

## **WOMEN WOMB HEAVILY LEGISLATED: ABORTION**

*Saumya Singh, University Institute of Legal Studies, Punjab University*

### **Introduction-**

Abortion was not originally embedded and legalised in India. Emergence of abortion law in India came to the surface in the 1960s when Shnatila Shah Committee,<sup>1</sup> was set up to evaluate the need for abortion law in India. After a long review, the criteria for legislation of abortion was framed –

- Human right
- The principles of solid science
- In step with the advancement in technology
- Control population
- Reduce the Mortality rate.

The parliament adopted the recommendations and India got its first legislation legalising abortion for married women and termed as Medical Termination of Pregnancy Act (hereinafter referred to as the MTP Act), 1971<sup>2</sup>. Although before 1971, abortion was illegal under Section 312 of IPC,<sup>3</sup> which states that "intentionally causing miscarriage" will serve 3 years of imprisonment/ fine or both.

The MTP Act, 1971 allows a registered medical provider to provide abortion services to women up to 20 weeks of the gestation period, under certain conditions as follows. First, when the continuation of the pregnancy would pose a risk to the life of a pregnant woman or could cause grave injury to her physical or mental health; Second, when there is a substantial risk that the child is born, would be seriously handicapped due to physical or mental abnormalities; third when pregnancy is caused due to rape; forth when pregnancy is caused due to the failure of contraceptives used by married women or her husband.

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<sup>1</sup>Shantilal Shah Committee Report, *Report of the committee on legalization of abortion*; Doc No. 521, at 54-57 (1966).

<sup>2</sup> Press Legislative Office, *The Medical Termination of Pregnancy bill, 2020*, PRS INDIA(March 20,2020) <https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020>

<sup>3</sup> Indian Penal Code, 1860. – (Section 312), causing miscarriage voluntarily not in a good faith will be punishable with imprisonment of 3 years can be extended to 7 years, or fine either both.

### **Need for amendment in above law –**

A study in 2015 in the Indian Journal of Medical Ethics, has observed that 10-13% of maternal deaths in India can be attributed to unsafe abortion.<sup>4</sup> Nearly, 15.6 million abortions take place in India annually in which 11.5 million abortions take place with unrecognized medical practitioners or unqualified medical practitioner, which ultimately lead to maternal death.<sup>5</sup> Many of those who survive such a method are compelled to live a life of pain compounded by infertility, sepsis, and other internal injuries.

### **Concern surrounding MTP Act, 1971**

In 2009, the Supreme Court of India gave a landmark judgment for the subject concerning the Right to Reproductive Autonomy as a Fundamental Right. The court in the case of *Suchita Srivastava v. Chandigarh Administration*,<sup>6</sup> said that Right to Life under Article 21 integrates the right to reproductive autonomy of women.<sup>7</sup>

Despite this landmark case, no amendment in the Act has been seen in the recent past; the bill, which seems to come in highlights during 2014, paled down and then again arose in 2020, and still fights to make its place as an amendment in MTP Act.

The concern highlighted by many women NGOs, welfare boards, and activists are as follows–

- *Discretion should rest in hands of women-* In India, abortion is the sole discretion of the doctors- that a woman may or may not undergo an abortion. Therefore, it is not the right of women to make decisions for themselves or their well-being. Here we can see that our country is still struggling to get out of the stigma of trusting women in decision-making positions.
- *Pregnancies resulting from rape-* As mentioned above, the gestation period for abortion is 20 weeks, which gives them a very narrow scope to terminate their pregnancy. If they are not able to find about it within the given time, then they have to go for an unsafe method of abortion or continue the unwanted pregnancy.

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<sup>4</sup> Geetanjali Gangoli, *Abortion : a fundamental right*, IJME(5January 2015), <https://ijme.in/articles/abortion-afundamental-right/>

<sup>5</sup>IIPS Office, *National Estimation of Abortion in India Released*, IIPS INDIA(Dec 11, 2018), <https://iipsindia.org/>.

<sup>6</sup>Suchita Srivastava v. Chandigarh administration, (2009) 14 SCR 989 (India)

<sup>7</sup> Justice Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

- *Burdened by legalities* – Due to the limited gestation period, if there is an emergency during pregnancy, the women have to go to court to ask for permission to terminate it, which is considered a time-consuming process.
- *Increase access to medication abortion*- Indian Journal of medical studies have shown that maximum abortion in India is done outside the government approved health facilities.<sup>8</sup> As there is a limited number of qualified doctors and health care centre, so women are left with no option but to use abortion drugs that are not legally regulated. A small initiative in which MBBS doctors would provide the abortion facilities will help to meet the lack of medical facilities.

To date, no visible changes have been seen in these socially damaging laws to give effect to the judgment cited above but there is an initiation taken by the government where an amendment has been proposed, to bring a wave of change in the world of Abortion in India.

