

**A CRITICAL ANALYSIS OF THE SHORTCOMINGS UNDER THE
MTP (AMENDMENT) ACT, 2021**

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ABSTRACT

The Most dangerous cocktails in a “normal” social order are the hegemony of dominant power-laden values that constrain the freedom of choice in the society whose borders are porous and social order fragile that gets destabilize when tested on the touchstone of constitutionalism. One of the most troubling issues for feminists in recent years, embodying an almost irresolvable dilemma, is an absence of exercising choice for medical termination of pregnancy by a unique entity who is bearing life within herself. The most unfortunate aspect of medical termination of pregnancy is restrictions in the veil of medical liberalizations granted under the Medical Termination of Pregnancy Act, 1971. Consequently, it is pertinent to analyse whether the Medical Termination of Pregnancy (Amendment) Act, 2021 has granted the right to abort or is it still a privilege? We need to analyse whether Right to Reproduction recognized by the Constitution of India is being upheld in its truest form and spirit? Are the perils of the rape survivors and those with unwanted pregnancies overlooked and neglected to uphold the patriarchal construct of the society? Are women solely responsible for taking care of the new life?

Keywords: Medical liberalization of abortion, medical termination of pregnancy, personal liberty, privacy, reproductive choices.

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INTRODUCTION

Women have used many methods of birth control and abortion throughout history. Since abortion is not only a techno-medical issue, but the fulcrum of a much broader ideological conflict in which the fundamental definitions of the family, the state, motherhood, and young women's sexuality are questioned, these practises have sparked strong moral, ethical, political, and legal arguments³³⁰.

Women have overtly or covertly resorted to abortion, but their access to services has been countered by the imposition of social and legal restrictions³³¹. The legal rules governing abortion have been constantly reshaped to fit the historical and social settings in which they are implemented. Despite their differences in structure, goal, and orientation, these standards have all been aimed at meeting social requirements while ignoring women's right to choose their sexuality, fertility, and reproduction³³².

This paper reviews the abortion scenario, with a specific reference to India. A brief historical account of the role of the Medical Termination of Pregnancy Act, 1971³³³ (hereinafter referred to as MTP Act) is followed by a discussion that throws light on the nuances of the Medical Termination of Pregnancy (Amendment) Act, 2021³³⁴ (hereinafter referred to as MTP(Amendment) Act) and medical liberalization therein. An analytic review of the abortion laws in India provides the reader with a reality check about the fact that a women's bodily autonomy primarily lies with the state rather than with her. The paper concludes with a critical appraisal of the recent amendment and by suggesting the model which might ensure liberalization of abortions.

LITERATURE REVIEW

The abortion policy in India is examined through the prism of constitutionalism in this study. The Medical Termination of Pregnancy (Amendment) Act, 2021, was evaluated and tested for this purpose against the backdrop of essential human rights established in Part III of the Indian Constitution. Because the researcher believes that the key to a successful future resides in the

³³⁰ Rosalind P. Petchesky, *Abortion and Women's Choice: The State, Sexuality and Reproductive Freedom* (North Eastern University Press, 1991).

³³¹ Malini Karkal, "Abortion Laws and the Abortion Situation in India" 4(3) *Issues in Reproductive and Genetic Engineering: Journal of International Feminist* 223-30 (1991).

³³² George J. Anna, "The Supreme Court, Privacy and Abortion", 321(17) *The New England Journal of Medicine* 1200-03 (1989).

³³³ The Medical Termination of Pregnancy Act, 1971 (Act 34 of 1971).

³³⁴ The Medical Termination of Pregnancy (Amendment) Act, 2021 (Act 8 of 2021).

past, Shri Shantilal H. Shah, *Report of The Committee to Study the Question of Legalization of Abortion, 1967* was used to delve into the history of abortion legislation in India. Several government documents, such as the Ministry of Health and Family Welfare's *Rural Health Statistics*, were extremely helpful in logically supporting the researcher's claim that abortion, despite these seemingly permissive rules, exists as a privilege rather than a right. The befitting response to patriarchal norms that state that an ideal mother should prioritise her unborn child over her health was given with the reasoning laid down in progressive judgements such as *Sharmishtha Chakraborty & Anr. v. UOI Secretary & Ors.*, (W.P.(C) No. 431/2017), *Priyanka Shukla v. UOI & Ors.*, (W.P.(ST) No. 36727/2017), *Suchita Srivastava v. Chandigarh Administration*, ((2009) 9 SCC 1), *Meera Santosh Pal v. UOI*, ((2017) 3 SCC 462), *Mamta Verma v. UOI*, ((2018) 14 SCC 289) and many more in which it has been unequivocally laid down that it is the women who have a sole right over her body and reproductive decisions. Several books and research papers, such as Nivedita Menon's *Seeing Like a Feminist*, Siddhivinayak S. Hirve's research paper *Abortion Law, Policy, and Services in India: A Critical Review of Abortion Law, Policy, and Practice in Transition*, published in "International Journal on Sexual and Reproductive Health and Rights" Vol. 12 Issue Supp 24 and others, were referred for expanding the horizons of knowledge in regards to the abortion policy in India.

