only allows termination of pregnancy to the individual if they manage to prove how the pregnancy will be a harm to them emotionally or physically, which would ultimately make the medical practitioner's opinion the deciding factor. This can risk the people from peri-urban or rural areas from being sidelined as not all districts are equipped with medical bodies and registered practitioners that can provide their opinion.

The recent rulings on abortion by the Supreme Court have been progressive, but it fails to prioritize the individual rights of the major stakeholders. Notably, the Act, even with all its

revisions and amendments, continues to systematically exclude a significant portion of the LGBTQIA+ community- including transgender, non-binary, and other gender-diverse people who were categorized as biologically female or intersex at birth- from the Indian abortion laws and healthcare infrastructure. Apart from the technical difficulties, there is also a worrying amount of people that face ideological abuse and stigma at government hospitals and a gynecologist crisis. They have to consider the judgment of aborting a child or the prejudice around having pre-marital sex. Lack of access to safe abortion services and the stigma around the procedure widens this gap between the stakeholders and their right to safe reproductive health.

According to Section 3(2)(d) of the Act, the confirmation of "at least two registered medical practitioners is needed to confirm that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health." Therefore, the current law, while acknowledging the right to access the medical bureaucracy of abortion, leaves it completely to the medical practitioners to decide, failing to be a rights-based framework. Not only does this violate the pregnant person of their agency, but it also leaves them wanting autonomy over their body.

RECENT DEVELOPMENT IN ABORTION LAWS

In July 2022, a contented legal order that restricted an unmarried woman's right to abortion was overturned by the apex court. The Supreme court stated that women, irrespective of their marital status, should be able to access safe abortion services as a right. In the interim order, it was expressed that any such restrictions on this right would violate their right to bodily autonomy and personal freedom. The Court observed, "petitioner should not be denied the benefits merely because she's an unmarried woman."⁹ The bench, headed by Justice D.Y. Chandrachud, allowed a 25-year-old unmarried woman who became pregnant due to consensual sex to abort her 24-week-old fetus. Earlier that month, the Delhi High Court had refused to permit the abortion by

⁹ Roy D, 'Beneficial Provisions of Abortion Law Cannot Be Denied to Woman Merely Because She Is Unmarried: Supreme Court' (*Bar and Bench*, 21 July 2022) <<https://www.barandbench.com/news/beneficial-provisions-abortion-law-cannot-be-denied-woman-merely-because-she-unmarried-supreme-court>> accessed 24 December 2022

stating that the pregnancy was a result of consensual sex. Therefore, it cannot be permitted to be terminated under current laws. The Supreme Court bench had noted that "we are of the view that allowing the petitioner to suffer an unwanted pregnancy would be contrary to the intent of the law enacted by the Parliament [...] The distinction between a married and unmarried woman does not bear nexus to the basic purpose and object sought to be achieved by the Parliament."¹⁰ The recognition of a single woman's access to abortion forms a pertinent step in securing a woman's right to healthcare facilities and personal liberties as guaranteed by "article 21 of the constitution." In a study published by the Guttmacher Institute, one in every six women who faced challenges to abortion stated that their pregnancy had resulted from non-consensual sex.¹¹ Such challenges generally tend to result from abortion in unconventional circumstances fraught with fear of shame, stigma, and difficulty in access and affordability.

In another recent instance, a three-judge bench of the Supreme Court gave a judgment emphasizing a woman's right to bodily autonomy without authorization from a third party on 29th September 2022. The judgment emphasized, "women's right to sexual and reproductive choices by extending equal benefits of the law to unmarried women without the need for authorization from a third party to access abortion services." This historic judgment, headed by Justice D. Y. Chandrachud, also noted, "unmarried women in a consensual relationship are entitled to safe and legal abortion services." The judgment also reflected on the various ways in which gender stereotypes may influence the operation of the law. The Court took note of the common practice of medical practitioners insisting that "abortion-seekers comply with extra-legal conditions like producing documentary evidence, obtaining the consent of the abortion seeker's family or partner, or legal authorization and the frequent denials of the medical procedure if such conditions are not fulfilled." The bench remarked these happenings as 'lamentable'.¹²

¹⁰ Network LN, 'Abortion Can't Be Denied Solely Because Woman Is Unmarried : Supreme Court Allows Unmarried Woman To Seek Termination Of Pregnancy' (*Live Law*, 21 July 2022) <<https://www.livelaw.in/top-stories/abortion-cant-be-denied-solely-because-woman-is-unmarried-supreme-court-allows-unmarried-woman-to-seek-termination-of-pregnancy-204394>> accessed 29 December 2022

¹¹ Susheela Singh (n 3)

¹² *X v Principal Secretary, Health & Family Welfare Department, Govt of NCT of Delhi* (2022) SC 22

Notably, the judgment was strikingly progressive in its approach toward adjudicating equality claims by clarifying right at the start that the term "women" relates to "persons other than cis-gender women who may require access to safe medical termination of their pregnancies," thus including the people existing on the wide spectrum of gender out of the gender binary of male and female. Regardless, it is also pertinent to take note of the fact that these judgments arrive in the context of a global reckoning with access to reproductive justice. In July 2022, the U. S. Supreme Court overturned the fifty-year-old landmark judgment of *Roe v Wade* that guaranteed women's reproductive right to abortion.¹³ As the United States rolled back on its legal position on access to abortion, discourse around the question of abortion as a right has come into the mainstream conversation, especially in India, where these issues are generally not talked about. Naturally, India's legal stance on abortion comes into sharper focus. It begs the question: How easy or difficult is it for people across social and economic classes in India to access safe and affordable abortions, despite the technical legality of the service?

CONCLUSION

The point behind trying to raise a discourse about abortion and its legality in a country like India is that access to abortion here is a societal and medical issue as much as it is a legal issue. The Indian State allows its people access to abortion procedures under carefully specified conditions, limiting its scope to certain people and their State of conditions. Coupling this with the stigma along with the lack of financial agency and mobility surrounding abortion in Indian society is what makes access to abortion restricted here. Therefore, barriers to abortion access in India are multifold and layered. It is laden with myths and misinformation, while many remain unaware of it.

While the recent amendments to the MTP Act are a step toward the direction of reproductive justice, it comes with their bureaucratic caveats. Abortion rights in India, as they stand today, fail to center on the autonomy of an individual and instead restrict access to lakhs of women

¹³ Patty Houseman, 'Roe v Wade Overturned: What It Means, What's Next' (*American University*, 28 June 2022) <<https://www.american.edu/cas/news/roe-v-wade-overturned-what-it-means-whats-next.cfm>> accessed 22 December 2022

who face social, medical, and economic barriers to healthcare. The true idea of a 'right' can only be based on the principle of freedom and an individual's claim to the autonomy of their body rather than narrow legal scopes of the possibilities. What we need today is inclusive progress that is constant and consistent with the above while keeping the primary stakeholders at the center.