### **Medical Termination of Pregnancy (Amendment) Bill, 2020**

The Union Cabinet, chaired by the Prime Minister, approved MTP (Amendment) Bill 2020.<sup>9</sup> The new bill was meant to be discussed in Rajya Sabha in early 2020, but were delayed due to a pandemic. The bill raises a lot of issues regarding the narrow scope of the MTP Act 1971 and calls for making the Act more liberal in context with advancing time-

- *Increase in gestation period to 24 weeks* – The upper limit for terminating is extended to 24 weeks, beyond 24 weeks abortion will be allowed to the vulnerable category of women. [Substantial fetal abnormalities, rape victim, minors].<sup>10</sup> This provision is quite vague as no specific categories of women are mentioned who may terminate pregnancies between 20-24 weeks, and it does not take account of other most common vulnerable categories of women like, displaced person, migrant worker, etc. The new bill does not focus on the rights of women who do not want to continue the pregnancy.
- *Privacy clause included*- This clause state that the details regarding a woman wanting to terminate the pregnancy will be confidential and if revealed, then it will amount to

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<sup>8</sup> *Ib.* At 4

<sup>9</sup>Press Legislative Office, *The Medical Termination of Pregnancy bill*, PRS(March 20, 2020) <https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020>

<sup>10</sup>PRS Legislative Research, *The Medical Termination Bill,2020*, Ministry of Health and Family Welfare (March 02, 2020), <https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020>.

punishment. The information can only be revealed to a person authorized by law. The issue arising in this clause is the privacy of the patient, as it allows the sharing of private data of a patient with officials who can compromise the confidentiality of an individual.

- *Failure of contraceptive method will give the right to abortion to unmarried women too-* As the Act prior specifies that, in this case only married women will have right to seek an abortion but now unmarried women will also have a legal right to go for abortion. However, there is a loophole under this clause too, as it continues to use the term "women" and excludes transgender, intersex, and gender-diverse person.<sup>11</sup>
- *A registered medical practitioner has the discretion to approve abortion-* The medical board would include a gynaecologist, a paediatrician, and a radiologist who will supervise the case of terminating pregnancy beyond 24 weeks. Though this clause takes all considerate steps to provide adequate medical care for a woman, there is a lack of access to the medical market as according to data, there is a 75% shortage of such community health centres in a rural area, a shortage of trained staff and inadequate supplies of medical kits.<sup>12</sup>

### **Where the globe stands for legislating the womb**

There are 32% of countries that allow abortion at women's will without any justification, approximately, 82% of countries permit abortion to save the women's life, 51% allow abortion on the fatal condition, 46% of countries allow abortion where the pregnancy is the result of rape, and 10% specify an economic or social ground.<sup>13</sup>

Abortion is one of the few health procedures that are legally regulated in most countries but this was not always the case. To begin with, currently, 26 countries in the world do not permit abortion, and 39 allow it only when the mother's life is at risk.<sup>14</sup>

Let us briefly discuss the legislatures of few countries;

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<sup>11</sup> Jain, *Proposed changes to abortion law continue to sideline pregnant person*, THE WIRE(March 15, 2020), <https://science.thewire.in/health/proposed-changes-to-abortion-law-continue-tosideline-pregnant-person/>.

<sup>12</sup>*Id* at 5.

<sup>13</sup> Antonella F. Lavelanet, Stephanie Schlitt, Bela Ganatra, Global Abortion policies Database: a descriptive analysis of the legal categories of lawful abortion, (Dec 20, 2018, 00:29 am), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6302420/>.

<sup>14</sup>Marge Berber, Abortion Law, and Policy Around the World, (March 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035>.

-United States: *Roe v. Wade*<sup>15</sup> judgment is considered the light of the American Constitution or can be said as synonymous with US abortion law. The judges held that the U.S Constitution protected a woman's right to terminate her pregnancy and defined viability as the ability to potentially live outside the mother's womb, albeit with artificial aids.

-German: Medical termination of pregnancy is available on request; gestation period is 14 weeks.

-France: MTP is available on request. Gestation limit is 12 weeks from conception or 14 weeks from last period. During this time, if doctors feel that pregnancy, if continued, will endanger the mother's life or will cause an incurable disease to the baby, she can ask for termination of her pregnancy.

-Canada: Abortion is permitted on the request and gestation limits vary with the case and its seriousness as there is a strict regulation mechanism.<sup>16</sup>

-Poland: Poland already has some of the strictest laws for abortion in Europe and many limitations in case of foetal defect abortion. Recently, Poland Constitutional Tribunal ruled that an existing law allowing abortion of malformed foetuses was unconstitutional.<sup>17</sup> Now if the court enacts this decision into a law, abortion will only be allowed to the rape victim, incest or if the pregnancy continued will endanger mother's life, where it has been seen that only 2% of the abortions in Poland fall in these categories.<sup>18</sup> Hence, if this law is passed, the rate of illegal abortion will rise because it will act as an indirect ban on abortion in the country.

## CONCLUSION

Illuminating the complexities that exist, reveals an additional burden on women to interpret legal categories related to abortion, there is a lack of awareness regarding abortion law in India there is a need for a proper educational drive conducted periodically so the misconceptions regarding abortion law is settled among the population.

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<sup>15</sup> *Roe v. Wade*, 410 U.S 113 (1973).

<sup>16</sup> Chitra Subramaniam, *India's new abortion law is progressive and has human face*, ORF(March 7, 2020), <https://www.orfonline.org/expert-speak/india-new-abortion-law-progressive-human-face%2062023/>.

<sup>17</sup> BC Office, *Poland abortion: Top court bans almost all terminations*, BBC(23 October 2020), <http://www.bbc.com/news.amp/world-europe-54642108>

<sup>18</sup> Rahel Philipose, *Why are women in Poland protesting against a court ruling on abortions?*, TNIE, October 31, 2020, at 9.

Abortion needs to be made women's circumspection and modification in the legislation should be proposed giving both unmarried and married women discretion over their bodies. At last, if we want to achieve the goal of where women's womb is not framed by legislation but by love then we have to take strong steps and active national coalition, a critical mass of support, with luck and knowing where the goalposts are in the ground of revolution.