ABORTION POLICY IN INDIA: A DISCOURSE ON THE PAST AND PRESENT

Abortion law in India, which was governed by the Indian Penal Code of 1862 and the Code of Criminal Procedure of 1898 until 1971, has its roots in 19th-century British law, which made abortion a crime punishable for both the mother and the abortionist unless it was performed to save the woman's life³³⁵.

Abortion laws were liberalised across Europe and America in the 1960s and 1970s, and by the 1980s, they had spread to many other countries of the world. During that period, about five million terminations were carried out per year in India out of which three million were illegal³³⁶.

Consequently, after taking into account the legal developments taking place around the world in regards to the liberalisation of the medical termination of pregnancy the *Shantilal Shah*

³³⁵ R. Chhabra & S.C. Nuna, *Abortion in India: An Overview* (Veerendra Printers, New Delhi 1994).

³³⁶ M. Berer, *Making Abortions Safe: A Matter of Good Public Health Policy and Practice*, Bulletin of the World Health Organization, 580-592 (2000).

Committee analysed the concept of abortion from various socio-cultural, legal, and medical perspectives. The committee recommended legalising abortion to prevent maternal morbidity and mortality on compassionate and medical grounds³³⁷. As a result of this humanitarian proposal, the MTP Act, 1971 which was substantially modelled³³⁸ after the United Kingdom's Abortion Act of 1967, was introduced in Parliament in 1970, which was eventually passed in August 1971 and came into operation on April 01, 1972.

Though some states looked upon the proposed legislation as a potential strategy for population control³³⁹, the committee specifically denies the legalization of abortion for the purpose of population control. On the contrary, it emphasises that legalising abortion for demographic reasons may be counterproductive to the constructive and beneficial practise of contraception family planning³⁴⁰. The liberalization in abortion laws will not only help in saving the lives of pregnant women but also avoid grave injury to their physical and mental health³⁴¹.

CUT OFF FOR TERMINATION OF PREGNANCY PRIOR THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

Before the enactment of the MTP (Amendment) Act, 2021 in the interest of justice and for protecting the human rights of women³⁴² the principal Act provided for the provision for authorization by one doctor for the termination of pregnancy up to twelve weeks while those between twelve to twenty weeks necessitate the opinions of two doctors. This stipulation is essential and laudable³⁴³. However, unfortunately, the plain reading of black letter law exhibits that in the cases where *fetus in utero* develops abnormalities or mother being in anguish and the gestational period advanced to more than the cut of statutory duration then in that situation the pregnant women (including rape victims) were forced to bear the child³⁴⁴. Consequently, considering this deplorable state Indian judiciary in a catena of case laws like *Sharmishtha*

³³⁷ Shri Shantilal H. Shah, "Report of The Committee to Study the Question of Legalization of Abortion, 1967", 51-53 (1967).

³³⁸ Asit K. Bose, "Abortion in India: A Legal Study", 16 *JILI*, 535 (1974).

³³⁹ Siddhivinayak S. Hirve, "Abortion Law, Policy and Services in India: A Critical Review of Abortion Law, Policy and Practice in Transition", Vol. 12 Issue Supp 24 *An International Journal on Sexual and Reproductive Health and Rights*, 114-121 (2004).

³⁴⁰ *Supra* note 8.

³⁴¹ *Tapasya Umesh Pisal v. UOI*, (2018) 12 SCC 57.

³⁴² *A v. UOI*, (2018) 14 SCC 75.

³⁴³ *Swati Chetan Fulzele v. UOI*, 2018 SCC OnLine Bom 672.

³⁴⁴ *X v. State of Maharashtra*, 2019 SCC OnLine Bom 11882.

*Chakraborty & Anr. v. UOI Secretary & Ors.*³⁴⁵, *Nisha Suresh Aalam v. UOI*³⁴⁶, *Priyanka Shukla v. UOI & Ors.*³⁴⁷ and many more have permitted the termination of pregnancy beyond the period of twenty weeks by acknowledging that the Right to Terminate Pregnancy could not be rejected only because the gestation period had extended beyond twenty weeks.

Manifestly, the aforementioned cases which were filed before the Supreme Court and High Courts for seeking permission to abort a pregnancy at stages beyond the twenty weeks limit on the grounds of foetal abnormalities or pregnancies due to rape faced by women highlights that people's needs and their lives are no longer similar to what was in the 70s when the MTP Act, 1971 was passed³⁴⁸.

Hence, the MTP (Amendment) Act, 2021 in the wake of the advancement of medical technology is long past the right time which increases the upper limit for terminating pregnancies especially for vulnerable women, and in cases of severe foetal abnormality.

MTP (AMENDMENT) ACT 2021: RESTRICTIONS UNDER THE VEIL OF MEDICAL LIBERALIZATION

*Nothing can be more universal or elementary than the fact choices of all kinds in every area are always made within particular limits*³⁴⁹

After receiving the president's assent and its notification by the Central Government in the Official Gazette on March 25, 2021, the Medical Termination of Pregnancy (Amendment) Bill, 2020³⁵⁰, introduced by the Ministry of Health and Family Welfare in the Lok Sabha on March 02, 2020, became the MTP (Amendment) Act, 2021(almost after a year)³⁵¹.

In essence, it liberalises and (attempts to) regulate medical practises and institutions in regard to abortion, allowing medical liberalisation to take precedence over medical criminalization. This is clear from a reading of the amendments carried out in Section 3 of the principal Act which can be categorised into three situations:

³⁴⁵ *Sharmishtha Chakrobarty & Anr. v. UOI Secretary & Ors.*, W.P.(C) No. 431/2017.

³⁴⁶ *Nisha Suresh Aalam v. UOI*, W.P.(C) No. 929/2017.

³⁴⁷ *Priyanka Shukla v. UOI & Ors.*, W.P.(ST) No. 36727/2017.

³⁴⁸ "Cabinet Approves the Medical Termination of Pregnancy (Amendment) Bill, 2020", *Press Information Bureau* (Jan. 29, 2020), available at <<https://pib.gov.in/PressReleasePage.aspx?PRID=1600916>> (last visited on September 25, 2021).

³⁴⁹ Nivedita Menon, *Seeing Like a Feminist* 173 (India, Penguin Random House 2012).

³⁵⁰ The Medical Termination of Pregnancy (Amendment) Bill, 2020, (Bill 55 of 2020).

³⁵¹ "The Medical Termination of Pregnancy (Amendment) Bill, 2020", *PRS Legislative Research*, <<https://prsindia.org/billtrack/the-medical-termination-of-pregnancy-amendment-bill-2020>> (last visited on September 25, 2021).

Situation 1: Where the pregnancy persists less than twenty weeks

Pregnancy termination is permitted based on the good faith assessment of a single registered medical practitioner:

- i. If there is a danger that the pregnant woman's life or physical or mental health will be jeopardised as a result of the pregnancy; OR
- ii. If there is a chance that the child will be born with a major physical or mental abnormality.

Situation 2: Where the pregnancy lasts longer than twenty weeks but less than twenty-four weeks

Termination of pregnancy is permissible based on the *bona fide* opinion of two registered medical practitioners:

- i. That the pregnancy poses a risk to the pregnant woman's life or grave injury to her physical or mental health, OR
- ii. If there is a risk that the child will suffer from serious physical or mental abnormalities after birth.

Explanations 1 and 2 to Section 3(2) (b) specify circumstances in which a presumption can be made about what constitutes a grave injury to the pregnant woman's mental health – viz., if the pregnancy is the result of the failure of any device or method used to prevent pregnancy, or if the pregnancy is alleged to have been caused by rape.

Situation 3: Where the pregnancy lasts longer than twenty-four weeks

The limitation of twenty weeks or twenty-four weeks would not apply under Section 3 (2B) if the termination was necessary due to a diagnosis by the Medical Board that the foetus has significant foetal abnormalities. A Board will be established by the state government for this purpose. A Gynaecologist, a Paediatrician, a Radiologist or Sonologist, and any other members as determined by the State Government are required to serve on such a Board. In the case of significant foetal anomalies, the pregnancy length of twenty weeks or twenty-four weeks would not apply.

In regards to these progressive changes, Justice Pratibha M. Singh while considering the case of *Mahima Yadav v. Govt. of NCT of Delhi and Ors.*³⁵² observed³⁵³:

³⁵² *Mahima Yadav v. Govt. of NCT of Delhi and Ors.*, W.P.(C) 4117/2021.

³⁵³ *Id* ¶ 12.

The above amendments introduced in 2021 are of enormous significance as they have relaxed the conditions under which pregnancy can be terminated.

In this backdrop, after close perusal of section 3 (2B) the court granted permission for terminating her twenty-five weeks old foetus who was suffering from warfarin embryopathy (substantial foetal abnormality) as in the opinion of medical practitioners it has a deleterious impact on the foetus as well as the mother.

Though these provisions to a certain extent have made an endeavour in legalising the medical termination of pregnancy, however, unfortunately, the decision to grant the permission only rests on the doctor's opinion. Instead of giving women the Right to Choose and Access Safe abortions, these provisions strip them of the agency over their own bodies. As a result, we must consider whether the medical liberalization of abortion under the MTP (Amendment) Act, 2021 is truly liberalized to the point that it can be claimed as a matter of right.

MEDICAL TERMINATION OF PREGNANCY: STILL NOT A RIGHT BUT A PRIVILEGE

The introductory paragraph of the MTP Act, 1971 provides that the Act is solely designed for the termination of certain pregnancies³⁵⁴. Medical liberalization for termination of pregnancy is permitted in those indications which are stipulated in the Act. This is often accomplished by broadening the prior medical indication of rescuing a pregnant woman, to include medical and psychological morbidity or the risk of such morbidity, if the woman is compelled to carry an unwanted pregnancy to full term. For this purpose, Chief Justice KG Balakrishnan in *Suchita Srivastava v. Chandigarh Administration*³⁵⁵ has recognized the "Best Interest Test" which requires the court to ascertain the cause of action which would save the best interests of persons in question.

Merely because a woman having undergone a sterilisation operation became pregnant³⁵⁶ resulting in unwanted pregnancy she cannot be compelled to bear the child as she will not be physically and emotionally compatible to raise a child³⁵⁷. In these situations, as observed by Justice SP Garg in *X v. State*³⁵⁸, the prosecutrix is usually major who understands the consequences of her actions and if gives consent after considering the mental, social, economic

³⁵⁴ The Medical Termination of Pregnancy Act, 1971. pmbi.

³⁵⁵ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

³⁵⁶ *State of Punjab v. Shiv Ram*, (2005) 7 SCC 1.

³⁵⁷ S. James Vincet, "Unwanted Pregnancy and the Unremitted Row", 32 *JILI* 246 (1990).

³⁵⁸ *X v. State*, (2013) SCC OnLine Del 1220.

problems which may arise in future then based on her express willingness she should be allowed to terminate the pregnancy.

In light of the apparent danger to the lives of pregnant women, on more than one occasion Chief Justice SA Bobde and Justice L Nageswara Rao in *Meera Santosh Pal v. UOI*³⁵⁹ and *Mamta Verma v. UOI*³⁶⁰ have allowed for 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.

If the continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow abortion³⁶¹. In *Sk Ayesha Khatoon v. UOI*³⁶² the petitioner claims that it would be injurious to her mental health to continue with the pregnancy since there are several foetal abnormalities. Therefore, in the interest of justice and for safeguarding the life and liberty of the prosecutrix the court permitted to undergo medical termination of pregnancy at a medical facility of her choice.

One of the best cases in point which exemplifies that abortion is not a right rather a privilege is the situation of an unwanted pregnancy suffered by victims of sexual crimes. Rape is considered as one of the most barbaric actions which shake the common consciousness of society³⁶³ and generally becomes a cause of unwanted pregnancy³⁶⁴. In such situations granting permission for termination of pregnancy beyond the statutory time limit becomes a therapeutic intervention rather than something to which they are entitled to as a matter of right. This line of argument is supported by *ABC through her Guardian v. State of Maharashtra*³⁶⁵, *Pramod A. Solanke v. Dean of BJ Govt. Medical College*³⁶⁶ and *X minor through her Guardian v. State of Madhya Pradesh*³⁶⁷ where the mother (including minor girls) were victims of rape and they were allowed to undergo medical termination of pregnancy in light of the apparent danger to their lives. This implies that the only recourse for terminating pregnancies due to rape that have

³⁵⁹ *Meera Santosh Pal v. UOI*, (2017) 3 SCC 462.

³⁶⁰ *Mamta Verma v. UOI*, (2018) 14 SCC 289.

³⁶¹ *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133.

³⁶² *Sk Ayesha Khatoon v. UOI*, 2018 SCC OnLine Bom 3034.

³⁶³ *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1.

³⁶⁴ *Z v. State of Bihar*, (2018) 11 SCC 572.

³⁶⁵ *ABC through her Guardian v. State of Maharashtra*, (2018) 4 Mah LJ 374.

³⁶⁶ *Pramod A. Solanke v. Dean of BJ Govt. Medical College*, (2020) SCC OnLine Bom 639.

³⁶⁷ *X minor through her Guardian v. State of Madhya Pradesh*, (2021) SCC OnLine MP 695.

crossed the twenty-four-week limit (as it stands today) is to get permission through a Writ Petition and to go through long and tedious judicial procedure³⁶⁸.

Clearly, the MTP Act, 1971 does not provide a basic right to induced abortion, but rather restricts the conditions under which women may obtain abortion services from certified medical practitioners. As a result, terminating a pregnancy becomes a therapeutic intervention or privilege, rather than a right, from a medical standpoint.

A Woman's Bodily Autonomy Still Primarily Rests with State rather than With Mother: Checking it on the Impediments of Constitution

The MTP Act of 1971 allows for abortion on medical grounds and in circumstances when a woman's life or physical or mental health is in jeopardy, as well as on humanitarian grounds when the pregnancy is the result of sex offences such as rape or intercourse with a lunatic woman³⁶⁹. Clearly, the pregnant woman seeking an abortion will have to explain herself. To say that pregnancy was desired when it was conceived but is now undesirable is not an acceptable explanation. She is expected to provide explanations that fall within the Act's generally liberal but stringent criteria³⁷⁰. This situation exhibits that abortion remains tied to the state-sanctioned conditions and not the rights of the woman.

With the overarching qualifier of grave injury to her physical or mental health or severe physical or mental abnormality of the foetus, the woman's agency is pushed to the background, requiring legal validation at every step along the way, robbing them of their Personal Liberty, Right to Privacy, and Right to Make Reproductive Choice. It is necessary to mention several landmark judgments that have passionately supported women's freedom in order to give real substance to this line of argument.

In *Suchita Srivastava v. Chandigarh Administration*³⁷¹, a bench of three judges adjudged that a woman's right to make reproductive choices is essentially a facet of personal liberty as envisaged under Article 21 of the Indian Constitution. The necessity of the pregnant woman's permission as an essential criterion for proceeding with the pregnancy termination was discussed in the instant by the court. Likewise, the court in *Mamta Verma v. UOI*³⁷² and *Meera Santosh Pal v. UOI*³⁷³ unequivocally pronounced that the freedom to make reproductive

³⁶⁸ *ABC v. State of Maharashtra through Rajapur Police Station and anr.*, 2021 SCC OnLine Bom 419.

³⁶⁹ *Hallo Bi v. State of MP*, 2013 SCC OnLine MP 445.

³⁷⁰ Sudha Kulkarni, "Claiming our Sexuality", in *Our Lives Our Health* 76-82 (Dr. Malini Karkal ed., 1995).

³⁷¹ *Supra* note 27 ¶ 22.

³⁷² *Supra* note 32.

³⁷³ *Supra* note 31.

choices is a facet of women's personal liberty. It is possible to use reproductive choice to both procreate and abstain from procreating. On a similar line of thoughts, Justice Chandrachud in *K.S. Puttaswamy (Retd.) v. UOI*³⁷⁴ observed that reproductive choice is personal liberty guaranteed under Article 21 of the Indian Constitution. In this sense, women's right to privacy, dignity, and bodily integrity must be respected.

Evidently, despite laying a robust jurisprudence on reproductive rights and the privacy of a woman, unfortunately, there is no fundamental shift in power from the doctor to the woman seeking an abortion.

It is conceivable that the fact that behind the seemingly liberal availability of abortion services lurks legislation that might easily be used to restrict access is underappreciated. Because the law does not support women's legal right to abortion, it instead serves as a regulatory framework for doctors and abortion clinics. As a result, abortion is still linked to state-sanctioned conditions rather than a woman's rights.

INTERTWINGLING OF MTP ACT WITH OTHER STATUTES

No statute can be studied in isolation³⁷⁵ for a purposive interpretation of a statute, it must be studied in consonance with the provisions laid in other statutes for solving the problems which legislature intended to solve at the time of enactment³⁷⁶. The MTP Act, 1971 which is intertwined like a quad-helix with the Pre-Conception and Pre Natal-Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994³⁷⁷ (hereinafter referred to as PCPNDT Act, 1994), the Protection of Children from Sexual Offences Act, 2012³⁷⁸ (hereinafter referred to as POCSO Act, 2012) and the Indian Penal Code, 1860³⁷⁹ (hereinafter referred to as IPC, 1860), specifically section(s) 312-316, together intends to accomplish the goal which is mentioned in their respective statement of reasons and purpose.

³⁷⁴ *KS Puttaswamy (Retd.) v. UOI*, (2017) 10 SCC 1.

³⁷⁵ Richard H. Fallon Jr, "The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation", 82 *U. Chi. L. Rev.* 1235, 1260 (2015).

³⁷⁶ *Liparota v. United States*, 471 U.S. 419, 424-25 (1985).

³⁷⁷ The Pre-Conception and Pre Natal-Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, (Act 57 of 1994).

³⁷⁸ The Protection of Children from Sexual Offences Act, 2012, (Act 32 of 2012).

³⁷⁹ The India Penal Code, 1860, (Act 45 of 1860).

The MTP Act, 1971 and the PCPNDT Act, 1994

After a successful campaign in response to an increase in sex-selective abortions, the PCPNDT Act became law in 1994³⁸⁰. When viewed together, the MTP Act, 1971 and the PCPNDT Act, 1994 suggest an interesting contrast: while the right to abortion includes women's freedom to manage their bodies, they should be prohibited by law from aborting female foetuses³⁸¹.

Overlap with the POCSO Act, 2012

Doctors are frequently trapped in the contradictions and confusions between the overlapping of the MTP Act, 1971 and the POCSO Act, 2012 in situations of pregnancy of a minor caused by sex offences such as rape³⁸². A close examination of the Acts reveals that the MTP Act's confidentiality clause³⁸³ requires medical practitioners to protect the patient's identity, while the POCSO Act, 2012 mandates that anyone who witnesses a sexual act involving a child under the age of eighteen must report it to the special juvenile police unit or the local police, failing which they may be prosecuted³⁸⁴.

According to a study conducted by the Centre for Enquiry into Health and Allied Themes (CEHAT), a Mumbai-based research institute that has been working on health and human rights, there are many cases that highlight that when the rape victim (minor girl) consults medical professionals for termination of pregnancy then as per the statutory requirement these practitioners are obliged to inform the police authorities or juvenile police unit about the incident. Consequently, with the fear of being ostracised from society, such families abstain from consulting medical practitioners and resort to illegal or unsafe methods of abortion, thereby jeopardising the innocent life³⁸⁵.

The MTP Act, 1971 and the IPC, 1860

The relationship between MTP Act and IPC was explained by Justice RM Sahai and Justice BL Hansaria in *Jacob George (Dr) v. State of Kerala*³⁸⁶ as follows:

³⁸⁰ *Federation of Obstetrics & Gynecological Societies of India v. UOI*, (2019) 6 SCC 283.

³⁸¹ *Rekha Sengar v. State of MP*, (2021) 3 SCC 729.

³⁸² Suyash Karangutkar, "Amend POCSO Act to protect rights of minors, says doctors", *The HINDU* (Apr. 10, 2019), <<https://www.thehindu.com/news/cities/mumbai/amend-pocso-act-to-protect-rights-of-minors-say-doctors/article26786455.ece>> (last visited on September 26, 2021).

³⁸³ The Medical Termination of Pregnancy Act, 1971 (Act 34 of 1971), § 7(1)(c).

³⁸⁴ The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), § 19.

³⁸⁵ Padma Bhate Deosthali & Sangeeta Rege, "Denial of Safe Abortion to survivors of Rape in India", *The National Centre for Biotechnology Information* (July 26, 2021 00:43), <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6927364/>> (last visited on September 26, 2021).

³⁸⁶ *Jacob George (Dr) v. State of Kerala*, (1994) 3 SCC 430.

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.

Clearly, if sections 312 to 316 of the IPC, 1860 were deleted, all abortion operations would be subject to medical guidelines in the same way that other surgical and medical treatments are. There is no distinct law in India for open-heart surgery, bariatric surgery, or endoscopy. These are entrusted to professionals with specialised clinical skills to handle. Similarly, medical issues involving abortion should be left to people with specialised clinical knowledge, rather than being governed by a regulation.

CRITICAL ANALYSIS: WHY AMENDMENTS TO MEDICAL TERMINATION OF PREGNANCY ACT DO NOT GO FAR ENOUGH?

The MTP (Amendment) Act, 2021 is one of the few accolades in the realm of women's empowerment that the Indian legislature has received. In addition to extending the time frame in which an abortion can be lawfully performed, the modification has broadened the scope of the Act by changing section 3. The new amendment replaces the terms “married woman and her husband” with the terms “woman and her partner”. As a result, an unmarried woman can also terminate pregnancies within the time limit prescribed under the Act. Besides this, with the zeal of safeguarding the privacy and confidentiality of women, the latest law by virtue of section 5A of the Act intends to penalise medical practitioners who fail to protect the privacy and confidentiality of women who desire to terminate their pregnancy.

Despite these welcome amendments in asserting women's reproductive rights in the country, the amendments to MTP Act, 1971 do not go far enough.

- **Medical Board to decide termination only in certain cases**

The MTP (Amendment) Act, 2021 was enacted as a legal remedy for the backlog of cases that had been filed in the form of Writ petitions before the Hon'ble Supreme Court and various High Courts, seeking permission to terminate pregnancies beyond twenty weeks in cases of foetal abnormalities or pregnancies caused by rape³⁸⁷. Resultantly, expanding the duration for the termination of pregnancy beyond twenty-four weeks only for the cases where a Medical Board diagnosis substantial foetal abnormality. In this regard, it is worth mentioning that the

³⁸⁷ *Supra* note 19.

implication of such legislation is that there is no change in the process for terminating pregnancies caused by rape that have progressed beyond the 24-week threshold: the only option is to obtain approval through a Writ Petition.

- **Time frame for Medical Board's decision not specified**

Termination of pregnancies is a time-sensitive matter. The amended Act does not stipulate the time limit within which the medical board must make its decision. Procrastination in decision making by the board may result in further complications for pregnant women.

- **Unclear if transgender persons will be covered**

It is an irrefutable fact that the Act allows the termination of pregnancies of “pregnant women” under certain conditions. However, with the advancement of medical sciences it has come to the knowledge that several medical studies have shown that there may be cases where persons who have been identified as an additional gender³⁸⁸ - transgenders (and not women) can become pregnant even after receiving hormone therapy to transition from female to male, and may require termination services³⁸⁹. Since the amended Act exclusively allows for the termination of pregnancies in the case of women, it is unclear if transgenders will be included under the amended Act.

- **Unavailability of qualified medical professionals to terminate pregnancies**

The condition precedent for termination of pregnancy under the Act is the seeking of approval from the medical board or doctors as the case may be. The statistics, on the other hand, indicate the absolute truth about how “unsafe women” are in these “safe abortions”. According to the All-India Rural Health Statistics (2018-19), there are 1,351 gynaecologists and obstetricians at community health clinics in rural regions across India, and the shortfall is 4,002, i.e., there is a 75% shortage of qualified doctors³⁹⁰. Furthermore, according to the National Health and Family Survey (2015-16), only 53% of abortions are performed by a registered medical doctor, with the remainder being performed by a nurse, auxiliary nurse-midwife, family member, or self due to a dearth of registered medical practitioners³⁹¹. Clearly, a scarcity of skilled medical

³⁸⁸ The Transgender Persons (Protections and Rights) Act, 2019 (Act 40 of 2019).

³⁸⁹ Alexis D Light et al., “Transgender men who experienced pregnancy after female to male gender transitioning”, 124(6) *OBSTET GYNECOL* 1120-1127, 1125(2014).

³⁹⁰ Government of India, “Rural Health Statistics” (Ministry of Health and Family Welfare, Statistics Division (2018-19)).

³⁹¹ “Unstarred Question No. 599 Ministry of Health and Family Welfare”, *Lok Sabha: Parliament of India* (July 20, 2018), <<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=69317&lsno=16>> (last visited on September 26, 2021).

practitioners has created a significant barrier to guaranteeing safe abortions, raising the likelihood of maternal mortality and morbidity as a result of botched abortions and their complications.

- **Inconsistency in the judicial decisions**

Inconsistency is often considered as the antithesis of certainty in the judicial decision-making process. Many times, it is witnessed that lower courts may pronounce a judgement on the fractured reasoning which is often rectified by higher courts when went in appeal. However, in the cases relating to abortion where the mental and physical health of the mother is of the essence then an irrational decision may be detrimental to her human rights. Also, there are situations wherein the mother who is already experiencing physical hardships may not have sufficient financial resources for filing an appeal against an unjustifiable judgement resultantly becoming a victim of the tedious judicial system. One such example is the case of the *State of Rajasthan & Ors. v. S & Anr.*³⁹² wherein vide the impugned order dated October 17, 2019, single judge bench of the Rajasthan High Court turned down the request of the rape victim for the termination of the child's pregnancy by observing that by virtue of Article 21 the unborn child in the mother's womb is entitled to Right to Life.

However, when an appeal was filed before the division bench of the Rajasthan High Court then a remarkable remark with respect to the same case was made by the division bench consisting of Justice Sandeep Mehta and Justice Dr. Pushpendra Singh Bhati. They observed that even when the pregnancy has exceeded the statutory limit, the right to terminate the pregnancy by the child who is a rape victim will supersede the right to life of the child in the womb who has not been born yet.

Clearly, the above-mentioned progressive reasoning was the result of the appeal which was filed before the division bench of the Rajasthan High Court if no appeal would have been filed then the rape victim would have been forced to bear the child which she does not want to carry. Therefore, again strengthening the line of argument that the decision whether to terminate the pregnancy should solely rest with the mother and state should only act as a medium of providing sufficient health facilities to the mother.

- **Non-inclusion of provision for ensuring the accountability when death of the mother is caused due to the denial to abort**

³⁹² *State of Rajasthan & Ors. v. S & Anr.*, Spl. Appl. Writ No. 1344/2019.

On a close perusal, of the provision of the MTP (Amendment) Act, 2021 it came to an understanding that there is no framework for upholding accountability when a mother dies as a result of the refusal to abort. Women who are denied abortion are primarily those who are unable to manoeuvre the legal system (particularly the very young and socially underprivileged) or who are apprehensive about the abortion³⁹³. In one such shocking incident of 2012 an Indian origin woman, Savita Halappanavar who was living in Ireland succumbed to medical complications when she was denied the right to terminate pregnancy³⁹⁴. Unfortunately, no one was held accountable for the untimely and preventable death of an innocent life since there was no legislation in place that specifically addressed such situations.

All this reminds one of the old British ditty³⁹⁵:

I'm the Parliament's draftsman,

I compose the country's laws,

And of half the litigation

I'm undoubtedly the cause!

SUGGESTIONS: NEED FOR AUTONOMY

Sudhir Chandra describes a social drama in *Enslaved Daughters*³⁹⁶ that evolved around a remarkable incident in colonial India when *Rukhmabai*, a twenty-two-year-old woman, defied convention and colonial legal mandates by refusing to be bound by a marriage. She proposed a subversive vision of women asserting their desire as individuals in a territory controlled by family, community, and tradition, challenging what was considered to be natural.

The objective of providing the aforementioned excerpt from one of the feminist literatures was to emphasise that maintaining social order necessitates the repeated faithful fulfilment of specified rituals throughout one's lifetime. This is the sole function of complex networks of cultural reproduction. Those who defy the meticulously crafted “natural” order of society by refusing to follow social norms are treated with zero tolerance. For instance, the 1973 US Supreme Court decision on abortion in the *Roe v. Wade*³⁹⁷ case made abortion legally available

³⁹³ SL Barron, “Abortion Denied”, *IPPF MED BULL* 2, 3-5 (Apr. 1986).

³⁹⁴ Hasan Suroor, “India woman dies after being refused abortion”, *THE HINDU* (Nov. 10, 2012), <<https://www.thehindu.com/news/international/Indian-woman-dies-after-being-refused-abortion/article12508292.ece>> (last visited on September 30, 2021).

³⁹⁵ *Ms Eera through Dr. Manjula Krippendorf v. Govt. of NCT of Delhi & anr.*, CA No. 1217-1219 of 2017 ¶14.

³⁹⁶ Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights*, (2d ed. 2008).

³⁹⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

to women, but the subsequent decision in 1989 with the *Webster v. Reproductive Health Services*³⁹⁸ case signalled a retreat from Roe.

The social order displays not the absolute presence or absence of intolerance to difference but a spectrum of intolerance. The point is precisely that, from ages it is considered that motherhood is the cultural process of locating women's identities in their capacity to nurture infants. Meaning thereby, a "responsible mother" should give primacy to her children's rights. In that sense, so-called stakeholders of the society contend that the Right to Life of Foetus must supersede the Right to Life of Mother. However, probably the best reply to this untenable objection can be found in the case law of the European Convention of Human Rights (ECHR), where abortion was approached from two perspectives: the unborn children and women. The issue of the unborn child and its Right to Life in Article 2 of the ECHR was deliberated in *Vo v. France*³⁹⁹. At the same hospital, two women with the same surname were scheduled for different medical procedures, and the applicant answered when the doctor said "Mrs. Vo". She was six months pregnant, of Vietnamese origin and had difficulties understanding French. Due to this mix-up, the applicant's amniotic sack was punctured. The applicant claimed the unintentional killing of her unborn child to qualify as a homicide, infringing the child's Right to Life. However, the court found it neither suitable nor possible to take stands on whether an unborn child was a person enjoying protection in Article 2 of ECHR, and ruled by fourteen votes to three, that there had been no violation of the Right to Life of Foetus.

The structure built by those protocols, which appears to be so "natural", unquestionable and immutable, is shakier than it seems when they are tested on the touchstone of a reasonable, rational and just legal principle. There are fissures, there are leakages. It is precisely because the structure is so fragile that such an enormous force had to be mobilized against the recalcitrance (defiance) by a single woman who called herself to be free by controlling her own body and reproductive choices.

Each of us bears the responsibility to some degree for maintaining these protocols of intolerance in regards to the termination of pregnancy, which could not be kept in place if every single one of us did not play our part; or work towards changing the circumstances which shape them, or continue to engage in dialogue and above all open to the destabilization of orthodox paradigm in regards to the termination of pregnancy.

³⁹⁸ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

³⁹⁹ *Vo v. France*, App No 53924/00, ECHR 2004.

After all, the pregnant body isn't two individuals with equal rights; it is an indivisible creature that can't be described in individualist terms –a life within a life, one life depending on the other. Under such circumstances, the host body of the mother acquires the right to decide its fate and terminate the pregnancy. In this context, a Division Bench of Bombay High Court comprising Justice V.K. Tahilramani and Justice Mridula Bhatkar in *High Court on its own Motion v. State of Maharashtra*⁴⁰⁰ decided on September 19, 2016, has endorsed a woman's sole right over her own body and her consequent right to *choose or not to choose motherhood*. Accordingly, the Hon'ble court in paragraph(s) 13, 14, 15 and 21 has made the following observations:

Pregnancy takes place within the body of a woman and has a profound impact on her health, mental well-being and life. Thus, how a woman wants to deal with this pregnancy must be a decision she, and she alone, can make.

It is important not to lose sight of the basic right of women: the right to decide what to do with their bodies, including whether to get pregnant and stay pregnant. This right emerges from her right to live with dignity as a human being in society and protected as a fundamental right under Article 21 of the Constitution.

Clearly, all women should have a right to terminate pregnancy irrespective of the reason. However, unfortunately despite it being a 2016 judgement the legislature while drafting the MTP (Amendment) Bill, 2020 failed to take into consideration the *ratio decidendi* of this progressive judgement. State interventions should be limited to ensuring access to comprehensive and safe abortion treatment, as well as other sexual and reproductive health services. Beyond that, any interference in matters of choice is not only contrary to equality ideals, but also an invasion of women's fundamental right to privacy.

Manifestly, based on the foregoing, it is past time for a modification in the statute to allow landmark judgments that are deemed praises in the field of women empowerment to become law of the land.

CONCLUSION

“*Narivad, behna, dheere, dheere aayi!*” is a satirical song, sung with good humour for endorsing the new contestations of patriarchy and condemning the “normal” social orders⁴⁰¹.

⁴⁰⁰ *High Court on its Own Motion v. State of Maharashtra*, 2016 SCC OnLine Bom 8426.

⁴⁰¹ *Supra* 20 at 221.

If one considers social order to be a collection of overlapping structures, it is clear that these structures must be put together by a range of actions. Even those who are subjected to the most severe orders are expected to put in the daily effort to keep everything together. Every story about a pregnant woman (including victims of rape) – every single one of them starkly underlines the fearsome perception that rather than mother who is caring a life within the life, it is the society (specifically state) who knows about the best interest of the mother and foetus and in that sense, the mother's bodily autonomy rests with the state rather than the mother.

As everyone of us participates in abiding by these “normal” social orders on “common sense” assumptions, what happens is that structures never really get to close their gates with a satisfactory click. Their borders are porous, the social order fragile and every structure destabilizes when tested on principles of constitutionalism.

Think about this – if these normal social orders were so natural it would not require such a vast network of controls to keep in place.